Harries v The Church Commissioners for England and Another 1993
Chancery Division

SIR DONALD NICHOLLS V-C: The Church Commissioners for England administer vast estates and large funds. At the end of 1990 their holdings of land were valued at about £1.7bn, their mortgages and loans at about £165m, and their stock exchange investments at about £780m. In 1990 these items yielded altogether an investment income of £164m. The commissioners' income included also some £66m derived principally from parish and diocesan contributions to clergy stipends. So the commissioners' total income last year was £230m.

The needs which the commissioners seek to satisfy out of this income are daunting. In 1990 they provided almost one half of the costs of the stipends of the Church of England serving clergy, much of their housing costs, and almost all their pension costs. These items absorbed over 85 per cent of the commissioners' income: that is, a sum of almost £200m. Unfortunately, this does not mean that the clergy are well remunerated or that the retired clergy receive good pensions. Far from it. The commissioners' income has to be spread widely, and hence thinly, over 11,400 serving clergy and 10,100 clergy pensioners and widows. So, as is well known, the amount each receives is not generous. In 1990-1991 the national average stipend of incumbents was only £11,308. The full-service pension from April 1991 was £6,700 per year.

For some time there have been voices in the Church of England expressing disquiet at the investment policy of the commissioners. They do not question either the good faith or the investment expertise of the commissioners. Their concern is not that the commissioners have failed to get the best financial return from their property and investments. Their concern is that, in making investment decisions, the commissioners are guided too rigorously by purely financial considerations, and that the commissioners give insufficient weight to what are now called "ethical" considerations. They contend, moreover, that the commissioners have fallen into legal error. The commissioners attach overriding importance to financial considerations, and that is a misapprehension of the approach they ought properly to adopt when making investment decisions. The commissioners ought to have in mind that the underlying purpose for which they hold their assets is the promotion of the Christian faith through the Church of England. The commissioners should not exercise their investment functions in a manner which would be incompatible with that purpose even if that involves a risk of incurring significant financial detriment. So these proceedings, seeking declaratory relief, were launched by the Bishop of Oxford, who is himself a Church Commissioner, the Archdeacon of Bedford, and the Reverend William Whiffin, a parish priest, with the support of the Christian Ethical Investment Group. This is a body set up in 1988 with the object of "promoting a stronger ethical investment policy in the Church of England." I understand that by an ethical investment policy is meant an investment policy which is not guided solely by financial criteria but which takes into account non-financial considerations deduced from Christian morality.

The Church Commissioners

I must first say something about the Commissioners. Their constitution is set out in

the Church Commissioners Measure 1947, as amended by the Church Commissioners Measures 1964 and 1970. Church Measures, when they have received the Royal assent, have the force and effect of an Act of Parliament: see section 4 of the Church of England Assembly (Powers) Act 1919, as amended by the Synodical Government Measure 1969. The Measure of 1947 incorporated the Church Commissioners as a corporate body. The incorporated body comprises the Archbishops of Canterbury and York, the three church estates commissioners, the 41 diocesan bishops, five deans, 10 clergy and 10 laymen appointed by the General Synod, together with a number of other individuals ex officio or nominated by the Crown or by others. The board of governors, which consists principally of 27 commissioners, has overall responsibility for carrying on the commissioners' business. One of the committees is known as the assets committee. Subject to any general rules made by the board for the committee's direction and guidance, the assets committee has the exclusive power and duty to act for the commissioners in all matters relating to the management of those assets of the commissioners the income of which is carried into their general fund, including power to sell, purchase, exchange, and let land and make, realise, and change investments. I pause to interpose that it is with the management of those assets that these proceedings are concerned. No rules have been made by the board of governors for the direction or guidance of the assets committee, but the committee regularly seeks the views of the board on important aspects of investment policy. The assets committee has a lay majority. It comprises the first church estates commissioner, one commissioner who is a clerk in holy orders, and between three and five lay commissioners appointed by the Archbishop of Canterbury as persons who in his opinion are well qualified to assist in the management of the assets of the commissioners.

The commissioners were established for the purpose of uniting two bodies: Queen Anne's Bounty and the Ecclesiastical Commissioners. On the appointed day, which was 1 April 1948, those two bodies were dissolved, all their property was vested in the commissioners, and "all functions, rights and privileges" of the two predecessor bodies were transferred to and became functions, rights and privileges of the Church Commissioners: section 2 of the Measure of 1947. Section 10 is concerned with finance. So far as is material, subsection (6) provides:

"the commissioners shall carry all income received in respect of property and funds held by them into their general fund, and shall discharge thereout [all expenses, etc] and the balance from time to time thereafter remaining in the said fund shall be available for any purpose for which, but for this Measure, any surplus of the common fund of the Ecclesiastical Commissioners or of the corporate fund of Queen Anne's Bounty would have been available."

