



IN THE FIRST-TIER TRIBUNAL

Case No. CA/2009/0001 & 0002

**GENERAL REGULATORY CHAMBER
(CHARITY)**

Appellants: DEREK MAIDMENT AND LENNOX RYAN

**Respondent: THE CHARITY COMMISSION FOR ENGLAND
AND WALES**

Heard at: Pocock Street, London SE1

Date of hearing: 26 and 27 October 2009

Date of decision: 16 November 2009

Date of Further Decision and Final Order: 16 February 2010

Before

**Alison McKenna, Principal Judge
Vivien Rose, Tribunal Judge
Carole Park, Tribunal Member**

Attendances:

For the Appellant: Both Appellants appeared in person

For the Respondent: Matthew Smith of Counsel

DECISION OF THE FIRST-TIER TRIBUNAL

The appeals having been allowed in part, the Tribunal has considered the parties' representations as to the form of Order it should make and now issues its further decision on that issue and its final Order.

REASONS FOR DECISION

Introduction

1. On 16 November 2009 the Tribunal issued its decision notice¹ for the purposes of rule 38(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”), allowing the appeals in part (“the decision”).
2. In the decision, the Tribunal invited the parties to make representations as to the final Order the Tribunal should make. This was because the Tribunal recognised that it could give effect to the decision either by quashing the Scheme dated 24 October 2008 and remitting the matter to the Respondent to make a fresh Scheme or, alternatively, by using its power to substitute and/or add to the provisions in the Respondent’s Scheme. The latter course had the clear advantage of providing both finality and a speedier resolution of the issues in this case. The Tribunal notes that if the Respondent were required by the Tribunal to make a fresh Scheme, it would have to follow the statutory public consultation procedures and consider representations in respect of the fresh draft, effectively starting at the beginning of a process which has already taken over two years to complete. The Tribunal was keen to avoid this if possible.
3. It is important to note that in inviting the parties’ representations on the final form of its Order, the Tribunal was not inviting further evidence and argument about the issues in these appeals. The Tribunal is *functus officio*² and consequently it is now unable to adjudicate on any issue other than that of perfecting its final Order so as to give effect to the decision it has made. The Appellants raised a number of issues in correspondence after the decision, which the Tribunal has explained to them it may not now consider.
4. In paragraph 6.1 of the decision, the Tribunal set out the matters which needed to be addressed in an amended Scheme, stating:

“...the Scheme should now be altered in the following ways:

 - (i) *so that the Scheme is expressed to be administrative and therefore subject to the existing trusts;*
 - (ii) *so that clause 4 (the Objects clause) is deleted in its entirety with the effect that the original Objects are reinstated;*
 - (iii) *so that the Committee of DBC which administers the charity is required to be constituted so as to provide for a quorum of individuals who do not suffer from a conflict of interest in relation to DBC and its dealings with the charity”.*
5. In allowing time for further representations, the Tribunal also recognised that the Respondent would need to discuss the terms of any proposed amended

¹ [2009] UKFTT 377 (GRC). Available on www.charity.tribunals.gov.uk/decisions

² i.e. It has reached the limit of its legal powers, having heard the evidence and reached its decision.

Scheme with Dartford Borough Council (“DBC”), which is the sole corporate trustee of the charity. As DBC did not apply to become a party to the Tribunal proceedings, its views were not formally before the Tribunal, however the Tribunal recognised that the decision nevertheless affected DBC and wished to give the Respondent an opportunity to discuss the arrangements for the future administration of the charity with DBC. This it has now done.

