First-tier Tribunal
(General Regulatory Chamber)
Charity

Appeal Reference: CA/2015/0011
CA/2017/0002

Heard at Field House, London
On 19 June 2017

Before

JUDGE J HOLBROOK

TRIBUNAL MEMBER H CARTER

TRIBUNAL MEMBER A KHAN

Between

PAULINE DENSHAM

Appellant

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

DECISION AND REASONS

DECISION

The appeals are dismissed.

REASONS

Introduction

1. These appeals concern land at various sites in Hughenden, Buckinghamshire, most of which is used to provide allotment gardens ("the Hughenden allotments"). The Appellant is Miss Pauline Densham, who is both a local resident and an allotment-holder at one of these sites.

2. Miss Densham appeals against two decisions of the Charity Commission for England and Wales ("the Commission"). First, she appeals against an order dated 7 October 2015 by which the Commission made a scheme ("the Scheme") under the Commons Act 1899 and the Charities Act 2011. The Scheme relates to 'The Hughenden Community Support Trust', previously known as 'Allotments for the Labouring Poor'. For ease of reference, we shall refer to this as "the Charity" although, as will become apparent, Miss Densham does not consider it to be a charity at all.

3. The Charity is registered with the Commission (under charity number 248607), and Miss Densham's second appeal is against the Commission's decision not to remove the Charity from the register of charities. That decision was made on 20 December 2016.

4. It is agreed that Miss Densham has standing to appeal against these decisions as a person who is, or may be, affected by them.

5. A hearing in relation to both appeals was held in London on 19 June 2017. Miss Densham represented herself at the hearing and the Commission was represented by Miss K Selway of counsel. An agreed hearing bundle was provided, which included written submissions and supporting documentary evidence and authorities. The parties made additional written and oral submissions. However, no witness evidence was given as the material facts in this case are not in dispute.

6. Judgment was reserved.

The issues

7. Although the parties had nor formally agreed a list of issues in advance of the hearing, there was, in reality, little dispute about what the Tribunal would need to decide in order to dispose of the appeals. Thus, at the outset of the hearing, it was agreed that the key issues for determination are:

- Whether two awards made under the Inclosure Act 1845 in relation to the Hughenden allotments created charitable trusts in relation to them;

- If so, whether subsequent changes in the law have affected the charitable status of those trusts;

- Whether the Charity has ceased to exist or operate;

- Whether the Commission has power to make the Scheme; and

- If so, whether the terms of the Scheme are appropriate.

8. Miss Densham also argued, as a separate point, that a purported appointment of new trustees in 2006 or thereabouts had been invalid; that there was not then (or, indeed, now) any statutory power – including any scheme-making power – which could be used to appoint trustees for the Charity; and that it therefore cannot be a charitable institution. To the extent (if any) that these arguments are not embraced by the issues identified above, we agreed to consider them. If fact, it was convenient to consider these arguments primarily in the context of the second issue identified above (see paragraphs 46 – 48 below).

9. The Tribunal's power to determine these appeals arises from section 319(5) of the Charities Act 2015 and from the relevant entries in the table in Schedule 6 to that Act. In determining the appeals the Tribunal must consider afresh the Commission's decisions. In doing so, the Tribunal may take into account evidence which was not available to the Commission.

Legal and factual background

10. The Inclosure Act 1845 contained provisions which required the "allotment" of land for various purposes. Thus, the open fields and common land of a parish could be divided up and allotted, whether, for example, as land under the plough, or for the creation of new roadways. Section 31 of the 1845 Act is of particular relevance in these proceedings. That section empowered the Inclosure Commissioners (the persons invested by the Act with the necessary authority to authorise the inclosure of land) to provide for the appropriation of land as allotments for the labouring poor, as they thought fit, as one of the conditions of inclosure. If the Commissioners decided not to make such an appropriation, they were required to explain, in their annual general report, why not.

