



**IN THE FIRST-TIER TRIBUNAL
(CHARITY)**

Case No. CA/2009/0001 & 0002

GENERAL REGULATORY CHAMBER

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

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

The appeals are allowed in part, and the Tribunal now invites the parties' representations as to the Order it should make, as set out at section 6 of the reasons.

REASONS FOR THE TRIBUNAL'S DECISION

1. Introduction

- 1.1 The Appellants are residents of Dartford in Kent. These appeals concern their objections to a Charity Commission Scheme, sealed on the 24 October 2008, relating to an unregistered charity known as "The Kidd Legacy, being part of Central Park, Dartford". This charity consists of a parcel of land which forms, in geographical terms, an integral part of the municipal park known as Central Park in Dartford. In legal terms, the "legacy land" (as it is subsequently referred to in this document) is held on distinct charitable trusts, its trustee for all purposes being Dartford Borough Council ("DBC").
- 1.2 The Tribunal made an earlier ruling in this case, dated 13 August 2009, which is available on www.charity.tribunals.gov.uk. In that ruling, the Tribunal determined which issues could be addressed at the final hearing. That ruling was aimed principally at assisting the Appellants (as litigants in person) to address only those issues within the Tribunal's powers and so to ensure that the final hearing was appropriately focussed. The ruling also confirmed that the Appellants fell into a category of persons who "*are or may be affected by the Respondent's Order*" (the Scheme) and so were entitled to apply to the Tribunal for it to be quashed (see paragraph 2.2 below). The Tribunal also ruled that the Appellants' appeals, whilst remaining separate, should be heard together. It is appropriate to record here that the members of the Tribunal panel each visited Dartford to look at the legacy land and the Central Park area for themselves, prior to the hearing.
- 1.3 The final hearing of these appeals took place on 26 and 27 October 2009. Whilst it would have been usual for the Appellants to have opened the hearing and thus to have presented their cases first, it was agreed at the directions hearing that it would be easiest for the Appellants (being litigants in person) if the Respondent's Counsel opened the hearing and presented the Respondent's evidence first, giving the Appellants the opportunity to marshal their arguments in reply. The Tribunal was grateful to the parties for agreeing to this format on this occasion and observes that the Appellants' arguments were, in the event, both germane and well-presented, despite the rather technical subject-matter of this case. The Tribunal also wishes to thank Mrs Maidment for her valuable assistance in managing the Appellants' documentation during the hearing.

2. The Powers of the Tribunal

- 2.1 Section 2A of the Charities Act 1993, as amended by the Charities Act 2006 ("the Act") 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.”

2.2 The schedule referred to in that section 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 Respondent’s Scheme in this case was made under the power contained in s.16 (1) (a) of the Act. 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.

2.3 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”.*

2.4 Schedule 1C paragraph 5 further 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”.*

2.5 In its earlier ruling, the Tribunal expressed the view that, if the current Scheme were quashed by the Tribunal, the Respondent would be able to rely on the trustee’s original application for a Scheme and thus be empowered to make a new Scheme for the charity (in different terms) on remittal. The Respondent has subsequently confirmed that it agrees with the Tribunal’s view on this point, with reference to the decision in *Re Poor’s Lands Charity, Bethnal Green* [1891] 3 Ch 400. Given that the Tribunal has power to quash the Scheme “*in whole or in part*”, (see paragraph 2.2 above), it interprets this authority to mean that the extant Scheme application could be relied upon by the Respondent to found jurisdiction to make either an entirely new Scheme, or only part of one (an amending Scheme) on remittal.

2.6 It follows that, when finally determining these appeals, the Tribunal’s task was 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 was able to consider evidence which was not before the Respondent when it made its original decision to make the Scheme. The appeals were heard by way of a substantive re-hearing, rather than a procedural review of the original decision.

2.7 Column 2 of the table in Schedule 1C gives DBC, as the trustee of the charity, the right to be joined as an Appellant in these proceedings. The Tribunal notes that DBC was aware of these proceedings¹, but did not apply to be joined as a party. Prior to the final hearing, the Tribunal refused an application by DBC for disclosure of the papers in the case, because there is no power under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”) to order disclosure of papers to a non-party. It would have been open to the parties to agree to disclose the papers, however the Appellants refused to do so in this case.

