



**IN THE FIRST TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

CA/2012/0001

ROGER THOMAS

Appellant

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

The Tribunal:

**Judge Alison McKenna
Carole Park, Lay Member
Stuart Reynolds, Lay Member**

Heard in public at Field House on 8 October 2012

The Appellant represented himself

**James Kilby (Charity Commission Legal Department) appeared for
the Respondent**

DECISION

The appeal is allowed and the Tribunal now makes an Order quashing the Scheme of 18 April 2012 in respect of Llanfair Waterdine Charities (503441)

REASONS

Introduction

1.1 These proceedings concern a charity known as Llanfair Waterdine Charities (registered charity number 503441) in Shropshire ("the Charity") and a scheme made by the Respondent to amend its trustee benefit provisions ("the 2012 scheme"). The Charity's governing document is a scheme dated 13 October 1977 ("the 1977 scheme") which provides a common administrative machinery for eight historic local trusts. The 1977 scheme provides for the application of income for different purposes depending on the provenance of the income-producing asset including the relief of need, the promotion of education, and the general benefit of the inhabitants of the parish.

1.2 The 1977 scheme includes an absolute prohibition on trustee benefits in the following terms:

"34. Trustees not to be personally interested. - No trustee shall take or hold any interest in property belonging to the Charities otherwise than as a trustee for the purposes thereof and no Trustee shall receive remuneration, or be interested in the supply of work or goods, at the cost of the Charities".

"Property" is not specifically defined in the 1977 scheme but clause 1 refers to the administration of "*the above-mentioned charities and the property thereof specified in the schedule hereto*". The property listed in the schedule comprises both land and investments.

1.3 The 1977 scheme provides for a trustee body of six trustees, comprised of five trustees nominated by the Parish Council and one co-opted trustee. The Appellant is a nominative trustee. All other members of the trustee body, as presently constituted, were informed of these proceedings but none of them applied to be joined as parties. One trustee filed a witness statement at the request of the Respondent. Two trustees corresponded with the Charity Commission so that their views about the 2012 scheme were made known to the Tribunal by this route. The final two trustees failed to respond to the Charity Commission's enquiries so their views about the 2012 scheme are, regrettably, not known to the Commission or to the Tribunal.

1.4 Following the agreed case management directions the parties exchanged with each other and filed with the Tribunal a bundle of documentary evidence and legal materials and agreed a list of issues. It was agreed between them that there should be no oral evidence at the hearing (and the Tribunal did not require any to be given) so the hearing proceeded by way of legal submissions

only. They both filed skeleton arguments which underpinned their oral submissions. We are grateful to the parties for co-operating with each other to assist the Tribunal to deal with this matter.

The 2012 Scheme

2.1 On the application of the then trustee body in June 2011, the Respondent decided to make a scheme pursuant to its powers under s. 69(1) (a) of the Charities Act 2011 ("the Act"). Following publication of a draft scheme, changes had been made following representations received. The scheme, having been reviewed twice by senior case officers, was eventually sealed on 18 April 2012. Its only purpose was to amend the prohibition on trustee benefits as follows:

"3. Alteration of governing document

The governing document will take effect with clause 34 being replaced with:

34. Trustees not to be personally interested

(1) No trustee shall take or hold any interest, including a grazing license, in property belonging to the charities, other than as a trustee for the purpose of the charities, without the prior consent of the Charity Commission. No trustee shall receive remuneration from the charities.

(2) Grazing licences lasting one year or less are not to be dealt with in accordance with clause 34(1). Grazing licences of the charities' land may be granted for up to and including a year's duration. Such licences should be granted for the best price available following advertisement on the open market which may include a public auction. Grazing licences granted in this way do not require the Charity Commission's consent even if obtained by a trustee of the charity".

2.2 The Appellant has consistently opposed the making of the 2012 scheme and made representations to that effect (as did other local people, including former trustees) to the Charity Commission in response to its publication of a draft scheme. After the 2012 scheme was sealed, the Appellant applied to the Tribunal by his Notice of Application dated 22 May 2012. He asked the Tribunal to quash the 2012 scheme but not to make any alternative or replacement provision, so that the charity would return to the position it had been in under the 1977 scheme.

2.3 The Respondent asked the Tribunal to dismiss the appeal and leave the 2012 scheme in place, although it acknowledged that it would need to continue to work with the trustees to improve the Charity's governance and that this may involve making a further Scheme in due course.