The Further Representations

6. The Tribunal is grateful to the Appellants and the Respondent for their further detailed submissions. The Tribunal gave directions extending the time for providing further argument, being satisfied that there were good reasons for doing so. The Respondent produced a draft amended Scheme in December 2009, however this in turn gave rise to further questions from both the Tribunal and the Appellants as to whether it properly gave effect to the decision (see paragraph 12 below).
7. It became apparent during the exchange of submissions that issue (iii) in paragraph 6.1 of the decision (quoted at paragraph 4 above) was the most complex of the Tribunal’s findings to implement. At the hearing of these appeals, the Tribunal was informed by the Respondent that DBC had agreed to appoint “independent” persons (i.e. persons without a connection to DBC whether as members or officers) as members of its Deed, Trust and Obligations committee, which administers the charity. However, the precise constitutional arrangements for subsequent decision-making by the committee thus constituted were not the subject of argument before the Tribunal. The Tribunal’s decision on this point therefore merely reflected the Respondent’s published Operational Guidance OG 56 B2 at paragraph 2.4, as to the ability of the Committee to form a quorum of persons not subject to a conflict of interest. The Tribunal now understands that the Respondent’s Operational Guidance on this point is itself the subject of challenge and debate and that the Respondent is presently working on revised guidance in the light of the concerns and issues which have arisen both in this case and in others. The Tribunal notes that there are, in relation to local authorities acting as sole corporate trustees of charities, a number of complex issues of law and practice which need to be addressed by a range of interested parties, quite independently of the circumstances of this case. Some examples of the arguments raised in this case are set out at paragraphs 11 and 12 below, albeit that (for the reasons stated above) the Tribunal has not adjudicated upon them.
8. The Tribunal has now concluded that it should exercise its power to amend the Scheme so as to give effect to the decision. There is appended to this decision an Order and Scheme (which were disclosed to the parties only in draft, so that they could make any further representations on them) which together constitute the Tribunal’s final Order in this case.

The Amended Scheme

9. The Tribunal has attempted to follow the usual format and drafting style of a Scheme. In their respective submissions, the Appellants made some drafting

suggestions which would have resulted in the inclusion in the Scheme of some unconventional provisions, for example the inclusion of the relevant paragraphs of the Tribunal's decision, a statement of the duties of a charity trustee or the inclusion of a map of the charity land³. The Tribunal has not adopted these suggestions, in order to keep the Scheme as conventional in form and content as possible. However, the Tribunal wishes to reassure the Appellants that neither they nor the charity have been disadvantaged by the Tribunal's approach in this regard. The requirements and duties of charity trustees apply to DBC in any event, as a matter of law and the Tribunal's decision is a matter of public record.

10. The amended Scheme gives effect to issues (i) and (ii) in paragraph 6.1 of the decision at paragraphs 2 and 4 of the Scheme respectively. As regards issue (iii), the Scheme provides at paragraph 7 that the Committee must be re-constituted so that it can form a quorum of members unaffected by conflicts of interest with DBC. The amended Scheme also includes a requirement at paragraph 8 for DBC to adopt a Code of Conduct for its Committee members, which must be approved by the Respondent in advance of its adoption by DBC. Members of the Committee are required to agree to abide by the Code of Conduct. The Tribunal has also provided at paragraph 11(3) that once approved, the Code of Conduct may not be amended by DBC without the prior consent of the Respondent. The precise terms of the Code of Conduct will need to be given further careful consideration by DBC and the Respondent. As stated in the decision, the Tribunal takes the view that unless and until these arrangements are in place, the Committee will have to seek the Respondent's authorisation for any decisions affected by a conflict of interest as between DBC and the charity.
11. A particular difficulty arose in the finalisation of this aspect of the Scheme in view of the fact that DBC's external solicitors initially argued that if a quorum of independent members of the Committee were to make a decision in the administration of the charity then those individuals would become *de facto* charity trustees, effectively displacing the sole corporate trustee and assuming its potential liabilities. In January 2010, DBC obtained an opinion from Josh Lewison of Counsel (which was, helpfully, disclosed to the Tribunal) in which he advised that Local Authorities could, in some circumstances, properly delegate decision-making power to non-councillors. Counsel advised that in order to permit such an arrangement, DBC's Deed, Trust and Obligations Committee would have to be re-constituted under the executive arrangements permitted by Part II of the Local Government Act 2000⁴ as a "Committee of the Executive" rather than (as presently constituted) a Committee of the Authority under the Local Government Act 1972. The Tribunal understands

³ The Tribunal understands that a map of the charity land will be available following land registration.