¹ Its solicitors, Bond Pearce, corresponded with the Tribunal.

2.8 The Tribunal observes that it was open to DBC to (i) apply to be joined as a party; (ii) apply for permission to intervene in the proceedings as a non-party; or (iii) represent its views to the Tribunal through witness evidence presented by the Respondent. Although DBC chose not to exercise any of these options, its Solicitor was in fact present throughout the Tribunal hearing and was of assistance to the Tribunal in providing information to the Respondent's counsel in a number of respects. The Tribunal was grateful for her constructive and helpful approach. DBC had previously expressed, through its external solicitors, some concern that it had not been notified by the Tribunal that these appeals had been made. The Tribunal notes that it has no obligation to seek out and notify potential parties (although it can, in appropriate circumstances, order the addition of parties under rule 9 of the Rules). The Tribunal observes that, once it has published on its website that an appeal has been made, that information is clearly in the public domain. In this case, these proceedings were also reported in local newspapers in Dartford and in the charity sector press. Although the Tribunal would not expect to seek out potential parties, it would have no objection to the Respondent notifying any potential parties that an appeal had been made. The Tribunal would clearly have in mind the rights of non-parties if it proposed to take any action which affected them directly, and considers DBC's position further at section 6 below.

3. Background to the Scheme

3.1 The charity with which the Tribunal was concerned in this case was created by a Deed of Gift dated 28 September 1903, between Charles Newman Kidd ("the settlor") and the Urban District Council of Dartford ("the Council") – whose functions have, through various re-organisations of local government, come to be exercised by the present Dartford Borough Council. The settlor granted to the Council "*freely and voluntarily and without any valuable consideration*" a parcel of land² "*to be appropriated and used in perpetuity as a Public Recreation Ground and for no other purpose whatsoever*". The Deed also provided that the Council might close the legacy land to the public for no more than twenty days in any year and no more than four consecutive days on any one occasion, to allow a charity or institution to use it for various purposes (including agricultural or horticultural shows) with or without payment to the Council. There was no accompanying endowment for the maintenance of the land, which appears always to have been undertaken by the Council from its own resources. This issue is considered further at paragraph 5.26 below.

3.2 On 15 December 1903, the Deed was ordered to be enrolled in the books of the Charity Commissioners under the provisions of s.6 of the Mortmain and Charitable Uses Act 1888³. The fact that there had been an enrolment was clear from the copy of the original indenture which

² Said in the Deed to measure "*four acres, two roods and thirteen perches little more or less*".

³ The Respondent produced the Order from its own archives for inclusion in the Tribunal hearing bundle.

the Appellants produced for the Tribunal (having obtained this from the National Archives at Kew) which shows, in the left hand margin of the front page, the relevant statement confirming that there had been an enrolment of the Deed in the books of the Charity Commissioners.

- 3.3 The Tribunal notes here that, despite some apparent confusion in the present century as to the status of the legacy land, it was clearly acknowledged to be subject to charitable trusts at the time of its enrolment, notwithstanding the absence in the Deed itself of any express reference to the creation of a charity. The Tribunal notes that, as a matter of law, the dedication of land to public recreational use “*in perpetuity*” could only ever have been valid if a charitable trust was thereby created. The Tribunal heard that the legacy land has never been entered into the Register of Charities, but that it will be registered by the Respondent once the outcome of these appeals is known. The Tribunal notes that DBC is under a legal obligation to apply for charity registration of the legacy land, by virtue of s.3B(1) of the Charities Act 1993.
- 3.4 On 3 October 2003, DBC contracted to sell a piece of the original legacy land to a company called St James’ Investments Ltd (“SJIL”), as part of a larger scheme for the redevelopment of the centre of Dartford, including the construction of a large Tesco supermarket and housing. The sale was completed on 15 April 2004. The Tribunal heard that, prior to completion of the land transaction, DBC had obtained legal advice from its then solicitors (Messrs Hewitsons), and that SJIL had obtained legal advice from its own solicitors (Messrs Berwin Leighton Paisner), as to the status of the legacy land. The Tribunal has not seen the advice given, but was told by the Respondent that both firms’ advice was now acknowledged to have been wrong in concluding that the legacy land was subject to restrictive covenants but not to charitable trusts. This issue is considered further at paragraph 5.10 to 5.17 below.
- 3.5 The Tribunal heard that on 3 March 2004 (i.e. before completion of the land sale) a local resident, Mr John French, addressed a public meeting in Dartford and informed representatives of DBC (officers and members) of the precise terms of the Deed, which he had found referred to in a book about the history of Dartford. Witness statements filed on behalf of the Appellants by Mr Hogan and Mrs Maidment confirmed that Mr Maidment had also addressed the meeting in similar terms, and that his reference to the terms of the Deed had been greeted by loud applause. The Tribunal saw a copy of the Kentish Times dated 11 March 2004, which reported the public meeting (including what had been said about the terms of the Deed) although there appear to have been no formal minutes taken.
- 3.6 On 23 June 2004, Mr Maidment (having undertaken further research into the provenance of the legacy land) contacted the Respondent. The Tribunal saw the Respondent’s records demonstrating that it