11. The details of an allotment of land were to be dealt with, under section 73 of the Inclosure Act, by the valuer appointed for the purpose. The process involved the valuer setting out and allotting to the relevant persons that which had been directed in the provisional order of the Inclosure Commissioners. For example, land appropriated "as a place of exercise and recreation for the inhabitants of the parish" was to be awarded to the churchwardens and overseers of the parish to be held by them for those purposes. A similar appropriation was to take place as far as an allotment for the labouring poor was concerned. Land appropriated for this purpose was to be held by the churchwardens and

overseers of the poor. Allotments made under the Inclosure Act to the churchwardens and overseers were to be held in trust for the purposes for which they were allotted.

12. Two separate awards made under the Inclosure Act 1845 concern the Hughenden allotments. The first of these awards was dated 27 March 1855, and allotted some of the land which now forms the Hughenden allotments to the churchwardens and overseers of the poor of the parish of Hitchenden (that being a reference to what is now Hughenden)–

> "… to be held by them and their successors in trust as allotments for the labouring poor of the said parish of Hitchenden …".

13. The second award was dated 4 August 1862, and allotted the rest of the land which forms the Hughenden allotments to the churchwardens and overseers of the poor of the parish of Hughenden–

> "… to be held by them and their successors in trust as allotments for the labouring poor of the said parish …".

14. By virtue of section 5(2)(c) of the Local Government Act 1894, title to the Hughenden allotments became vested in Hughenden Parish Council as holding trustee when the council was brought into existence by that Act.

15. The trusts created by the inclosure awards of 1855 and 1862 were registered as a single charity by the Commission and entered onto the register of charities in 1966. At this time, the Charity was known as 'Allotments for the Labouring Poor'.

16. Originally, the Hughenden allotments comprised seven sites of roughly two acres each. However, for a time (particularly during the early years following the end of the Second World War) the allotments fell into disuse, and their overall acreage has decreased over the years. For example, some of the land, which had become derelict and vacant, was compulsorily purchased by the local county council in 1971 as the site for a new school. Four of the sites are still cultivated today. One site is used as a public open space, and another is partly let to a cricket club and also accommodates a children's playground.

17. The parties agree that the disposal, through compulsory purchase, of parts of the land originally comprising the Hughenden allotments served to free those parts from any charitable trusts to which they may have been previously subject.

18. The remaining land continued to be held and managed by Hughenden Parish Council, but not (in the Commission's view at least) in furtherance of the Charity's objects. In 2004, or thereabouts, the Commission opened an inquiry into the Charity to establish whether it existed, what assets it held, and whether it was required to submit annual accounts. There was apparently some discussion about whether the parish council should appoint new trustees to act in its place, and whether the new

trustees might then apply to the Commission for a cy-près scheme to allow for the disposal of land and the application of the proceeds of sale for charitable purposes.

19. The Commission closed its inquiry in May 2005. The Charity was removed from the register of charities in 2008 for failing to file accounts, but was restored to the register in 2011.

20. In 2006, or thereabouts, the parish council appears to have appointed new trustees for the Charity (although, as we have mentioned, Miss Densham disputes the validity of these appointments). There followed protracted discussions between the parish council and the trustees about the future management of the Hughenden allotments. Having eventually reached an agreement with the parish council, the trustees made an approach to the Commission in 2014 which ultimately led to the making of the Scheme.

The Commission's decisions

21. In 2015, public notice was given of a draft scheme which, if made, would replace the existing trusts established by the Hughenden inclosure awards. It would provide a new object, establish a self-perpetuating body of trustees, include provisions for the administration of the Charity and give the trustees power to dispose of all or any of its land. The scheme was to be made under section 18 of the Commons Act 1899 and section 69 of the Charities Act 2011.

22. The Commission's rationale for making such a scheme was that the inclosure awards of 1855 and 1862 had established charitable trusts for the relief of poverty, but that, at some point in the past, using the land in question to provide allotment gardens had ceased to be a suitable and effective means of relieving poverty in Hughenden. The Commission therefore considered there to be justification for making a scheme to change the objects of the Charity by reason of a cy-près occasion, and to update the trustees' powers of management.

23. Representations were received by the Commission in response to publication of the draft scheme. In particular, the trustees of the Charity suggested several changes to the terms of the draft scheme and the Commission subsequently agreed to make some amendments to reflect these.

