

**IN THE MATTER OF AN APPEAL TO THE CHARITY TRIBUNAL
AND IN THE MATTER OF THE KIDD LEGACY, BEING A PART OF
CENTRAL PARK, DARTFORD**

BETWEEN

DEREK MAIDMENT

LENNOX PATRICK RYAN

Appellants

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

TRIBUNAL'S RULING ON THE ISSUES FOR THE HEARING

1. Introduction

- 1.1 The Tribunal has seen correspondence between the parties debating the nature of the issues which the Tribunal can and cannot address in these appeals. The Appellants, Mr Ryan and Mr Maidment, are not legally represented. The Tribunal makes this ruling on the issues for the hearing with the intention of clarifying the scope of the hearing and assisting the parties to prepare effectively for it. The Tribunal has also issued directions to set out a preparation timetable for the hearing.
- 1.2 This ruling was previously disclosed to the parties in provisional form and submissions were made on its contents at the directions hearing on 11 August 2009. Having considered those submissions, the Tribunal now finalises its ruling.

2. The Appeals

- 2.1 Mr Maidment and Mr Ryan are residents of Dartford in Kent. Their appeals concern their objections to a Charity Commission Scheme sealed on the 24 October 2008 concerning the Kidd Legacy. This charity consists of a parcel of

land which forms, in geographical terms, an integral part of Central Park in Dartford. In legal terms, it is held on distinct charitable trusts.

- 2.2 The Respondent has confirmed that it takes no issue regarding the Appellants' standing to bring these appeals as local residents and the Tribunal now rules that they are persons who are or may be affected by the Respondent's Order (the scheme) and so are entitled to apply to the Tribunal for the scheme to be quashed.
- 2.3 The Respondent's original decision to make the Scheme was reviewed under the auspices of its internal review procedure. The decision was confirmed in a final decision dated 20 March 2009.

3 The Powers of the Tribunal

3.1 It may assist the Appellants in particular if the Tribunal sets out clearly the legal basis of its powers. Copies of the relevant legislation are available on the Tribunal's website www.charity.tribunals.gov.uk.

3.2 Section 2A of the Charities Act 1993 provides that

“(4) The Tribunal shall have jurisdiction to hear and determine -

(a) such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders or directions of the Commission.”

3.3 The schedule referred to (schedule 1C to the Charities Act 1993 as amended by the Charities Act 2006) sets out in a table format the following matters: in column 1, which particular decisions directions or orders may be appealed to the Charity 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 Tribunal understands that the scheme for the Kidd Legacy was made under the power contained in s.16 (1) (a) of the Charities Act 1993. The relevant entries in the table are therefore as follows:

1.	2.	3.
Order made by the Commission under section 16(1) of this Act....	The persons are – (a) in a section 16(1)(a) case, the charity trustees of the charity to which the order relates.....and (c) any other person who is or may be affected by the order.	Power to – (a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission, (b) substitute for all or part of the order any other order which could have been made by the Commission, (c) add to the order anything which could have been contained

		in an order made by the Commission.
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3.4 Schedule 1C paragraph 1 sub-paragraphs (4) and (5) set out the relevant approach and the powers of the Tribunal in determining such an appeal:

“(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”.

3.5 Schedule 1C paragraph 5 provides that:

“References in column 3 of the Table to the power to remit a matter to the Commission are to the power to remit the matter either -

(a) generally, or

(b) for determination in accordance with a finding made or direction given by the Tribunal”.

3.6 It follows that, when finally determining these appeals, the Tribunal’s task is to decide “*afresh*” whether to uphold the scheme in its original terms or to allow the appeals and take one or more of the actions described in column 3 of the table. In making its decision, the Tribunal may consider evidence which was not before the Respondent when it made its original decision to make the scheme. The appeals will be by way of a substantive re-hearing rather than a procedural review of the original decision.

