



Neutral Citation: [2023] UKFTT 805 (GRC)

Case Reference: CA/2021/0009

First-tier Tribunal
(General Regulatory Chamber)
Charities

Heard in public in London on 20, 21 and 22 February 2023

Decision given on: 21 September 2023

Before

DAMIEN MCMAHON
TRIBUNAL JUDGE

MANU DUGGAL
TRIBUNAL MEMBER

STUART REYNOLDS
TRIBUNAL MEMBER

Between

TONY MILLER

and

WILL FRENCH

Appellants

-and-

THE CHARITY COMMISSION FOR ENGLAND AND WALES

and

THE LONDON BOROUGH OF EALING

Respondents

Representation:

For the Appellants:

Mr. T. Loveday, of counsel, instructed by Bates Wells, Solicitors.

appeared for the Second Respondent.

For the First Respondent:

Ms. S. Adelbi, of counsel, instructed by the First Respondent.

For the Second Respondent: Mr. J. Winfield, of counsel, instructed by the Second Respondent.

Decision:

The appeal is allowed in part.

A *cy près* occasion had arisen and the relevant statutory criteria, pursuant to ss. 61-68 of the Charities Act 2011 ('the Act'), were satisfied.

While it is appropriate to make a Scheme of Arrangement ('the Scheme') in respect of the property of Victoria Hall Trust ('the Charity') (being the first floor of the property known as Victoria Hall but including the Prince's Hall at basement level), pursuant to ss. 69-75 of the Act, the terms of the Scheme, as made by the First Respondent on 12 March 2021 are not accepted as being the most appropriate terms. The Tribunal, rather than itself making a new Scheme, directs the First Respondent, in consultation with the Appellants and the Second Respondent, to re-visit the Scheme and prepare a new Scheme, taking account of the findings of the Tribunal in this Decision within 185 days of the date of this Decision.

Upon the making of a new Scheme which takes into account the Tribunal's findings, the parties shall confirm that they are in agreement or otherwise. The parties are directed to keep the Tribunal advised and updated, in a timely fashion, as to any developments in that regard.

Should agreement between the parties on a new Scheme not be reached, the First Respondent is directed to make a new Scheme that, in its view, takes account of the findings of the Tribunal, whereupon, a new right of appeal, this time against the terms of the new Scheme, will arise at the instance of any party with the necessary *locus standi* subject to the time limits for bringing an appeal set out in the Act.

REASONS

Background

1. On 6 December 1893, the property of the Trust was placed in trust for the purpose of meetings, entertainments and other activities listed in the Trust document with any profit generated by use for such purposes to be applied, after deduction of expenses, to any charities in the district of the then Ealing Local Board (the predecessor in title to the Second Respondent).
2. The Respondents ultimately considered that the Charity was no longer sustainable and had not been for a number of years. This was disputed by the Appellants. The First Respondent decided that a *cy-près* occasion had arisen and authorised the Scheme dated 12 March 2021, pursuant to an Order made under s. 69 of the Act.
3. The Tribunal considered these matters entirely afresh, taking into account evidence not available to the First Respondent, pursuant to s. 319(4) of the Act, while giving what it considered appropriate weight to the decision of the First Respondent, the decision under appeal, and its reasons for making the Scheme. The Tribunal did not, in determining this appeal, merely review the decision-making of the First Respondent.
4. The Second Respondent is the sole trustee of the Charity. However, it did not recognise, for many years, that the property of the Charity was held on a charitable trust and the management of the property of the Charity became subsumed with the management of the Town Hall property of the Second Respondent, located on the same lands. This, regrettably, resulted in separate accounts not being kept by the Second Respondent in respect of the Charity (as should have been done) until the 2018-19 financial year. Secondly, the Second Respondent had been paying, as a local authority rather than as the sole trustee of the Charity, for the upkeep and maintenance of the property of the Charity, as well as accepting, in the same capacity, receipts for its use. Finally, the property of the Charity was included in the plans of the Second Respondent, again in its capacity as a local authority, to dispose of the Town Hall. A tender exercise was undertaken resulting in an agreement being entered into with a developer known as Mastcraft.
5. The Scheme, that is complex, authorises the property of the Charity to be leased to Surejogi, the company established by Mastcraft to redevelop the Second Respondent's Town Hall, for 250 years, allowing for an up-front premium to be paid to and received by the Charity (after deduction of transactions costs) and subject to a Community Use protocol, with the repair and maintenance obligations for the property of the Charity to be the responsibility of Surejogi. The income from the community hiring of the Victoria Hall, part of the property of the Charity, will go to Surejogi, while income from community hiring of other premises, known as the Queen's Hall, will go to the Charity, of which the Second Respondent is the sole trustee. The reasoning behind this arrangement was set out in the written and oral submissions of the Second Respondent.
6. The Scheme provides that the Second Respondent, as the sole trustee of the Charity, will be the tenant in possession of Victoria Hall and Queens Hall, two halls within the Town Hall complex, as allowed under the Scheme, by way of an under-lease and sub-under-lease of the same duration or Term as the head-lease to Surejogi of the whole Town Hall complex, which includes the current Trust Property. The Second Respondent, as the sole trustee of the Charity, will effectively have control of the