24. Representations were also received from Miss Densham. She fundamentally disagreed with the proposal to make a scheme, arguing that the Hughenden allotments were not subject to charitable trusts and that the Commission had no jurisdiction to make a scheme in respect of them. The Commission considered Miss Densham's arguments but concluded that her analysis of the applicable law was incorrect. It re-published an amended scheme on its website and, following consideration of further representations received from Miss Densham and others, the Scheme was made without further amendment on 7 October 2015.

25. On 14 November 2015, Miss Densham appealed to the Tribunal against the Scheme. The basis of her appeal was (and remains) the contention that the Hughenden allotments are held by Hughenden Parish Council for public purposes but are not subject to a charitable trust. However, at a preliminary stage in the proceedings, a likely impediment to the success of an appeal on this ground was identified. That impediment arises because of the presumption in favour of charitable status found in section 37(1) of the Charities Act 2011. Consequently, Miss Densham then applied to the Commission under section 36(1) of that Act for the Charity to be removed from the register of charities. As we now know, the Commission refused that application on 20 December 2016 (having concluded that the Hughenden allotments continued to be held subject to overriding charitable trusts, and that the Charity had not ceased to exist or operate) and, on 31 January 2016, Miss Densham appealed to the Tribunal against that decision.

26. The central issue in both appeals is whether the Hughenden allotments have ever been subject to charitable trusts, and it is to this question that we now turn.

Did the Hughenden inclosure awards establish charitable trusts?

27. The inclosure awards of 1855 and 1862 expressly provided for the Hughenden allotments to be held in trust "as allotments for the labouring poor" of the parish. The Commission contends that these were trusts for the relief of poverty and were thus for wholly charitable purposes.

28. Miss Densham disagrees. She maintains that the Hughenden allotments are held by the parish council free from any charitable trusts. She considers that the land was vested in the parish council's predecessors (the churchwardens and overseers of the poor) for public purposes and that "there seems to have been no element of charity in this". Miss Densham makes the point that the inclosure system permitted land to be made available for the poor in different ways. So, she suggests, 'fuel allotments' (land from which the poor could take wood for fuel) were considered to be charitable, whereas 'field garden allotments' (such as those in Hughenden) were not.

29. The Commission observes that the fourth edition of *Tudor, The Law of Charities & Mortmain* (at p49) cited the case of *Crafton v Frith* (1851) 4 DE G & Sm 237 as authority for the proposition that the provision of allotments is a charitable purpose because it is a purpose connected with the relief of poverty. Miss Densham, on the other hand, cites the more recent case of *Snelling v Burstow Parish Council* [2013] EWHC 46 (Ch); [2013] EWCA Civ 1411 as indicating that field garden allotments are not held for charitable purposes. It is unnecessary to set out here a detailed analysis of the decisions in either of these cases: suffice it to say that neither case explored the question of charitable status in detail and so we do not consider that either of them provides clear authority for or against the trusts in the present case being trusts for charitable purposes.

30. The Hughenden inclosure awards themselves tell the reader little about the terms of the trusts they established, other than that the land was to be held in trust as allotments for the labouring poor of the parish and was to be subject to an annual rent charge. However, given that the awards were made under the Inclosure Act 1845, we can look to that Act for assistance. Indeed, the Inclosure Act made explicit provision for the operation of trusts established by inclosure awards, and this, presumably, is why the awards themselves do not provide additional elucidation.

31. Section 108 of the Inclosure Act provided that land allotted for the labouring poor was to be managed by 'allotment wardens', who were to carry out their functions under the overarching jurisdiction of the Inclosure Commissioners. The allotment wardens were also responsible for paying the rent charge in respect of the allotment in accordance with the 1845 Act.

32. Section 109 of the Act gave direction as to how individual field gardens were to be let by the allotment wardens. Essentially, field gardens of no more than a quarter of an acre each were to be let to poor inhabitants of the parish at such rents as the allotment wardens thought fit. However, the field gardens had to be valued (and periodically re-valued) by a competent person and could not be let at a rent which was below their full yearly value. Nevertheless, the letting was to be free of all rates and tithes, which were to be borne by the allotment wardens.