Thus to ascertain the functions of the present-day commissioners, and the purposes for which their income is applicable, it is necessary to travel back as far as 1704, to the charter founding the "Governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy," and to the Ecclesiastical Commissioners Act 1836 (6 & 7 Will 4, c 77) and the Ecclesiastical Commissioners Act 1840 (3 & 4 Vict c 113).

I shall have to return and make that journey presently. For the moment it is sufficient to note, first, that section 10(6) is a direction regarding the application of income.

Section 10 contains no general provision requiring or authorising the commissioners to apply capital. Second, the direction in section 10(6) regarding the application of the balance of income of the general fund is for a purpose which is exclusively charitable. Third, the commissioners are in law a charity. Fourth, the assets in question are held by the commissioners as a corporate body's property and applicable in accordance with its constitution. The assets are not, strictly, vested in trustees and held by them upon defined trusts: see Liverpool and District Hospital for Diseases of the Heart v Attorney-General [1981] Ch 193, 209. For present purposes, however, nothing turns upon this distinction. Whatever significance this distinction may or may not have in other contexts, in the context of the issues arising in these proceedings the commissioners' position is no different from what it would be if the commissioners were unincorporated and they held the assets formally as trustees.

Charity trustees and investment powers

Before going further into the criticism made of the commissioners I will consider the general principles applicable to the exercise of powers of investment by charity trustees. It is axiomatic that charity trustees, in common with all other trustees, are concerned to further the purposes of the trust of which they have accepted the office of trustee. That is their duty. To enable them the better to discharge that duty, trustees have powers vested in them. Those powers must be exercised for the purpose for which they have been given: to further the purposes of the trust. That is the guiding principle applicable to the issues in these proceedings. Everything which follows is no more than the reasoned application of that principle in particular contexts.

Broadly speaking, property held by charity trustees falls into two categories. First, there is property held by trustees for what may be called functional purposes. The National Trust owns historic houses and open spaces. The Salvation Army owns hostels for the destitute. And many charities need office accommodation in which to carry out essential administrative work. Second, there is property held by trustees for the purpose of generating money, whether from income or capital growth, with which to further the work of the trust. In other words, property held by trustees as an investment. Where property is so held, prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of their investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish.

In most cases this prima facie position will govern the trustees' conduct. In most cases the best interests of the charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, the need to balance income against capital growth, and the need to balance risk against return.

In a minority of cases the position will not be so straightforward. There will be some cases, I suspect comparatively rare, when the objects of the charity are such that investments of a particular type would conflict with the aims of the charity. Much-cited examples are those of cancer research companies and tobacco shares, trustees of

temperance charities and brewery and distillery shares, and trustees of charities of the Society of Friends and shares in companies engaged in production of armaments. If, as would be likely in those examples, trustees were satisfied that investing in a company engaged in a particular type of business would conflict with the very objects their charity is seeking to achieve, they should not so invest. Carried to its logical conclusion the trustees should take this course even if it would be likely to result in significant financial detriment to the charity. The logical conclusion, whilst sound as a matter of legal analysis, is unlikely to arise in practice. It is not easy to think of an instance where in practice the exclusion for this reason of one or more companies or sectors from the whole range of investments open to trustees would be likely to leave them without an adequately wide range of investments from which to choose a properly diversified portfolio.

There will also be some cases, again I suspect comparatively rare, when trustees' holdings of particular investments might hamper a charity's work either by making potential recipients of aid unwilling to be helped because of the source of the charity's money, or by alienating some of those who support the charity financially. In these cases the trustees will need to balance the difficulties they would encounter, or likely financial loss they would sustain, if they were to hold the investments against the risk of financial detriment if those investments were excluded from their portfolio. The greater the risk of financial detriment, the more certain the trustees should be of countervailing disadvantages to the charity before they incur that risk. Another circumstance where trustees would be entitled, or even required, to take into account non-financial criteria would be where the trust deed so provides.