Victoria and Queens Halls. A user covenant, in addition to the Community Use Protocol in the head-lease is a requirement of the Scheme.

7. The Appellants are entitled to bring this appeal, pursuant to s. 319 and Schedule 6 of the Act, as persons affected by the making of the Scheme.
8. This appeal was the subject of a number of Directions in order to narrow the issues and address various procedural issues that had arisen.
9. The Appellants were unrepresented until the substantive hearing.
10. There was considerable public interest in this matter among residents of the London Borough of Ealing and a number of interest groups, namely, the Ealing Performance & Arts Centre; Ealing Voice and The Friends of Victoria Hall, the last being a voluntary unincorporated association established to secure the preservation and protection of Victoria Hall, and its associated spaces, for the benefit of the local community (presumably meaning the residents of the London Borough of Ealing ('Ealing')). The Appellants are residents of Ealing and members of the said various interest groups.

Legal Issues

11. (1) Whether a *cy-près* occasion had arisen in respect of the property of the Trust – a pre-requisite for the making of a Scheme by the First Respondent – to amend the purposes of the Charity.

(2) If so, whether the Order dated 12 March 2021 ('the Order') made by the First Respondent, pursuant to sections 67 and 69 of the Charities Act 2011 ('the Act') making a Scheme, on the application of the Second Respondent, and the terms thereof, were appropriate.
12. These are the sole legal issues that fell for determination by the Tribunal in this appeal.
13. The burden of proof, on the balance of probabilities standard, lay on the Appellants.

Appellants

Cy-près Issue

14. The Appellants submitted that the conditions, both statutory (section 62(1) of the Act), and in policy Guidance issued by the First Respondent, to apply a property *cy-près* were not met for the reasons set out in their written and oral submissions.

Whether the Scheme was appropriate.

15. This question was framed in a somewhat different way by the Appellants, namely, that, for the reasons set out in their written and oral submissions, the Scheme failed to have proper regard to the relevant matters set out in section 67(3) of the Act and was not in the best interests of the Charity's original charitable purposes, even if a *cy-près* occasion had arisen.

16. The Appellants submitted that if the Tribunal found in their favour in respect of one or both of the legal issues set out in section 67(3) of the Act, that it either quash the Order or remit the matter to the First Respondent with directions. The Appellants further invited the Tribunal, in those circumstances, to rule on the extent of the property of the Charity and direct its registration in the freehold ownership of the Charity with particular reference to the Charity having freedom of access across and through the property of the Second Respondent.

First Respondent

Cy-près Issue

Whether the Scheme was appropriate

17. The First Respondent, in its written and oral submissions, maintained that a *cy-près* occasion had arisen and that the terms of the Scheme made on 12 March 2021, pursuant to sections 67 and 69 of the Act, taking account of some revisions to the draft of the Scheme, following a review of the original decision of the First Respondent by one of its senior case officers, Mr. Neil Robertson, were appropriate.
18. The First Respondent submitted that the only powers available to the Tribunal, pursuant to Column 3 of Schedule 6 of the Act, in determining this appeal, were to
 - quash the Order in whole or in part and, if appropriate, remit the matter to the First Respondent; or,
 - substitute for all or part of the Order any other Order that could have been made by the First Respondent; or,
 - add to the Order anything that could have been contained in an Order made by the First Respondent.
19. The First Respondent submitted that the way in which the ‘appropriateness’ issue was framed by the Appellants was an incorrect statement of the legal test.
20. The First Respondent also submitted that the terms of the Scheme would ensure that the property of the Charity would retain a level of social use to comply with the amended purposes of the Charity while ensuring that such property could continue to be used for charitable purposes and allow the Charity to be financially viable.
21. The First Respondent rejected the alternative proposal of the Appellants that the Charity could operate without the assistance of the Second Respondent as it was highly unlikely that the Charity would be financially viable in the case proposed by the Appellants.