33. Miss Densham argues that this prohibition against the letting of field garden allotments at an undervalue evidences a lack of charitable intent underlying the statutory regime. She also points to the fact that section 106 of the Inclosure Act provided that land allotted to persons under that Act was to be regarded as compensation for any property rights previously enjoyed by them, including rights of common. How, then, could something which was compensatory also be charitable?

34. In principle, a charity may charge a commercial rate for the charitable services it provides. However, a trust which excludes the poor from benefit cannot be charitable. In *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), the Upper Tribunal stated that "poor" in this context does not mean destitute, even in the case of trusts for the relief of poverty. It can cover persons of modest means in certain cases and persons of "some means" in others. An institution may be a charity even though it charges, without any element of subsidy at all, for its services where the cost is nevertheless within the ability of the not very well off to meet.

35. It has not been suggested that the purpose of the Hughenden inclosure awards was defeated by the fact that "the labouring poor" could not, as is suggested, afford the rents for the field gardens provided, or that the land was not let successfully as field gardens on the basis contemplated by the Inclosure Act. Nor was there any evidence which would support such a contention.

36. The focus of the Tribunal must be on the *purpose* of the trusts established by the Hughenden inclosure awards rather than on their actual effect. As an aid to discerning the original purpose of those trusts, we were referred to extracts from the final report of a Departmental Committee of Inquiry into Allotments appointed in August 1965. Known as 'the Thorpe Report', this was presented to Parliament by the Minister for Housing & Local Government in October 1969. In setting out an historical survey of the allotments system in this country, the Thorpe Report identified the enclosure system as a major cause of rural poverty in the early to mid-nineteenth century, and (at p2) stated:

> "With enclosure, a great many [peasant farmers] disappeared from the rural scene almost without trace. … Thus there emerged from enclosure a rural proletariat which had largely lost its direct contact with the soil and which faced a future of direst poverty. To these thousands, and to their families, there appeared to be only three alternatives – to offer themselves for hire to the nearest landowner for wages which (especially in the southern counties) were scarcely sufficient to enable them to survive; to move into the growing industrial towns in search of employment; or to depend upon poor relief."

37. The Thorpe Report went on to document how the provision of allotments was seen by many as a means of addressing rural poverty. We are told that the early Inclosure Acts did little to ameliorate the lot of the rural poor because they made scant provision for the allotment of land for their use. It was not until the advent of the 1845 Act that a serious attempt was made to ensure the provision of allotments and to ratify the association of enclosure with allotment provision.

38. The Thorpe Report thus offers a fairly clear indication that the purpose of the allotments system established by the 1845 Act (and the awards made thereunder) *was* a purpose connected to the relief of poverty. Such relief was not to be provided by offering allotments to the labouring poor free of charge, or even at cheap rates (although there was an element of subsidy in that field gardens were let free of tithes and taxes, and free also of the costs of fencing (see section 73 of the 1845 Act)). Relief was provided instead merely by giving the labouring poor an opportunity to have a stake in the soil following enclosure. But for the provision of such allotments, the poor were unlikely to have that opportunity at all. The fact that section 106 of the Inclosure Act describes the compensatory nature of allotments does not detract from this fact.

39. As the Commission has pointed out, the view that allotments made for the labouring poor were made for purposes connected to the relief of poverty is supported by a consideration of section 112 of the Inclosure Act. That section dealt with the application of rents received by the allotment wardens. Such rents had to be applied, first, towards payment of all rates, tithes and other taxes; to the rent charge payable under the 1845 Act; and to the expenses incurred by the allotment wardens in the performance of their functions. However, any residue was to be paid to the overseers of the poor, in aid of the poor rates of the parish, to be used for the relief of the poor.

40. For these reasons, we conclude that the inclosure awards of 1855 and 1862 established charitable trusts in respect of the Hughenden allotments.

41. In coming to this view, we have also had regard to Miss Densham's submissions concerning the operation of the Local Government Act 1894 (see paragraphs 44 and 45 below), as well as her views on the availability (or lack of it) of a power to appoint trustees for the Charity (see paragraphs 46 – 48). Moreover, we have considered the evidence Miss Densham introduced concerning various decisions of Commons Commissioners about who should be registered as the owner of unclaimed common land. None of those decisions (which were made under section 8 of the Commons Registration Act 1965) related to land in Hughenden, and we did not find that they were of assistance in determining the issues in this case. The decisions in question were concerned only with the matter of the ownership of common land for commons registration purposes, and not with the question whether the land was held by the owner subject to overriding trusts, charitable or otherwise.