No doubt there will be other cases where the trustees are justified in departing from what should always be their starting point. The instances I have given are not comprehensive. But I must emphasise that of their very nature, and by definition, investments are held by trustees to aid the work of the charity in a particular way: by generating money. That is the purpose for which they are held. That is their raison d'etre. Trustees cannot properly use assets held as an investment for other, viz, non-investment, purposes. To the extent that they do they are not properly exercising their powers of investment. This is not to say that trustees who own land may not act as responsible landlords or those who own shares may not act as responsible shareholders. They may. The law is not so cynical as to require trustees to behave in a fashion which would bring them or their charity into disrepute (although their consciences must not be too tender: see Buttle v Saunders [1950] 2 All ER 193). On the other hand, trustees must act prudently. They must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees. Those who wish may do so with their own property, but that is not a proper function of trustees with trust assets held as an investment.

I should mention one other particular situation. There will be instances today when those who support or benefit from a charity take widely different views on a particular type of investment, some saying that on moral grounds it conflicts with the aims of the charity, others saying the opposite. One example is the holding of arms industry shares by a religious charity. There is a real difficulty here. To many questions raising moral issues there are no certain answers. On moral questions widely differing views are held by well-meaning, responsible people. This is not always so. But frequently,

when questions of the morality of conduct are being canvassed, there is no identifiable yardstick which can be applied to a set of facts so as to yield one answer which can be seen to be "right" and the other "wrong". If that situation confronts trustees of a charity, the law does not require them to find an answer to the unanswerable. Trustees may, if they wish, accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment. But when they are not so satisfied trustees should not make investment decisions on the basis of preferring one view of whether on moral grounds an investment conflicts with the objects of the charity over another. This is so even when one view is more widely supported than the other.

I have sought above to consider charity trustees' duties in relation to investment as a matter of basic principle. I was referred to no authority bearing directly on these matters. My attention was drawn to Cowan v Scargill [1985] Ch 270, a case concerning a pension fund. I believe the views I have set out accord with those expressed by Sir Robert Megarry V-C in that case, bearing in mind that he was considering trusts for the provision of financial benefits for individuals. In this case I am concerned with trusts of charities, whose purposes are multifarious.

The commissioners' objects

I turn next to the commissioners' objects. As already noted, it is necessary to go back to the objects of the two constituent bodies which became united in the commissioners in 1947. First, Queen Anne's Bounty. Here it is sufficient to refer to one passage from the 1704 charter. The "bounty" consisted of the grant by the Crown to the governors of certain "first fruits and yearly perpetual tenths" to which the Crown had become entitled at the reformation. These revenues were:

"to be applied and disposed of by the said governors hereby constituted, to and for the augmentation of the maintenance of such parsons, vicars, curates, and ministers officiating in any church or chapel within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed where the liturgy and rites of the Church of England as now by law established, are or shall be used and observed . . . in such manner . . . as shall be established pursuant to these presents."

Thus, in short, financial provision for certain clergy of the Church of England. Between 1704 and 1947 the functions of Queen Anne's Bounty were extended, but they remained primarily and principally provision of financial assistance and housing for the lower clergy.

Second, the Ecclesiastical Commissioners. They were incorporated by the Ecclesiastical Commissioners Act 1836. Here again it is sufficient to refer to one section. Section 67 of the Act of 1840 provided for the application of the revenues which under that Act became payable to the commissioners. These revenues were directed to be carried by the commissioners to a common fund, and by payments thereout or by the conveyance of lands:

"additional provision shall be made . . . for the cure of souls in parishes where such assistance is most required, in such manner as shall . . . be deemed most conducive to

the efficiency of the established church."

Before me there was some argument over the precise width of this section. It is sufficient for the purpose of these proceedings to say that section 67 is concerned with making additional (financial) provision by payments out of the common fund "for the cure of souls in parishes." In its context that must mean making financial provision for those who have the cure of souls. The Ecclesiastical Commissioners, as much as the governors of Queen Anne's Bounty, were charged with providing financial assistance for clergy of the Church of England.

This, then, under section 10(6) of the Measure of 1947, became the purpose for which after 1 April 1948 the balance of the general fund established by the Measure of 1947 was applicable by the commissioners. For completeness I add that from time to time other Measures have made express provision for the application of the general fund for other particular purposes, such as loans or grants to the Church Urban Fund. Nothing turns on these other Measures for present purposes.