⁴ The Appellants have argued that s.81 of the 2000 Act would permit the local authority to grant a dispensation from the Code of Conduct, thus circumventing the conflict of interest provisions of the Scheme. The Tribunal takes the view that this concern is misplaced because the exemption powers in s.81 relate only to the mandatory provisions of the Model Code and not therefore to the bespoke Code of Conduct entrenched within the Scheme.

that DBC has accepted this advice and will shortly re-constitute the Committee and recruit independent members to it⁵.

12. Counsel's Opinion also considered the proposal previously put forward by DBC (and originally endorsed by the Respondent) that a Code of Conduct complying with the Local Authorities (Model Code of Conduct) Order 2007⁶ would provide a sufficient mechanism for the management of the conflicts of interest which concerned the Tribunal. When this proposal was put to the Tribunal in the course of the further submissions, the Tribunal asked for clarification because it was concerned that the definition of "a prejudicial interest" in the Model Order was insufficiently wide to cover situations where a conflict of interest arose not from a private or familial interest but rather as a result of a member's role in administering a charity of which DBC was trustee. The Appellants also raised similar concerns about the ambit of a Code based solely on the Model Order. Counsel's advice was that the effect of the Model Code was to disqualify members of the Deed, Trust and Obligations Committee from voting on the corporate business of the local authority in which the charity's interests might conflict with the local authority's, but, crucially, not the other way around. Counsel concluded that the Model Code did not envisage circumstances where a councillor would have to withdraw from a trustee committee meeting. Counsel referred in his Opinion to the recently-published Standards for England guidance, *Charitable Trustees and Declarations of Interest Under the Code*⁷. Having considered Counsel's advice and the published guidance, the Respondent then submitted to the Tribunal that a bespoke Code of Conduct which provides for the management of conflicts of interest in both directions would be required to give effect to the Tribunal's decision because of the apparent absence of any existing provision which addresses precisely these issues. The Tribunal has now reached the same conclusion.
13. Having considered the issues very carefully, the Tribunal is satisfied that it should now proceed to amend the Scheme. The Tribunal's amended Scheme (appended to this decision) now provides an appropriate framework within which a bespoke Code of Conduct can be developed, regulating the identification and management of the conflicts of interest which may arise as between DBC and the charity. There is further work to be undertaken on the detailed provisions of the Code of Conduct required by the amended Scheme, however it is both necessary and appropriate for this detailed work to be taken forward by the Respondent, rather than the Tribunal. The Tribunal observes that the Respondent's original Scheme contained no express provisions for the management of conflicts of interest, and considers that the Appellants have brought about an important enhancement of the governance arrangements for

⁵ The Appellants have indicated that they are not content with DBC's proposed method of recruitment of the independent members of the Committee. This is not, however, a matter that the Tribunal can determine. The Tribunal notes that DBC is required to act in the best interests of the charity in making such appointments.

⁶ Available at http://www.opsi.gov.uk/si/si2007/uksi_20071159_en_1

⁷ Available at <http://www.standardsforengland.gov.uk/Guidance/TheCodeofConduct/Guidance/Topicguides/CharitableTrusteesanddeclarationsofinterestu/>

this charity through the partial success of their appeals. The Tribunal hopes that the Code of Conduct which is developed under the auspices of the Tribunal's amended Scheme might ultimately serve as a model of good practice for local authorities acting as charity trustees. The Tribunal also hopes, however, that the resolution of the specific issues in this particular case will not be not unduly delayed by the need to address the wider policy context within which they arise.

Outstanding Issues

14. The Tribunal notes that the charity has now been registered in the Central Register of Charities under number 1134257⁸. The Tribunal notes that the details of its governing document will need to be amended on the Central Register following the coming into force of the Tribunal's Scheme appended hereto. The Tribunal understands that DBC has given the Respondent an undertaking to register the replacement land at Land Registry.
15. The Respondent has asked the Tribunal to make some minor corrections to its earlier decision in reliance upon rule 40 of the Rules. The Tribunal has included these in its final Order, appended to this decision. The Respondent also asked the Tribunal to clarify some points of its earlier decision in view of a possible misunderstanding of them by DBC; however, the Tribunal observes that it has no power to amplify or clarify an earlier decision.