Second Respondent

22. The Second Respondent, as trustee, in its written and oral submissions, confirmed that Ealing Borough Council wished to dispose of the ‘Town Hall complex’ as it was uneconomic to retain it.

23. The Second Respondent accepted that part of the Town Hall complex is the property of the Charity, namely the hall known as the Victoria Hall and the hall known as the Prince's Hall (at basement level).

24. The Second Respondent is the sole trustee of the Charity.

Cy-près Issue

25. The Second Respondent, in its written and oral submissions maintained that a *cy-près* occasion, pursuant to section 67 of the Act, had arisen, the key issue being that the Charity was not, and could not be, as things stood, financially self-sustaining. Moreover, that it had no financial reserves to draw upon.

Whether the Scheme was appropriate

26. The Second Respondent submitted in its written and oral submissions that proper regard was had by the First Respondent as to whether the Scheme and its terms, as revised, were appropriate, pursuant to section 67 of the Act, with particular reference to the provisions of section 67(3)(c) – the need for the Charity to have purposes which are suitable and effective in the light of *current* social and economic circumstances.

27. It was further submitted that the preservation of the existing property of the Charity was not a current object of the Charity – that would, in any event, be a rare object.

Reasoning

Cy-près Issue

28. The Tribunal was satisfied, on the balance of probabilities, that the Appellants had not discharged the burden of proof upon them that a *cy-près* occasion, pursuant to the provisions of section 62 of the Act, had not arisen.

29. The Tribunal was satisfied, weighing up all the matters set out in sections 62 and 67 of the Act, and having regard to the circumstances, that the original purposes of the trust, in whole or in part, could not today be carried out, or not carried out in accordance with the directions given and to the spirit of the gift in the Declaration of Trust declared on 6 December 1893. The original purposes had also ceased to provide a suitable and effective method of using the property of the Charity available by virtue of the Declaration of the said trust. While recognising that a large matter of civic pride was bound up in a significant commercial issue, the Tribunal accepted the submissions of the Respondents, in particular the submissions of the First Respondent, in this regard.

30. The Tribunal was satisfied that the First Respondent had properly applied its operational guidance entitled 'Application of Property *Cy-près*' and other policy guidance (albeit the Tribunal determined this appeal *de novo*) when addressing the *cy-près*' issue.

31. The Tribunal found that the essential submissions of the Appellants revolved around the appropriateness of the proposed Scheme and not, primarily, whether or not a cy-près occasion had arisen.
32. The Trust was simply not self-sustaining on the facts. The concept of the spirit of the original gift, as set out in section 67(3) of the Act, and the other matters set out in that provision, was simply no longer achievable. Accordingly, it was entirely proper, and permissible, that the First Respondent should make a Scheme with the statutory objective set out in section 67(3) of the Act, to apply the property of the Charity for charitable purposes that were, desirably, close to the original purpose, that were suitable and effective in the light of *current* social and economic circumstances. Legal authority requires appropriate weight to be given to the decision of the First Respondent to make a Scheme if satisfied that a cy-près occasion had arisen (albeit this is not an immutable proposition).
33. While the issue of ‘preservation’ as an original purpose of the Charity was pleaded by the Appellants, it emerged at the hearing that the Appellant’s argument had shifted to the concept of the ‘spirit’ of the gift. The Tribunal found that ‘preservation’ was neither mentioned in the Charity’s governing document, nor part of the spirit of the gift.
34. The underlying charitable purpose was not to *provide* income for ‘preserving’ charity property but to apply income from the Charity property for the beneficiaries of the Charity.
35. The purpose of the Charity, as originally envisaged, was no longer sustainable on the basis that it had no endowments, nor was there any prospect that any endowments would ever be in place. Further, the Charity was not generating a surplus.
36. The Appellants suggested that the Charity could be sustained by the Second Respondent (albeit the Second Respondent was the sole trustee of the Charity). This, in itself, was a firm indicator that the Charity could not be self-sustaining and therefore that a cy-près occasion had arisen. Furthermore, the Tribunal accepted evidence presented during the hearing from witnesses that confirmed the Charity was currently not self-sustaining and had not been for many years.
37. A further fact, found by the Tribunal, in deciding whether a cy-près occasion had arisen, was that the Charity could not operate / manage its Property (the exact extent of which was in dispute but the answer to which was not determinative and which was not a matter to be ruled upon by the Tribunal), other than by accessing it through the property of the Second Respondent.
38. The Tribunal accepted that this was a somewhat unusual cy-près occasion in that the property of the Charity under the proposed Scheme would still be offered for use by the public, the original beneficiary class, subject to a necessary modernisation of approach, but with a significant material difference, namely, the proposed property swap arrangement between the Charity and the Second Respondent as set out in the proposed Scheme.