The commissioners' investment policy

The commissioners' investment policy is set out in their annual report for 1989 in terms I should quote in full:

"The primary aim in the management of our assets is to produce the best total return, that is capital and income growth combined. While financial responsibilities must remain of primary importance (given our position as trustees), as responsible investors we also continue to take proper account of social, ethical and environmental issues. As people became increasingly aware of the many factors which can adversely affect both their own and other people's lives, so we must be responsive to these areas of concern. As regards our Stock Exchange holdings this means that we do not invest in companies whose main business is armaments, gambling, alcohol, tobacco and newspapers: it also means that we must continue to be vigilant in our monitoring of the activities of those companies where we do have a shareholding. Our practice is to follow up with senior management any major criticisms of a particular company's activities through confidential correspondence and, where appropriate, direct discussions. Our aim is to establish facts, to see whether there is any basis for the criticism and to evaluate what action the company has taken or is prepared to take if the criticism is justified. Each case is considered on its merits. The ultimate pressure we can bring to bear is that of disinvestment. The paradox of doing so is that we then lose any opportunity to use our influence for good. Our policy with regard to investment and South Africa remains unchanged. We do not invest in any South African company nor in any other company where more than a small part of their business is in South Africa. Where we do invest in a company with a small stake in South Africa we try to ensure that it follows enlightened social and employment policies, so far as is possible within the system of apartheid of which we have repeatedly expressed our abhorrence. In common with the rest of the Church, we welcome the important political developments since the end of 1989 and hope that the momentum will be sustained. On the property side, although we shall continue to seek out development possibilities so as to discharge our duties as trustees, we are conscious of the effect of our actions upon local communities and their perceptions of the Church as a whole. We shall therefore continue to ensure that environmental

considerations are properly taken into account when development schemes arise. In particular, during the year we have introduced new procedures for keeping bishops, incumbents and local church members informed whenever we are involved in a scheme affecting their community. We are also keen to find investments which respond positively to specific areas of concern in our society. We were glad therefore that our development of four small light industrial units at Walsall was completed during 1989. We believe that in direct property investments such as this we can set an example of what help can be given to small businesses wishing to expand, particularly in urban priority areas, although only a small proportion of our total funds can be invested in this way. However, if we can influence others to respond in a similar way it will do much to improve the quality of life of those living in areas of high unemployment."

It will be seen, therefore, that the commissioners do have an "ethical" investment policy. They have followed such a policy for many years. Indeed they have done so ever since they were constituted in 1948. Let me say at once that I can see nothing in this statement of policy which is inconsistent with the general principles I have sought to expound above.

The statement of policy records that the commissioners do not invest in companies whose main business is in armaments, gambling, alcohol, tobacco or newspapers. Of these, newspapers fall into a category of their own. The commissioners' policy regarding newspapers is based on the fact that many newspapers are associated, to a greater or lesser extent, with a particular political party or political view. Leaving aside newspapers, the underlying rationale of the commissioner's policy on these items is that there is a body of members of the Church of England opposed to the businesses in question on religious or moral grounds. There are members who believe these business activities are morally wrong, and that they are in conflict with Christian teaching and its moral values. But this list has only to be read for it to be obvious that many committed members of the Church of England take the contrary view. To say that not all members of the Church of England eschew gambling, alcohol or tobacco would be an understatement. As to armaments, the morality of war, and the concepts of a "just war," are issues which have been debated for centuries. These are moral questions on which no single view can be shown to be "right" and others "wrong." As I understand the position, the commissioners have felt able to exclude these items from their investments despite the conflicting views on the morality of holding these items as investments because there has remained open to the commissioners an adequate width of alternative investments.

I have already indicated that at the heart of the plaintiffs' case is a contention that the commissioners' policy is erroneous in law in that the commissioners are only prepared to take non-financial considerations into account to the extent that such considerations do not significantly jeopardise or interfere with accepted investment principles. I think it is implicit, if not explicit, in the commissioners' evidence that they do regard themselves as constrained in this way. So far as I have been able to see, this is the only issue identifiable as an issue of law raised in these proceedings. In my view this self-constraint applied by the commissioners is not one which in practice has led to any error of law on their part, nor is it likely to do so. I have already indicated that the circumstances in which charity trustees are bound or entitled to make a financially disadvantageous investment decision for ethical reasons are extremely limited. I have

noted that it is not easy to think of a practical example of such a circumstance. There is no evidence before me to suggest that any such circumstance exists here.

The evidence does show that the commissioners have declined to adopt financially disadvantageous policies advocated by, among others, the Bishop of Oxford. In October 1989 his bishop's council passed a resolution urging his diocesan board of finance to adopt certain specific criteria in relation to South Africa. For example, investments should not be directly or indirectly in groups of companies (other than banks, for the time being) which derived more than £10m in annual profits from South Africa or more than three per cent of their worldwide profits from South African activities. As to that, the commissioners' ethical policy excludes about 13 per cent of listed United Kingdom companies (by value) from consideration. The companies in which the commissioners hold shares that would be excluded under the suggested criteria would comprise a further 24 per cent (by value) of listed United Kingdom companies, making a total exclusion of about 37 per cent. The part of the market excluded by the criteria would include some of the largest United Kingdom companies whose shares make up a very important part of the commissioners' total portfolio. The criteria would exclude two companies which make up 65 per cent of the oil sector, and a further two companies which make up 62 per cent of the chemical sector of the United Kingdom equity market. Nor surprisingly, the commissioners' view is that a portfolio thus restricted would be much less balanced and diversified, and they would not regard it as prudent or in the interests of those for whom they provide.