Appeal to the Upper Tribunal

16. In paragraph 6.6 of the decision, the Tribunal extended the time limit for applying for permission to appeal so that the relevant written decision for the purposes of any such application would be the Tribunal's further decision following receipt of the written representations. As the Tribunal has now made this further decision, it follows that the parties now have 28 days to apply to the Tribunal for permission to appeal to the Upper Tribunal against the decision of 16 November and against this further decision. If they wish to do so, they must cite an alleged error of law made by the Tribunal, pursuant to rule 42(5) of the Rules. The Tribunal notes that if it receives an application for permission to appeal, it must first consider whether to review its own decision, in accordance with rule 43 and rule 44 of the Rules.

Order

17. The Tribunal now makes the Order appended to this decision, which gives immediate effect to the Scheme appended hereto. There is no requirement for the Respondent to seal the Tribunal's Scheme.

⁸ www.charity-commission.gov.uk/ShowCharity/RegisterOfCharities/CharityFramework.aspx?RegisteredCharityNumber=1134257

Signed:

Dated: 16 February 2010

Alison McKenna
Principal Judge

Vivien Rose
Tribunal Judge

Carole Park
Tribunal Member



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**GENERAL REGULATORY CHAMBER
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Appellants: DEREK MAIDMENT AND LENNOX RYAN

**Respondent: THE CHARITY COMMISSION FOR ENGLAND
AND WALES**

ORDER

Upon the Tribunal having issued its decision on these appeals on 16 November 2009

And Upon the Tribunal having considered representations from the parties as to the appropriate form for its final Order

The Tribunal now Orders:

- 1. That the Respondent's Scheme of 24 October 2008 shall be amended as directed by the Tribunal in the attached document;**
- 2. That the amended Scheme shall take effect as of the date of this Order;**
- 3. That the Tribunal's decision of 16 November shall be amended as follows, pursuant to rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, and that an amended version of that decision shall be published on its website:**
 - (i) In paragraph 3.3 of the decision, the reference should be to s.3B(1) of the Charities Act 1993;**
 - (ii) In paragraph 3.4 the effective date of the completion of the sale to the developer should be 15 April 2004;**
 - (iii) In paragraph 5.27 the reference should be to Mr Ryan not to Mr Lennox.**

Signed:

Dated: 16 February 2010

**Alison McKenna
Principal Judge**

**Vivien Rose
Tribunal Judge**

**Carole Park
Tribunal Member**



THE First-Tier Tribunal (Charity)

Under the power given in the Charities Act 1993 (as amended)
Orders that from today, the **16 February 2010**

This **SCHEME** will govern the charity known as
THE KIDD LEGACY (BEING A PART OF CENTRAL PARK, DARTFORD)
(1134257) at Dartford, Kent

1. Definitions

In this scheme:

“the charity” means the charity identified at the beginning of this scheme.

“the trustee” means the trustee of the charity acting under this scheme.

“the original trusts” means the Indenture dated 28 September 1903 made between Charles Newman Kidd of the first part and the Urban District Council of Dartford of the second part.

ADMINISTRATION

2. Administration

The charity is to be administered in accordance with the original trusts as amended by this scheme.

3. Name of the charity

The name of the charity is The Kidd Legacy (being a part of Central Park, Dartford).

CHARITY LAND

4. Object of the Charity

(1) The object of the charity is as set out in the original trusts, namely the appropriation and use of the land in perpetuity as a Public Recreation Ground and for no other purpose whatsoever.

(2) The land identified in parts 2 and 3 of the schedule to this scheme is designated land and must be retained by the trustee for use for the object of the charity.