The Powers of the Tribunal

3.1 Section 315(2) of the Act provides that

“(2) The Tribunal has jurisdiction to hear and determine -

(a) such appeals and applications as may be made to the Tribunal in accordance with Chapter 2, or any other enactment, in respect of decisions, orders or directions of the Commission,”

3.2 Schedule 6 to the Act sets out in a table format the following matters: in column 1, which particular decisions directions or orders may be appealed to the Tribunal; in column 2, who may bring such an appeal; and in column 3, what powers the Tribunal may exercise in determining each type of appeal. The Scheme in this case is in fact an order made under s.69 (1) of the Act. The relevant entries in the table are therefore as follows:

1.	2.	3.
Order made by the Commission under section 69(1)....	<p>The persons are –</p> <p>(a) in a section 69(1)(a) case, the charity trustees of the charity to which the order relates.....</p> <p>(b) [...]</p> <p>(c) any other person who is or may be affected by the order.</p>	<p>Power to –</p> <p>(a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission</p> <p>(b) substitute for all or part of the order any other order which could have been made by the Commission</p> <p>(c) add to the order anything which could have been contained in an order made by the Commission.</p>

3.3 Section 319 (4) of the Act sets out the relevant approach and the powers of the Tribunal:

“(4) In determining such an appeal the Tribunal -

(a) shall consider afresh the decision, direction or order appealed against, and

(b) may take into account evidence which was not available to the Commission.

(5) The Tribunal may -

(a) dismiss the appeal, or

(b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of the Table”.

- 3.4 It follows that this appeal takes the form of a substantive re-hearing, rather than a procedural review, of the original decision.
- 3.5 The Tribunal's power to remit the matter to the Commission is described in section 323 of the Act as a power to remit (a) generally or (b) in accordance with a finding made or direction given by the Tribunal.

The Parties' Submissions

- 4.1 The parties agreed, at the suggestion of the Tribunal, for the Respondent to present its case first and for the Appellant to make his submissions in reply. They both structured their submissions to address the agreed list of issues, and we deal with these in our conclusions below.

(i) The Respondent's Case

- 4.2 Mr Kilby explained to the Tribunal that the Commission's approach was to ask itself whether making any administrative scheme was expedient in the interests of the charity. He submitted that there had been some confusion and miscommunication between the Commission and the trustees over the effect of clause 34 of the 1977 scheme. The Commission's view is that the grant of grazing licences by the charity to its trustees is not in fact prohibited by clause 34 of the 1977 scheme because a grazing licence is a contractual right and not an interest in land. He submitted that clause 34 would have effect only to prevent the grant of an interest in land to a trustee. He pointed out that the Commission had the power under the 1977 scheme to interpret questions under that scheme, and this was the Commission's interpretation.
- 4.3 The Commission did, however, regard the grant of a grazing licence by the charity to one of its trustees as an infringement of the general rule of equity that a trustee should not put him or herself in a position where their own interests and those of the charity would conflict and so the grant of any grazing licence by the charity to one of its trustees would of necessity have to be authorised by the Commission unless a more general permissive power were conferred by a scheme.
- 4.4 The Commission's assessment of how the 2012 scheme would be expedient in the interests of the charity had, as Mr Kilby accepted, altered over the course of this case. Different reasons had been relied on by the Commission's officers in their reviews of the draft scheme (see paragraphs 4.8 to 4.10 below). Mr Kilby also accepted that the drafting of the 2012 scheme could be improved upon: it does not provide for a minority of trustees only to benefit from the grant of grazing licences at any one time and it does not provide for the management of conflicts of interest that might arise during the currency of a grazing licence granted to a trustee. However, he submitted that this was a case that justified departing from the usual prohibition on trustee benefits for the following reasons. Llanfair Waterdine is a small agricultural community and it seemed likely that from time to time trustees who are farmers would wish to bid for grazing licences, as they had in the past (albeit technically in breach of trust).

He added that the amounts of money involved here would be very small, the grazing licences would be of short duration, and there would be a public auction at which trustees would bid for the licence against third parties rather than a process of direct negotiation between the trustee and the charity. It was a better use of the Commission's resources to confer a general power to be relied on in the future, subject to appropriate safeguards, than for the Commission to be required individually to authorise any future grazing licences to trustees, which it would have to do under the terms of the 1977 scheme.