Appropriateness of Scheme

39. The Tribunal found that the current Scheme made by way of the Order dated 12 March 2021 was not the most appropriate and has decided to remit the matter to the First Respondent for it to make a new Scheme. This section sets out the findings of the Tribunal with regard to appropriateness of any Scheme.
40. Although after remittal the terms of the new Scheme are exclusively a matter for the First Respondent, it should take the Tribunal's findings into account. The First Respondent is reminded that in preparing the new Scheme, this decision requires it to consult with the other parties and keep the Tribunal updated as to whether agreement can be reached.
41. In issuing these findings, the Tribunal notes that certain failings as to how the Charity was previously operated by the Second Respondent as Trustee are not directly addressable in the making of the new Scheme and so not necessary to be mentioned here. Many are matters to do with historical failures (which cannot now be remedied), others to do with implementation of any Scheme (a matter for the Trustee) and some covered by duties owed to the Charity by the Trustee (covered by charity law).
42. For the avoidance of doubt, the Tribunal accepted the change proposed by the First Respondent to the purposes as being appropriate. However, some of the other terms of the Scheme being appealed were deemed inadequate because they did not protect the interests of the Charity, even allowing for the unusual and complex nature of the property transactions leading to this appeal.
43. It was accepted by all parties that historically there had been failures in governance and independence of the Charity Trustee; the Second Respondent was a Council operating and sharing use of parts of Charity property and, on the other hand, allowing access through its own property while acting as Trustee. The Tribunal notes that although the issue of bias and independence loomed large when looking at how the Charity had made decisions historically, if the Mastcraft transaction proceeds, the role of the Trustee will change.
44. It is essential to properly consider and, to the extent possible, manage any actual, or perceived, conflict of interest between the Charity and Ealing Borough Council, as owner of the Town Hall, in respect of the property of the Charity. Therefore, the new Scheme must recognise the division, and need for independence, between the Second Respondent as the local authority and as the Charity trustee in taking decisions affecting the Charity, on a forward looking basis. Although setting up the advisory committee seems to be a good step to take to address the above issues, the parties will need to put their minds to agreeing this matter in the preparation of the new Scheme. In particular the way that independent members are selected, and the influence and power they have, in a practical sense, to ensure the Charity's assets are protected.
45. The Second Respondent submitted that the test of the appropriateness of the Scheme is whether the Mastcraft transaction is the 'best available deal'. The Tribunal found that the proper test is whether the transaction with Mastcraft / Surejogi, taken as a whole, on the assumption that it is the only offer available in respect of the Town Hall complex, should be permissible. This must take into account current circumstances,

market conditions and the outlook for use of Charity property in meeting its purposes going forward absent the proposed lease transactions.