POWERS OF THE TRUSTEE

5. Powers of the trustee

In addition to any other powers which it has, the trustee may exercise the following

powers in furtherance of the object of the charity:

- (1) Power to provide and maintain equipment to be used in furtherance of the charity's object.
- (2) Power to appoint staff and pay them reasonable remuneration, including pension provision for them and their dependants.
- (3) Power to insure against public liability and, if appropriate, employers' liability; and to insure any buildings of the charity to their full value against fire and all other usual risks (except to the extent that the buildings are insured against any of these risks by a tenant).
- (4) Power to raise funds. (In exercising this power, the trustee must not undertake any substantial permanent trading activity and must comply with any relevant statutory regulations.)
- (5) Power to co-operate with other charities, voluntary bodies and statutory authorities and to exchange advice and information with them.
- (6) Power to make rules and regulations consistent with this scheme for the management of the charity.
- (7) Power to borrow money and to charge the whole or any part of the property belonging to the charity as security for repayment of the money borrowed. The trustee must comply as appropriate with sections 38 and 39 of the Charities Act 1993 if they wish to mortgage land owned by the charity.
- (8) Power to purchase, lease, exchange, hire or otherwise acquire any property and any rights and privileges and construct, maintain and alter any buildings or exchange for the promotion of the object.
- (9) Power to close the land identified in parts 2 and 3 of the schedule to this scheme to the public for up to 20 days per year to enable it to be used for up to four days at a time by any public charity or institution or for any agricultural or horticultural or any other public purpose.
- (10) Power to deposit or invest funds in any manner (but to invest only after obtaining advice from a financial expert and having regard to the suitability of the investment, the need for regular review and the need for diversification).
- (11) The trustees may appoint as the investment manager for the charity a person who they are satisfied after inquiry is a proper and competent person to act in that capacity and who is either:
 - a) an individual of repute with at least fifteen years' experience of investment management who is an authorised person within the meaning of the Financial Services Act 1986; or
 - b) a company or firm of repute which is an authorised or exempted person within the meaning of that Act otherwise than by virtue of s45(1)(j) of that Act.
- (12) The trustees may delegate to an investment manager power at his or her discretion to buy and sell investments for the charity on behalf of the trustees in accordance with the investment policy laid down by the trustees. The trustees may only do so on terms consistent with this clause. Where the trustees make any delegation under this clause they must:
 - a) inform the investment manager in writing of the extent of the charity's investment powers;
 - b) lay down a detailed investment policy for the charity and immediately inform the investment manager in writing of it and of any changes to it;
 - c) ensure that the terms of the delegated authority are clearly set out in

- writing and notified to the investment manager;
- d) ensure that they are kept informed of, and review on a regular basis, the performance of their investment portfolio managed by the investment manager and the exercise by him or her of the delegated authority;
 - e) take all reasonable care to ensure that the investment manager complies with the terms of the delegated authority;
 - f) review the appointment at such intervals not exceeding 24 months as they think fit; and
 - g) pay such reasonable and proper remuneration to the investment manager and agree such proper terms as to notice and other matters as the trustees decide and as are consistent with this clause. (Such remuneration may include commission fees and/or expenses earned by the investment manager to the extent that they are disclosed to the trustees.)
 - h) Where the trustees make any delegation under this clause they must do so on the terms that:
 - (i) the investment manager must comply with the terms of his or her delegated authority;
 - (ii) the investment manager must not do anything which the trustees do not have the power to do;
 - (iii) the trustees may with reasonable notice revoke the delegation or vary any of its terms in a way which is consistent with the terms of this clause; and
 - (iv) the trustees must give directions to the investment manager as to the manner in which he or she is to report to them all sales and purchases of investments made on their behalf.

TRUSTEE

6. Trustee

Dartford Borough Council is the trustee of the charity.

7. Delegation

(1) The trustee may delegate any of its powers or functions in accordance with Part II of the Local Government Act 2000 to a committee of the executive comprising elected councillors and independent co-optees (being co-optees who do not suffer from a conflict of interest in relation to the trustee and the trustee's dealings with the charity).

(2) There shall be sufficient independent co-optees to form a quorum for the duration of a meeting of any committee where the elected councillors have or may have a conflict of interest as defined by the Code of Conduct to be adopted under paragraph 8 of this scheme.

8. Conflicts of interest

(1) Any conflict between the interests of the charity and the interests of the trustee and/or the interests of the individual members (elected councillors and independent co-optees) of any committee of the executive shall be managed in

accordance with a Code of Conduct to be adopted by the trustee under this paragraph.