The investment issue raised by this resolution is another example of a moral question to which there can be no certain answer. The commissioners do not invest in a company where more than a small part of its business is in South Africa. The policy advocated by the Bishop of Oxford's council does not seek to exclude every company which has a South African business connection. The council's policy embodies fixed, and to this extent, artificial limits on the degree of South African involvement which is acceptable. As between these two alternatives, there can be no right or wrong answer. This is a question of degree, and whether Christian ethics require a more restrictive policy then that adopted by the commissioners is a matter on which there can be literally endless argument and debate. The commissioners are therefore right not to prefer one view over the other beyond the point at which they would incur a risk of significant financial detriment.

Another example raised before me concerned land owned by the commissioners in a village where local people are finding housing impossible to afford. Such land, it was suggested by the plaintiffs, could be made available for low-cost housing at a price below open-market value. Investing instead in a more expensive housing development with a higher rate of return would undermine the credibility of the Christian message by the affront such a policy would cause to the needs and consciences of local people. I do not think this example advances the plaintiffs' case. The commissioners are not a housing charity. There is force in the commissioners' contention that local housing needs are or should be reflected in local planning policies. When planning permission is available for a particular type of development, it is not a proper function for the commissioners to sell their land at an under-value in order to further a social objective on which the local planning authority has taken a different view. This, once more, is an illustration of a circumstance in which different minds within the Church of

England, applying the highest moral standards, will reach different conclusions. If the commissioners' land is to be disposed of at an undervalue, they need an express power to do so. Such a disposition cannot properly be made in exercise of their power to make and change investments.

The relief claimed

In these proceedings the commissioners are not themselves seeking directions from the court, nor are they surrendering to the court the exercise of any of their discretionary powers. I turn to the relief claimed, to consider whether nevertheless the declarations sought would furnish useful guidance for them. The plaintiffs essentially claim two declarations, namely (1) that the commissioners, the board of governors and the assets committee respectively, in exercising their various functions under the Church Commissioners Measure 1947 in relation to the management of the assets the income of which is carried to the general fund of the commissioners, are obliged to have regard to the object of promoting the Christian faith through the established Church of England; and (2) that in the exercise of those functions, the board of governors and the assets committee may not act in a manner which would be incompatible with that object.

The fundamental difficulty I have with these declarations is their ambiguity. The objects of a charity can be stated at different levels of generality. Stated at one level of generality, the object which the financial payments made by the commissioners seek to achieve is the promotion of the Christian faith through the established Church of England. That is not in dispute. And it is clear that in managing their investments the commissioners do have regard to that object. That is shown by their ethical investment policy. Thus there is no need for the court to make the first declaration. But the matter goes further. The first declaration is not merely unnecessary. "Have regard to the object" is a loose phrase, and there is a real danger it will mean all things to all men. Such a declaration should not be made.

Likewise with the second declaration. The phrase I have used above when considering the position of charity trustees is "conflict with." In the course of argument many other phrases, synonymous to a greater or lesser extent, were canvassed before me: directly contrary to, inimical to, inconsistent with, undermine, defeat, incompatible with. Each of these phrases has its own shades of meaning. I certainly do not claim that "conflict with" is superior to all others. There may be circumstances where other phrases would be more helpful and apt. But it seems to me that, in general, this phrase encapsulates as well as any other, and better than some, the principle which is involved. Even so, and even if this change were made to the wording of the second declaration, I do not think such a declaration would be of assistance to the commissioners. In particular, it would not deal with how the commissioners should proceed when confronted with differing views on whether, on moral grounds, a proper investment is in conflict with the objects the commissioners are seeking to promote. I shall therefore not make either declaration.

I add only this. In bringing these proceedings the Bishop of Oxford and his colleagues are actuated by the highest moral concern. But, as I have sought to show, the approach

they wish the commissioners to adopt to investment decisions would involve a departure by the commissioners from their legal obligations. Whether such a departure would or would not be desirable is, of course, not an issue in these proceedings. That is a matter to be pursued, if at all, elsewhere than in this court.