Have subsequent changes in the law affected the status of the trusts?

42. We have already noted that, in 1894, legal title to the Hughenden allotments was vested in Hughenden Parish Council by section 5 of the Local Government Act of that year. The parish council acquired the land as holding trustee and the statutory vesting of the land had no effect upon the charitable trusts subject to which it was held. This fact is clear from the wording of section 5(2)(c), which provided that the vesting of the legal interest was to be "subject to all trusts and liabilities affecting the same", and also from the provision, made in section 6(1)(c) of the Act, for the following to be transferred to the parish council:

> *The powers, duties, and liabilities of the overseers or of the churchwardens and overseers of the parish with respect to ... the holding or management of parish property, not being property relating to affairs of the church or held for an ecclesiastical charity, and the holding or management of village greens, or of allotments, whether for recreation grounds or for gardens or otherwise for the benefit of the inhabitants or any of them.*

43. Section 6(4) went on to provide for parish councils to assume the functions of allotment wardens.

44. However, the 1894 Act provided another means by which a parish council could acquire property held subject to trusts. This was in section 14(1) of the Act, which permitted "trustees" to transfer property to a parish council, with the approval of the Commission, if the trustees held that property for the benefit of the inhabitants of a rural parish. Such property could include land held by the trustees for the purposes of allotments. Miss Densham argues that the fact that Hughenden Parish Council acquired the Hughenden allotments under section 5 of the 1894 Act, rather than by a transfer under section 14, indicates that the allotments were not subject to

charitable trusts. She reasons that, if charitable trusts had been involved, it would have been appropriate for the Commission to approve the acquisition of the land by the parish council. Section 14 provides for this, whereas section 5 does not.

45. In our view, however, Miss Densham's view is incorrect. It fails to take account of the fact that, whereas the power in section 14(1) of the 1894 Act was conferred on "trustees" generally, sections 5 and 6 applied exclusively to property held by "the churchwardens and overseers" of a parish. Sections 5 and 6 thus applied to property held subject to charitable trusts if that property was held by the churchwardens and overseers. Moreover, where section 5 applied, the property in question vested in the parish council automatically, by operation of law: the churchwardens and overseers could not choose to rely on section 14 instead, because the property concerned had already vested in the parish council as soon as it came into existence. For the same reason, the Commission had no role to play in approving the acquisition by the parish council.

46. Miss Densham also argues that the existence of the Charity in the period following the enactment of the Local Government Act 1894 depended upon there being some means of appointing trustees in respect of it. She notes that, in contrast to section 14 of that Act, sections 5 and 6 made no provision for the appointment of trustees. Miss Densham also notes that, in 2006 (and with the Commission's encouragement), Hughenden Parish Council purported to appoint new trustees for the Charity in exercise of a power conferred on parish councils in respect of parochial charities by section 79 of the Charities Act 1993. This provision was a re-enactment of section 14 of the 1894 Act and Miss Densham argues that the purported appointments were therefore invalid because section 14 of the 1894 Act did not apply in respect of the Charity (and thus neither did section 79 of the 1993 Act). Section 79 was itself re-enacted in sections 298 – 300 of the Charities Act 2011 and, taking her line of reasoning one stage further, Miss Densham contends that, for the same reason, the power of appointment now found in section 300 of the 2011 Act cannot be used to appoint trustees for the Charity. Indeed, she argues that there are no statutory provisions under which trustees could now be appointed. In summary, Miss Densham says that "If it is found that trustees cannot be appointed, then it is a matter of simple logic to conclude that the institution cannot be identified as a charitable trust".

47. Although it is true that neither section 5 nor section 6 of the 1894 Act provided for the appointment of new trustees in respect of trust property vesting in the newly established parish councils, Miss Densham's argument appears to overlook the fact that a parish council necessarily acquired such property as a holding trustee. The parish council continues as trustee unless and until new and different trustees are appointed.