3.7 Whilst it would be usual for the Appellants to open the hearing and to present their case first, it was agreed at the directions hearing that it would be easiest for the Appellants as litigants in person if the Respondent’s Counsel were to open the hearing and present the Respondent’s evidence first. The Tribunal is grateful to the parties for agreeing to this format on this occasion.

4. The Issues for the Hearing

4.1 In a joint letter dated 7 July, the Appellants suggested that the legal questions for the Tribunal were as follows:

- (i) Whether or not the Deed of Gift imposes a duty on successive Dartford Councils to maintain the recreation ground “in perpetuity”;
- (ii) Whether or not the avoidance or non performance of a restrictive covenant is a breach of contract or an act of bad faith or both;
- (iii) Whether or not the term “public benefit” includes the free use by a developer of adjoining charity land to form part of their commercial development;
- (iv) Whether or not there is a “legal mechanism” which prevents the buying back of the sold charity land by Dartford Borough Council.

4.2 In his response dated 17 July, the Respondent’s Senior Legal Adviser, David Boyd commented on each of these issues. In summary, his response was as follows:

- (i) The correct interpretation of the Deed of Gift is agreed to be a key question for the Tribunal. He understood it to be agreed that the land is subject to charitable trusts rather than to a restrictive covenant. He suggested that there are some sub-issues which should also be considered, namely whether a charity trustee has a duty to maintain charitable assets out of its own resources in the absence of charitable funds to do so, and secondly whether the use of the words “in perpetuity “ in the Deed of Gift meant that the trustee could never have disposed of the land in furtherance of the charity’s objects (in reliance on statutory powers and/or with the appropriate consent from the Court or the Charity Commission);
- (ii) The issue of “bad faith” raised by the Appellants could only be relevant to the question of whether the disposition to St James Investments was caught by s.37 (4) of the 1993 Act and therefore valid notwithstanding the absence of the relevant Charities Act procedures for the disposition of charity land. The Respondent, in reliance upon the legal advice obtained by the trustee, had taken the view that s. 37(4) had been satisfied so that the disposition was validly made. In the Respondent’s view, the Tribunal would not be able to rule otherwise without (a) inviting direct evidence from both parties to the transaction and (b) receiving strong evidence as to “bad faith”;
- (iii) That the third issue relates to a potential use of the remaining charity land in respect of which there has as yet been no decision by the Respondent and consequently there can be no consideration of this issue by the appellate Tribunal;
- (iv) This question might be better expressed as whether the Council as trustee had any power to compel the developer to re-convey the land to the charity. The Appellants were asked to identify any such power as the Respondent did not think any such power existed.

4.3 The Tribunal understood that Mr Maidment had suggested (in a telephone conversation with Mr Boyd) that the Tribunal should determine the relevant

issues for the hearing in the absence of agreement between the parties. This view was confirmed in subsequent correspondence from the Appellants which in fact crossed with the Tribunal's provisional ruling.

- 4.4 The Appellants presented the Tribunal with a further document at the 11 August directions hearing, which set out examples of the respects in which the Appellants argued that the scheme had altered the trusts on which the land was held. Some of the issues raised in that document appeared to the Tribunal to arise from the Appellants' (entirely understandable) lack of familiarity with the duties of a charity trustee, which exist as a matter of law but which are not made explicit in the terms of the scheme itself. Others had already been referred to in the Tribunal's provisional ruling. The Respondent accordingly agreed to write to the Appellants as soon as possible, to explain the legal position and duties of the charity trustee in addition to those referred to in the scheme and to refer the Appellants to the relevant statute and case law where necessary. If, following that correspondence, the Appellants wish the Tribunal to address any issues in addition to those identified in paragraph 4.5 below, they must ask for further directions from the Tribunal at the earliest opportunity.
- 4.5 The Tribunal's final ruling on the issues to be addressed at the final hearing is as follows:
- (i) The correct interpretation of the Deed of Gift (including the significance of the words "in perpetuity" and the duties of the trustee in respect of the maintenance of the charity land) is a relevant issue for the Tribunal. The Tribunal rules that it will hear evidence from both parties as to the correct interpretation of the Deed of Gift, but that this must be directed to the issue of whether (and if so to what extent) the scheme which was made altered the trusts on which the land is held;
 - (ii) The Tribunal rules that it has no power to set aside the disposition of the charity land to St. James Investments. The Tribunal must act within its statutory powers, as described above, and these do not include the power to set aside a land transaction. The Tribunal notes that there has apparently been considerable misunderstanding about the Tribunal's powers in this respect, as it has received a petition from local residents calling on it to set aside the land disposition. The Tribunal will publish this ruling on its website in an attempt to clarify this issue for local residents. Nevertheless, it seems to the Tribunal that the question of whether the terms of the scheme as made were appropriate may be relevant to Tribunal's power of remittal (if it quashes the scheme). The Tribunal therefore rules that the relevant question to be addressed by all parties in evidence is whether the Respondent acted reasonably in taking the view that the developer could rely upon s.37 (4) of the Charities Act 1993 (in reliance upon the trustee's legal advice) or whether the issue should have been further investigated by the Respondent so that the scheme should now be quashed and the matter remitted by the Tribunal to the Respondent for further consideration. To that extent, the Tribunal is prepared to hear the parties' evidence on the question of the applicability