- 4.5 The Appellant had argued that the 2012 scheme had given certain trustees the impression that the Commission was exonerating past breaches of trust and that this was harmful to the reputation of the charity. Mr Kilby wished to make clear that this was not the Commission's view. However, he confirmed that the Commission was not intending to take any regulatory action against trustees who had taken grazing licences from the charity in the past. He told the Tribunal that this was because there was no evidence of loss to the charity (as a market rate always appeared to have been paid) and also because it was likely that equitable relief could be obtained for an innocent breach of trust. In addition Mr Kilby submitted that past breaches of trust should not count against regularising the situation in future if this was expedient in the interests of the charity.
- 4.6 In relation to the Appellant's other criticisms of how the charity had been administered in the recent past, Mr Kilby assured the Tribunal that the Commission intended to work with the trustees to improve the future governance of the charity and he hoped this would include the Commission making a further scheme in due course to provide a more up to date governing document. There had also been preliminary discussions about a possible *cy-près* scheme. He accepted that, as of the date of the hearing, three trustees were opposed to the 2012 scheme, one trustee appeared to favour it and two had not confirmed their position one way or the other. This situation was less than ideal. However, in the Commission's view the present difficulties within the trustee body were not a good reason to quash the 2012 scheme, which was expedient in the interests of the charity. The Commission had, in an attempt to settle these proceedings, suggested a differently worded amendment to clause 34 of the 1977 scheme with safeguards to restrict the number of trustees able to benefit and to provide for the management of conflicts of interest. However, the Appellant's view was that no amendment to clause 34 of the 1977 scheme should be permitted, and so this matter had proceeded to a hearing.

(ii) The Appellant's Case

- 4.7 The Appellant's case, in essence, was that no good reason had been provided as to why the 2012 scheme was in the interests of the charity, as opposed to being in the interests of those trustees who wished to obtain grazing licences and those who wished to be exonerated from past breaches of trust. He submitted that, unless a positive case for departing from the absolute prohibition on trustee benefit had been made, the 2012 scheme should not have been made.

- 4.8 The case put forward in the application for the scheme in June 2011 had been that *"if trustees are allowed to bid at public auction it will help to increase the amount of public interest in the land and will consequently raise the auction price"*. The application was initially dealt with by a case worker at the Commission, who made a note of her telephone conversation with a trustee, including the statement that *"one of the trustees...has always rented the charity land and pays a fair price for it...It is rare that anyone else puts in a bid and in effect the land is worthless to anyone else"*. This was followed up by a letter from the case officer which stated *"...if he did not rent it, it would in fact be worthless"*. The Appellant submitted that this was a plainly nonsensical statement and that the Commission officer should not have accepted it as a basis for making a scheme. The Commission's December 2011 review, undertaken as a result of the objections received following publication of the draft, included a comment that *"the charity did not explicitly say why it was effectively worthless to anyone else"*. This document was sent to the trustees in draft for comments on factual accuracy and then the trustee who was recorded to have made the original comment about "worthless" land replied that *"you have assumed that the land would be worthless if not rented by a trustee. This is not so, the land would only be worthless to the trustees if there was no income from letting"*. The December 2011 review concluded that further information needed to be obtained before the scheme was reconsidered by the Commission and that it should not at that stage be sealed.
- 4.9 In January 2012, the trustee responded to further questions from the Commission with the statement that *"the value of the land will not be altered by people bidding at auction. Land values remain unaltered by this process. The income from the land will probably be raised by more people bidding. Therefore if trustees are allowed to bid at auction the income should reflect a higher price"*. And later *"it might be assumed that if trustees did not bid and no other bona fide bids were received then there would be no income and therefore a serious management problem"*.
- 4.10 In April 2012 the Commission's reviewer decided to seal an amended scheme (in the form set out at paragraph 2.1 above). She included the following statement in her summary of the issues she must decide: *"the trustees...believe that allowing the trustees to bid will help to increase the amount of interest in the land and consequently raise the rent value"*. However, in the section of the review headed *"my decision"* she did not then proceed to record whether she had accepted the trustees' belief as a proper basis for making the scheme. She set out her reasons for concluding that the amended scheme should be made as:

"I conclude that making the scheme is expedient in the interests of the charity"..."there is only one piece of land belonging to the charity that regularly receives bids from trustees (this land is surrounded by land belonging to the individual trustee in question). Although there is potential for trustees to bid for other pieces of land this does not appear to be a frequent occurrence".

She also added that:

“These amendments are in line with the Charity Commission’s published Risk Framework. The charities own several pieces of land for which grazing licences are granted each year. At the moment a grazing licence typically generates £300 per year for the charity. It is not proportionate for the Charity Commission’s consent to be required each time a grazing licence is granted. If the specified conditions are met there is no reason that the situation cannot be adequately managed by the trustees of the charity”.