(2) The Code of Conduct referred to above shall be approved by the Charity Commission for England and Wales in advance of its adoption by the trustee. It shall take account of any guidance issued by the Charity Commission for England and Wales and by Standards for England and must also take account of the need to manage the specific conflicts of interests identified at paragraphs 5.30 and 5.31 of the Tribunal's decision of 16 November 2009.

(3) Members of the committee of the executive referred to in paragraph 7 must, before taking up office, sign a declaration confirming that they have read, understood and promise to comply with the Code of Conduct.

CHARITY PROPERTY

9. Replacement property

(1) The property described in part 2 of the schedule was part of the corporate property of Dartford Borough Council. It must now be held by the charity to replace the property described in part 1 of the schedule.

(2) The trustee must hold the sum of £270,000 received from Dartford Borough Council acting in its capacity as local authority as investment permanent endowment of the charity.

10. Use of income and capital

(1) The trustee must firstly apply:

(a) the charity's income; and

(b) if the trustee thinks fit, expendable endowment; and

(c) when the expenditure can properly be charged to it, its permanent endowment in meeting the proper costs of administering the charity and of managing its assets including the repair and insurance of its property.

(2) After payment of these costs, the trustee must apply the remaining income in furthering the object of the charity.

(3) The trustee may also apply for the object of the charity:

(a) expendable endowment; and

(b) permanent endowment, on such terms as authorised by the Commission or by compliance with any statutory or other relevant procedure to do so.

POWER OF AMENDMENT

11. Power of amendment

(1) The trustee (subject to the provisions of this clause) may from time to time amend the trusts if it is satisfied that it is expedient in the interests of the charity to do so.

(2) The trustee must not make any amendment which would have the effect directly or indirectly of:

(a) altering or extending the objects of the charity;

(b) authorising the trustee to do anything which is expressly prohibited by the trusts of the charity;

- (c) causing the charity to cease to be a charity at law;
 - (d) altering or extending the power of amendment that is conferred by this clause.
- (3) The trustee must obtain the prior written approval of the Commission before making any amendment which would have the effect directly or indirectly of:
- (a) enabling it to spend permanent endowment or capitalise income of the charity;
 - (b) conferring a benefit of any kind on the trustee (or on members of its governing body) or on its successors;
 - (c) restricting the existing right of any person (other than the trustee) to appoint or remove the trustee, or to intervene in the administration of the charity, without the consent of that person;
 - (d) varying the name of the charity.
 - (e) varying the provisions of any Code of Conduct which has been adopted under paragraph 8 of this Scheme.
- 4) The trustee must:
- (a) prepare a written memorandum of each amendment that it makes;
 - (b) send to the Commission a certified copy of the memorandum within three months of the date of making the amendment; and
 - (c) retain the memorandum as part of the governing document.

GENERAL PROVISIONS

12. Questions relating to the Scheme

The Commission may decide any question put to it concerning:

- (1) the interpretation of this scheme; or
- (2) the propriety or validity of anything done or intended to be done under it.

SCHEDULE

PART 1

Land at Central Park, Dartford, Kent containing 0.089 hectares or thereabouts, and having a frontage on the west to Lowfield Street comprising a narrow vehicular access from Lowfield Street having a maximum width of 4.15 metres and depth of 51 metres to a rectangular plot approximately 32 metres by 22 metres and forming part of the land described in an indenture of 28 September 1903 made between Charles Newman Kidd of the first part and the Urban District Council of Dartford of the second part.

PART 2

Land at Central Park, Dartford, Kent containing 0.089 hectares or thereabouts to the East of the land described in part 3 of the schedule to this scheme and being of an irregular shape comprising of a grassed area with a footpath.

An easement over land belonging to Dartford Borough Council for the purpose of pedestrian and vehicular access from the land identified in part 3 of this schedule to Cranford Road.

PART 3

Land at Central Park, Dartford, Kent described in an indenture of 28 September 1903 made between Charles Newman Kidd of the first part and the Urban District Council of Dartford of the second part less that land described in part 1 of this schedule.

Signed:

Dated: 16 February 2010

Alison McKenna
Principal Judge

Vivien Rose
Tribunal Judge

Carole Park
Tribunal Member