46. The Tribunal accepted the Second Respondent's submissions that the transaction with Mastcraft / Surejogi was the only option available to the Second Respondent (acting as a local authority) in disposing of its land interests and that the viability of this is irretrievably tied to Charity property. Equally that the Charity could no longer operate on a stand-alone basis. Therefore, there can be no basis, at this remove, but to endorse the transaction, including the proposed land swap arrangement, otherwise, no agreement could realistically be achieved to respond to the cy-près occasion that had arisen, the Respondents' submissions on this point having been accepted by the Tribunal.
47. Notwithstanding this, the new Scheme must show adequate regard for the Charity's property and beneficiaries. In order to achieve this to the fullest extent possible, the Second Respondent (as Trustee) must, from a governance perspective, recognise this, and act only in the best interests of the Charity, when agreeing to the terms and conditions finalised with Mastcraft / Surejogi (or another).
48. Any Scheme, once it becomes operative, will effectively define boundaries between property intended to be available for use by the Charity and that available exclusively to Mastcraft for centuries to come. Defining the boundaries of Charity property raised in the course of this appeal, is neither something within the jurisdiction of the Tribunal (nor the First Respondent) to determine under this appeal or generally, nor necessarily required for the Second Respondent to be satisfied that the proposed transaction with Mastcraft protects the Charity's interests.
49. The Second Respondent, through its surveyor Sanderson Weatherall, provided an estimate of the square footage (area) of Charity property, to be used as a basis of apportionment of the income to be received from Mastcraft. Any new Scheme must ensure that the process for agreeing apportionment of the income to be received by the Charity under the Mastcraft transaction, protects the Charity's interests by way of arms-length scrutiny by or on behalf of the Charity trustee. As such, this issue is bound up with the governance and decision making at the Charity and ought to be dealt with by the parties when aiming to agree the new Scheme.
50. The disposal of the Town Hall Complex, which requires a Scheme, was driven by the decisions and preferences of the Second Respondent acting as the local authority. Whilst it is noted that a cy-près occasion has arisen, the Tribunal expects the Second Respondent, as the local authority, to be responsible for all transactions costs of any arrangement affecting Charity property: there should be no cost apportionment burden on the Charity arising from the Mastcraft / Surejogi (or other) transaction.
51. The Scheme (Community Use Protocol, which forms part of the lease transaction with Mastcraft / Surejogi), currently grants free use to Ealing Borough Council, a statutory entity and not within the beneficiary class. This, the Tribunal feels, is not appropriate. There should be no rent-free concession to the Second Respondent to use the property of the Charity. Any use should be at commercial rates and paid over to the Charity. Any subsidy or support Ealing Borough Council may have given to the Charity in the

past, although undoubtedly helpful to the Charity, is trumped by the need to adhere to the revised purposes which do not, in themselves, allow this.

52. The Scheme envisages community users being charged ‘reasonable and affordable’ rates which are set for 10 years. This seems to the Tribunal to be a very long period to set between reviews. The Tribunal is concerned that this may result in a situation where the proposed pricing (for 10 years) is such that community users are either priced out of the market, allowing commercial users to dominate use of Charity Property (albeit the Charity will receive income), or little use is made of the Halls by community users. The parties may wish to put their minds to revisit issues such as these, although it is for the First Respondent to decide if, and how, any amendments to the current Scheme are incorporated into the new Scheme.
53. There are, and will be, divergent interests in the property of the Charity: Mastcraft / Surejogi have very different interests to those of the Charity which could cause detriment to the Charity. To the extent that the terms of the new Scheme can affect this issue, it is an area where all parties need to collaborate to ensure that the Charity does not face any avoidable harm. Other matters which the Tribunal felt required attention in the new Scheme include:
54. The Tribunal was concerned that the Community Use Protocol in the Scheme had not yet been agreed. The revised Scheme should ideally include an agreed version as it is central to the issue of achieving the Charity’s purposes. This must have due regard to the resources – cash and liquidity in particular - of the Charity to avoid there being any legacy management burden on the Charity in circumstances where the Charity has no resources of its own.
55. The Scheme creates a proposed structure for the Advisory Group. However, the detail of this, or any alternative governance structure, needs to be finalised in the new Scheme noting that it should provide an independent perspective so as to benefit and protect the Charity and its property.
56. The Scheme needs to achieve clarity as to how income from use of charity property (as redefined by the Mastcraft / Surejogi transaction) intended to be paid to the Charity is collected and paid over to the Charity. It should make clear what deductions are allowed, if any, and when it is to be paid to the Charity.
57. The Scheme should include a provision for an alternative trustee(s) of the Charity.

Conclusion

58. A cy-près occasion had arisen thereby enabling, or obliging, the First Respondent to make a Scheme to allow the Charity to continue in existence for charitable purposes.
59. The Tribunal is not satisfied that the terms of the proposed Scheme adequately protects the interests of the Charity and directs that a revised Scheme is drawn up between the two Respondents in consultation with the Appellants, within 185 days of the date of this Decision.

Note: A right of appeal, on a point of law only, lies to the Upper Tribunal against this decision. Any person seeking permission to appeal must make application in writing to this Tribunal for permission to appeal no later than 28 days after this decision is issued, identifying the alleged error of law and state the result the person making the application is seeking.

Signed: *Damien McMahon*
Tribunal Judge

Date: 20 September 2023