48. There is insufficient evidence before the Tribunal to enable us to determine whether the 2006 trustee appointments were valid or not (although we observe that statutory powers other than those in the Charities Act would potentially have

permitted the appointment of new trustees). However, it is unnecessary for us to make such a determination as it is clear that the Charity has at no time been without trustees of some sort, whether corporate or individual. Nor do we accept that the Commission cannot appoint new trustees for the Charity – as we explain below, it may do so in exercise of its scheme-making powers.

49. Section 26 of the Commons Act 1876 (the Act which also introduced the term 'field gardens' to refer to allotments created for the labouring poor) had permitted allotments to be let to other people where there was insufficient demand from the "poor inhabitants of the parish". However, the general law relating to the provision and management of allotments was reformed more substantially by the Small Holdings and Allotments Act 1908. That Act imposed a duty on local authorities (including Hughenden Parish Council) to provide sufficient allotments to meet local demand for the same by "the labouring population". The Act permitted land to be acquired for use as allotments and conferred wide powers of management in relation to them. These powers (which included a power to sell land which was not needed for allotments) were exercisable in respect of land acquired by virtue of other enactments as well as land acquired under the 1908 Act itself.

50. The reference to the target population of allotment holders as "labouring" was removed from the 1908 Act by the Land Settlement (Facilities) Act 1919, and the policy underlying the reforms of the late nineteenth and early twentieth centuries appears to have been that, in general, allotments should henceforth be provided as a public service and not necessarily as a means of relieving poverty. The question, then, is whether this shift in policy led to the cessation of the charitable trusts established by the Hughenden inclosure awards.

51. Miss Densham argues that this was indeed the case, because the continuation of those trusts was incompatible with the new statutory regime for the provision and management of allotments. She notes that, in *Snelling v Burstow Parish Council*, the High Court referred to the charitable purpose of a trust established under the Inclosure Act being "diluted" by section 26 of the Commons Act 1876. Miss Densham also makes particular reference to the power of sale in section 32 of the Small Holdings and Allotments Act 1908 which, she says, is incompatible with the continuation of a charitable trust. Again citing *Snelling* (this time in the Court of Appeal), Miss Densham points out that, when referring to that power, Patten LJ commented (at paragraph 30 of his judgment) that:

> "The continuation of a charitable trust would obviously be inconsistent with this statutory scheme …"

52. The Commission argues that this is not so. Miss Selway submitted that there is nothing in the 1908 Act which is obviously inconsistent with the continuation of a charitable trust. She accepted that the power of sale in section 32 could be exercised to bring such a trust to an end. However, the power may only be exercised where the land in question is no longer needed to provide allotments and, even then, it would

not be the only option available to a charity: which could, instead, apply to the Commission for a scheme to preserve the charity whilst enabling flexibility in its operation.

53. The point in issue in *Snelling* was whether the power of sale in section 32 of the 1908 Act was exercisable in the circumstances of that case. The court was not required to decide (and did not decide) whether the allotment land in question was held subject to a charitable trust or whether any such trust had ceased. The comment of Patten LJ cited above was therefore *obiter* and does not bind the Tribunal. In our view, the more liberal regime for the provision and management of allotments established by the Small Holdings and Allotments Act 1908 did not extinguish pre-existing charitable trusts of allotment land. Certainly, the Act contained no express revocation of such trusts. Nor did its provisions prevent such trusts from continuing in accordance with their terms. It follows that there was no implied revocation either. As the Commission has observed, the continued (charitable) provision of allotments for the labouring poor was not inconsistent with the wider power of the parish council to provide allotments.

54. For these reasons, we conclude that the charitable status of the trusts established by the Hughenden inclosure awards has been unaffected by the subsequent development of charity law and the law relating to allotments.

Has the Charity ceased to exist or operate?

55. The parties agree that, whilst most of the land in question is presently used for allotment gardens, there was a period during the last century when the Charity was not obviously functioning to provide allotments. It is also agreed that the allotments are no longer being let to "the poor", and that the cost of maintaining the land is now greater than the income they produce. In addition, there was a period (between 2008 and 2011) when the Charity was removed from the register of charities. Does such removal – and/or the fact that the Charity may not be fulfilling its charitable purpose – mean that the Charity has ceased to exist or operate?

