Hypothetical facts

Consider the validity of the following clauses in the will of Mr X:

Clause One: 'To my son, Leonard, a life interest in the income earned from my country properties, to determine if ever the income of the fund becomes payable to another person. In the event of determination of the interest the income from the properties shall be held by my trustees on trust for such of my children and in such shares as my trustees shall in their absolute discretion think fit.'

Clause Two: 'In the event of any of the beneficiaries under this will converting or marrying into Islam, the estate hereby limited to him or her shall cease and determine and be utterly void.'

Clause Three: '£100,000 to my trustees on trust to provide temporary shelter for Old Etonians who have fallen on hard times. Preference to be given to my old class mates.'

Clause Four: '£10,000 to my trustees to support research into the likely consequences for political and public life of a legal ban on the Society of Free and Accepted Masons.'

Problem scenario

The issues raised by this problem scenario include a range of matters concerning public policy aspects of trusts, the most important (in terms of the current book chapter) being clauses three and four, which raise issues of charitable trusts.

Clause One

Although a trust set up to defraud the settlor's creditors will generally be invalid, a trust set up to protect another person from their creditors will be valid if it takes the form of a 'protective trust' (see Trustee Act 1925, s. 33). Protective trusts will often defeat the interests of the spendthrift's creditors, but that to some extent is also the purpose of the

insolvency legislation itself. The statutory scheme for distribution of the insolvent person's estate is designed to satisfy the creditors as far as is reasonably possible, but the statutory insolvency scheme is designed also to discharge the liabilities of the insolvent person and to allow them, eventually, to have a fresh start (Insolvency Act 1986).

Clause Two

In *Blathwayt* v *Baron Cawley* [1975] 3 All ER 625 Lord Wilberforce opined that: 'Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.' In relation to religious discrimination, specifically, Lord Cross had this to say:

> . . . it is true that it is widely thought nowadays that it is wrong for a government to treat some of its citizens less favourably than others because of differences in their religious beliefs; but it does not follow from that that it is against public policy for an adherent of one religion to distinguish in disposing of his property between adherents of his faith and those of another. So to hold would amount to saying that although it is in order for a man to have a mild preference for one religion as opposed to another it is disreputable for him to be convinced of the importance of holding true religious beliefs and of the fact that his religious beliefs are the true ones.

In *Blathwayt* a clause of a testator's will provided that, in the event that one of the beneficiaries under his will should 'be or become a Roman Catholic . . . the estate hereby limited to him shall cease and determine and be utterly void'. It later transpired that a life tenant had indeed become a Roman Catholic. The judge at first instance held that his estate should be forfeit, a judgment which was ultimately upheld in the House of Lords. It follows that clause three of the present will is valid and that the granddaughter's interest will be forfeit if she marries into Islam. As to the element of restricting freedom to marry. Whereas a general condition in restraint of marriage will be void for public policy (*Long* v *Dennis* (1767) 4 Burr 2052 at 2059), a specific restriction on marriage to particular individuals or classes of person will not be void (*Duggan* v *Kelly* (1848) 10 I Eq R 47).

The impact of the Human Rights Act 1998 (which received the Royal Assent on 9 November 1998) on this area of the law has yet to be established.

Clause Three

This provision might be charitable under the first head of charity: the relief of poverty. It is somewhat reminiscent of the gift in *Re Niyazi's Will Trusts* [1978] 1 WLR 910. There a testator provided that his residuary estate should be held by his trustees upon trust to pay the capital and income to a local authority in a needy part of Cyprus 'on condition that the same shall be used for the purposes only of the construction of or as a contribution towards the cost of the construction of a working men's hostel'. Megarry V-C held that this was a valid charitable trust for the relief of poverty. The word 'hostel' suggested a poor inhabitant. The judge also took into account the fact that the relatively modest size of the fund made it unlikely that a 'grandiose building' would be erected.

The word 'shelter' as used in the present legacy also suggests a poor inhabitant. The fact that the beneficiaries are Old Etonians will not disqualify them from benefiting from a charitable trust. In *Re Gardom* [1914] 1 Ch 662 a trust for 'ladies of limited means' was held to be charitable, as was a trust for 'distressed gentlefolk' in *Re Young* [1951] Ch 344. The courts have never been slow to allow the charitable relief of the impoverished upper classes. The inclusion of a preference does not invalidate educational trusts (*Re Koettgen* [1954] 1 All ER 581), and is even less likely to invalidate a trust for the relief of poverty. As long as the potential benefiting class is sufficiently large there should be no problem (*Re Segelman* [1995] 2 All ER 676). However, there may be a problem if too narrow a class of beneficiaries is actually preferred, if that class, as here, is defined by some personal connection to the testator or to each other, thereby excluding benefits to society at large. Thus, in *IRC* v *Educational Grants Association Ltd* [1967] 2 All ER 893, evidence showed that 76 per cent to 85 per cent of the association's income had been applied to educate the children of persons connected with an associated commercial company. Despite this, the association had claimed a tax refund from the Inland Revenue. The Inland Revenue refused the refund, claiming that the association had failed to apply its funds to exclusively charitable ends. The court held for the IRC.

Clause Four

Trusts for research may be charitable if they are for the advancement of education, thus falling within the second of Lord Macnaghten's heads of charity.

In *Re Shaw* [1957] 1 WLR 729 George Bernard Shaw left his residuary estate on trust to research into a new English alphabet. This failed as a charitable trust for the advancement of education. The judge held that 'if the object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education'. Accordingly, the clause is Reginald's will is more likely to be recognised to be a valid charitable trust for education were it to include express provision for dissemination of the research outcomes. There has, however, been limited recognition that the educational benefits of research might still be charitable if confined to the researchers themselves, provided that the subject matter of the research is a worthy object of study (*Re Hopkins* [1965] Ch 669).

The political aspect of the research is a bit of a red-herring. Although a trust established for political purposes will not be recognised to be charitable, research into political matters can be charitable (*McGovern* v *Attorney-General* [1981] 3 All ER 493), provided it is not undertaken to support a political campaign. In *Re Koeppler's WT* [1986] Ch 423, a testamentary gift to Wilton Park, whose main function was to organise educational conferences, was upheld by the Court of Appeal as a gift for charitable purposes, although Wilton Park's objects included the promotion of informed international public opinion and the promotion of greater cooperation between East and West.