- 4.11 The Appellant submitted that the Commission’s conclusion that the 2012 scheme was expedient in the interests of the charity was fundamentally flawed because, on examination, it had found no positive case for departing from the absolute prohibition on trustee benefit under the 1977 scheme. The Appellant referred the Tribunal to the witness statement provided by a trustee which exhibited a list of rent achieved by the charity in respect of grazing licences for its three lots for each year between 2001 and 2012. The Tribunal was informed that this year no trustees had bid for grazing licences of charity land and yet each lot had been let. The value of the grazing licence for each lot had, however, reduced from that of 2011. The Appellant submitted that this was due to a number of different factors. In the absence of evidence the Tribunal is unable to form a view as to the reasons for the drop in rental value and Mr Kilby conceded on behalf of the Respondent that there is little to be read into the figures produced.
- 4.12 The Appellant submitted that, not only had no positive case been advanced for making the 2012 scheme, but that it had served to damage the reputation of the charity because it was thought locally it had been made to regularise past irregularities in the management of the charity. Finally the Appellant acknowledged that a complete update of the charity’s governing document was required, but the 2012 scheme was not the right place to start. He suggested that in fact the existence of the 2012 scheme was itself a barrier to the trustees working together to address the governance issues.

The Tribunal’s Conclusions

- 5.1 We have considered carefully the terms of the 2012 scheme and the reasons given for making it in those terms. We have also considered carefully the Appellant’s objections to it. We are conscious of the fact that this is an appeal by way of re-hearing so that we must decide the matter afresh rather than conducting a review of the Commission’s decision making processes. However, it does not seem to us that the case for the 2012 scheme made by the then trustee body in so far as it relates to increasing the revenue of the charity has ever had a sufficiently solid foundation. It may be that there is an evidential basis for the assertions made, but the Respondent did not elicit them in the course of its casework and such evidence has not been presented to us.

5.2 We note that in the recently sworn witness statement of one of the Appellant's fellow trustees, it is said that the scheme was applied for inter alia because there had been complaints about trustees having grazing licences and "to clarify the situation". This tends to support the Appellant's contention that the trustees were motivated at least in part to apply for the 2012 scheme to justify past breaches of trust rather than acting solely in the interests of the charity. The trustee also repeats in his witness statement the assertion that allowing trustees to bid would maximise the revenue available to the charity. As noted above, we have not found any evidential basis for this oft-repeated statement, especially in circumstances where only one trustee has ever bid for a grazing licence and the value of the other plots has apparently been unaffected. Mr Kilby on behalf of the Respondent asserted at the hearing of this matter that this statement is "inherently plausible" but did not put forward any evidence to support this view.

5.3 Our attention was drawn by the Respondent to the House of Lords' decision in *Bray v Ford* [1896] AC 44, and in particular to the classic statement by Lord Herschell that

"It is an inflexible rule of the court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases...Indeed it is obvious that it might sometimes be to the advantage of the beneficiaries..."

5.4 In applying these principles, we have considered whether a sufficient case has been made that it is expedient in the interests of the charity for the general prohibition against trustees benefitting from their charity to be departed from in this case. We conclude that it has not. We are sympathetic to the Respondent's desire to use its resources efficiently, however we conclude that it must consider first whether a positive case has been made for permitting a trustee benefit and only then proceed to consider how best to confer such benefit.

5.5 In all these circumstances we conclude that this appeal should be allowed.

5.6 We have considered which, if any, of the alternative powers in column 3 of the table in Schedule 6 to the Act we should exercise. Having considered the parties' submissions, we conclude that the Charity should now be returned to the position it was in under the 1977 scheme. This is because there is no basis on which we could amend the 2012 scheme in the light of our conclusions, and considerable work needs to be done with the trustee body in order to update its governing document in any event. We therefore decide to exercise the power

to quash the 2012 scheme in column three of the table in Schedule 6 and now make the order at Annexe A to this decision.

Dated: 19 October 2012

**Signed:
Alison McKenna
Principal Judge**

**Carole Park
Member**

**Stuart Reynolds
Member**

ANNEXE A: THE TRIBUNAL'S ORDER



**IN THE FIRST TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

CA/2012/0001

ROGER THOMAS

Appellant

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

ORDER

Upon the Tribunal issuing its Decision dated 19 October 2012

And pursuant to the power contained in s. 315(2) of the Charities Act 2011 and the table in schedule 6 to that Act in connection with an Order made under s. 69(1) of that Act

IT IS ORDERED THAT:

- 1. The Scheme dated 18 April 2012 in respect of Llanfair Waterdine Charities (503441) is hereby quashed.**

Dated: 19 October 2012

**Signed:
Alison McKenna
Principal Judge**

**Carole Park
Member**

**Stuart Reynolds
Member**