56. The answer to this question is 'no'. The fact that the Hughenden allotments may have fallen into disuse for a time is not sufficient to extinguish the Charity. As a matter of law, a charity continues to exist even if it is not actively fulfilling its functions. Of course, where this is the case, regulatory action by the Commission may well follow.

57. The Charity was entered in the register of charities in 1966 (and there can be little doubt that it was in existence at that point). It was removed from the register in 2008 for failing to file accounts. However, we accept the Commission's evidence that this was an administrative sanction imposed as a result of the Charity's regulatory non-compliance, and that it did not require any consideration of the Charity's continued existence. Removal from the register does not extinguish a charity. Besides, the Charity was restored to the register in 2011.

58. For these reasons, we conclude that, whilst the Charity may no longer be functioning for its original purpose (and, prior to the making of the Scheme, was no longer operating for the relief of poverty), it has not ceased to exist or operate.

Does the Commission have power to make the Scheme?

59. This question requires a consideration of two issues: first, whether the Commission has jurisdiction in relation to the Charity; and, second, whether it has power to make a scheme in the circumstances of this case.

60. In relation to the first of these issues, Miss Densham argues that the Commission cannot have jurisdiction over the Hughenden allotments because there is no reference to the Charity Commissioners in any section of the Inclosure Act 1845, and because such jurisdiction was not subsequently acquired. She states that the Commissioners "had no role to play in the provision or management of those allotments. In the case of dispute, there was no right of appeal to the Charity Commissioners."

61. As Miss Selway pointed out, however, the Charity Commissioners were not in existence when the 1845 Act came into force. It is thus unsurprising that the Act makes no mention of them. However, by the time of the Hughenden inclosure awards, the Charitable Trusts Act 1853 had established the Charity Commissioners as a permanent body. The 1853 Act was followed by the Charitable Trusts (Amendment) Act of 1855. The powers conferred on the Commissioners by these two Acts were essentially inquisitorial and administrative, but the remedial and protective powers conferred on the Commissioners extended to protect all charities, save for those that were expressly exempted (which did not include allotment charities). The Commissioners powers therefore extended to the charitable trusts established by the Hughenden inclosure awards. These powers were augmented by various subsequent enactments and, of course, are now to be found principally in the Charities Act 2011.

62. In the present case, the Commission asserts that its jurisdiction to make the Scheme derives not only from the provisions of the 2011 Act, but also from section 18 of the Commons Act 1899. That section (as amended) provides as follows:

> *Any provisions with respect to allotments for recreation grounds, field gardens, or other public or parochial purposes contained in any Act relating to inclosure or in any award or order made in pursuance thereof, and any provisions with respect to the management of any such allotments contained in any such Act, order, or award, may, on the application of any district or parish council interested in any such allotment, be dealt with by a scheme of the Charity Commission in the exercise of its ordinary jurisdiction, as if those provisions had been established by the founder in the case of a charity having a founder*

63. Miss Densham argues that this provision was not intended to apply to all field garden allotment awards, but only to those which were expressly stated to be for

charitable purposes. She also contends that the provision does not apply to the Hughenden inclosure awards because they were not established by a "founder".

64. We can see no justification for the narrow construction of section 18 of the 1899 Act which Miss Densham advocates. The provision is framed in wide and general terms and should be construed accordingly. Nor is the reference to a "founder" an impediment to the application of the section: that reference is merely intended to ensure that the relevant provisions with respect to allotments etc. may be dealt with by the Commission "as if" they were ordinary charities subject to its jurisdiction.

65. This analysis of section 18 of the Commons Act leads in to the second issue identified above (whether the Commission has power to make a scheme in the circumstances of this case). In our judgment, section 18 is clearly engaged upon the present facts and permits the Commission to exercise its general regulatory powers in relation to the Charity (that is the purpose of the reference to the exercise of the Commission's "ordinary jurisdiction" in section 18).