of s. 37 (4) of the 1993 Act to the disposition of the land, but wishes to make it absolutely clear to the Appellants and other interested persons that the Tribunal may not itself either determine the legal effectiveness of s.37(4) in relation to this transaction, and that it has no power to set aside the land transaction. The Tribunal's view is that its consideration of the question of remittal would not of itself necessitate the involvement of third parties in these proceedings;

- (iii) The Tribunal's rules that it has no power to consider issues in respect of which there has been no decision by the Respondent and so it could not hear evidence in respect of any planned future use of the charity land. The extent to which the scheme permits any future use of the land which was not permitted by the Deed of Gift is a relevant issue for the Tribunal, referred to at (i) above;
- (iv) The Tribunal has seen reference in the correspondence to Appellants' view that the local authority might use its powers to compulsorily re-purchase the charity land which has been conveyed to St James Investments. The Tribunal's own view is that statutory powers which might be available to the local authority in that capacity would not also be available to it when acting as charity trustee. In any event, as stated above, the Tribunal takes the view that it has no power to order the re-conveyance of the land to the charity. In those circumstances the question of what power (if any) might be relied upon to enforce a re-conveyance is not a relevant issue for the Tribunal. The Tribunal's ruling is that this is not an issue in relation to which it can hear evidence.

4.6 In considering the full scope of its powers under column 3 in the schedule 1C table set out above, the Tribunal suggests that evidence might also be presented by both parties in respect of the following issues:

- (i) Whether the scheme made should itself have provided a mechanism for the management of any conflict of interest between the local authority and its role as charity trustee, for example an independent review of the terms of any maintenance contract for the charity land;
- (ii) Whether the Respondent gave proper consideration to the amenity value of the land disposed of in terms of the access to the park it provided for local people when authorising the exchange for land without this specific amenity value;
- (iii) Whether the scheme made should itself have provided a mechanism for the replacement of the local authority as trustee for all purposes of the land, so as to include local people as administrative trustees on a management committee;
- (iv) Whether the use in the scheme of Recreational Charities Act objects for the charity in fact represented a change of objects and, if so, whether the new objects narrowed or enlarged the use to which the charity land and funds could in future be put;

4.7 The Tribunal entirely understands that the Respondent wishes to discuss these issues with the charity trustee before presenting its views to the Tribunal in its skeleton argument, and also that it may wish to present the charity trustee's views to the Tribunal in evidence. The Tribunal's understanding is that if the current scheme is quashed by the Tribunal then the Respondent would be able to rely on the original application for a scheme and thus be empowered to make a new scheme with different terms on remittal. The Tribunal has invited the Respondent to make further submissions on this point in its skeleton argument if, on further reflection, it takes a different view as to its powers.

Alison McKenna
President of the Charity Tribunal

13 August 2009