66. Of particular relevance when considering those general powers are sections 67 and 69 of the Charities Act 2011. Section 69(1) enables the Commission to make an order establishing a scheme for the administration of a charity. Section 67(2) and (3) provides:

> *(2) Where any property given for charitable purposes is applicable cy-près, the court or the Commission may make a scheme providing for the property to be applied –*
>
> *(a) for such charitable purposes, and*
>
> *(b) (if the scheme provides for the property to be transferred to another charity) by or on trust for such other charity,*
>
> *as it considers appropriate, having regard to the matters set out in subsection (3).*
>
> *(3) The matters are –*
>
> *(a) the spirit of the original gift,*
>
> *(b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and*
>
> *(c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.*
>
> *The "relevant charity" means the charity by or on behalf of which the property is to be applied under the scheme.*

67. The circumstances in which the original purposes of a charitable gift can be altered to allow property to be applied cy-près are listed in section 62 of the Charities Act 2011. By virtue of subsection (1)(e)(iii), this list of 'cy-près occasions' includes –

> *where the original purposes, in whole or in part, have, since they were laid down … ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.*

68. The "appropriate considerations" are, on the one hand, the spirit of the gift concerned, and, on the other, the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes (section 62(2) of the 2011 Act).

69. It is apparent from the language used in sections 62 and 67 of the Charities Act that the power to make a scheme for the application of property cy-près relates to charities established by "gift". The charitable trusts concerning the Hughenden allotments were not established in that way, of course. Nevertheless, the power to make a scheme under section 67(2) is still available to the Commission in relation to those trusts by virtue of the power conferred on it by section 18 of the Commons Act 1899.

70. Accepting the Commission's assertions (which were not disputed by Miss Densham) about changes in the economic and social conditions of the inhabitants of Hughenden in the period since the mid-nineteenth century, we find that a cy-près occasion has occurred in this case – because the provision of allotment gardens is no longer a suitable and effective method of using the land for the relief of poverty. We are therefore satisfied that the Commission has power to make the Scheme.

Are the terms of the Scheme appropriate?

71. Miss Densham's case is based on the contention that the Commission does not have power to make the Scheme. She did not argue, in the alternative, that the terms of the Scheme are inappropriate. Nevertheless, bearing in mind that the Tribunal's function in these proceedings is to consider the relevant decisions afresh, we have addressed the question of the terms of the Scheme, following our finding that the Commission does have power to make it.

72. We note that the principal effect of the Scheme is to give the Charity new objects. These are expressed as follows:

> "The object of the charity is the relief of persons resident in [the parish of Hughenden] who are in need, hardship or distress.
>
> The trustees may relieve persons in need by:
> (a) making grants of money to them; or
> (b) providing or paying for goods, services or facilities for them; or
> (c) making grants of money to other persons or bodies who provide goods, services or facilities to those in need."

73. The Scheme thus gives the Charity the broad charitable purpose of relieving poverty in the locality. The name of the Charity is changed to 'The Hughenden Community Support Trust' in recognition of this. In our judgment, this is a wholly appropriate use of the powers conferred on the Commission by the Charities Act 2011.

74. The Scheme makes additional provision for the administration of the Charity. It transfers the land held in trust to the Official Custodian for Charities, in trust for the Charity, and provides for the appointment of individuals as trustees. The Scheme gives the trustees a power to sell, or otherwise dispose of, the trust property, with the proceeds of any such disposal being invested in trust for the Charity. It also provides for the application of the Charity's income and capital. Again, we consider all of these provisions to be appropriate in the circumstances of this case.

Disposal

75. Subject to certain exceptions (which do not apply here), section 30(1) of the Charities Act 2011 requires every charity to be registered in the register of charities. Section 34(1) of that Act requires the Commission to remove a charity from the register if it no longer considers the institution to be a charity, or if the charity has ceased to exist or does not operate. Given our above findings, we conclude that the Commission was right to refuse to remove the Charity from the register. Miss Densham's appeal against the Commission's decision on this matter must therefore fail.

76. In addition, given our finding that the Commission has power to make the Scheme and that the terms of the Scheme are appropriate, Miss Densham's appeal against the Scheme must also fail.

77. Both appeals are accordingly dismissed.

Signed J W HOLBROOK

Judge of the First-tier Tribunal
Date: 14 August 2017