opened a case but apparently decided to take no action in relation to Mr Maidment's complaint and closed the case in January 2005. On 27 January 2005, an undaunted Mr Maidment wrote to the Respondent again, following which a second case was opened and the Respondent asserted its jurisdiction over the legacy land, making enquiries of DBC about the earlier land disposal.

- 3.7 DBC then instructed counsel to advise it on the status of the legacy land. Francesca Quint of Counsel produced two opinions, dated 1 and 30 March 2005 which were, helpfully, produced to the Tribunal. She advised DBC that the legacy land was subject to charitable trusts and also advised on the issues of the breach of trust by DBC in selling part of the legacy land, and whether the failure by DBC and SJIL to have observed the statutory formalities for the disposal of charity land had implications for the validity of the earlier land transaction⁴. These issues are considered further at paragraph 5.17 below.
- 3.8 The Tribunal notes that the remaining legacy land (i.e. the charitable land that had not been sold to SJIL) was registered at the Land Registry under its own title number in 2007. Under the terms of the Respondent's Scheme, the charity acquired replacement land (within Central Park, Dartford) to replace the land which had been sold in breach of trust. The Tribunal heard that no action has yet been taken to register that land with the Land Registry, pending the outcome of these appeals. This matter is considered further at section 6 below.
- 3.9 The Tribunal heard that SJIL obtained its own Counsel's advice, also confirming that the land was indeed subject to charitable trusts. Once the charitable status of the legacy land had been acknowledged, the Respondent invited DBC to apply for a Scheme for the charity. The draft Scheme it proposed to make (i) ratified the earlier sale of part of the legacy land; (ii) provided financial compensation to the charity for the land it had lost; (iii) permitted part of the capital sum thereby raised to be spent on acquiring replacement land for the charity; (iv) provided for the investment of the remaining proceeds of sale and the expenditure of the income arising from that investment; (v) provided the charity with a modern machinery of governance; and (vi) re-stated the charity's Objects, with reference to section 1 of the Recreational Charities Act 1958. The Respondent's reasons for making the Scheme are considered further at paragraph 3.11 below.
- 3.10 The Respondent advertised its proposed Scheme in January 2008 and received a number of objections, including from the Appellants. The Respondent considered these, but then indicated to the Appellants its rejection of their submissions and its intention to seal the draft Scheme in April 2008. Mr Maidment then requested an "internal decision review" by the Respondent. This was carried out by Mr Neil

⁴ These formalities are imposed by sections 36 and 37 of the Act. See http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1993/cukpga_19930010_en_7#pt5

Robertson, the Head of the Respondent's Specialist Casework Division, but in October 2008 he decided to seal the Scheme. The Scheme was formally sealed on 24 October 2008 (although the Respondent in fact made a subsequent clerical amendment to the Scheme on 11 December 2008⁵). Mr Ryan then asked for an "internal decision review" in January 2009, which was conducted on 20 March 2009 by Mr David Locke, the Executive Director of the Respondent's Charity Services Directorate. The Tribunal notes that Mr Locke's written decision concluded that the Scheme "*should be sealed*" (which the Tribunal understands to have been a decision not to discharge the Scheme, which had of course been sealed some six months earlier). The Appellants then applied to the Tribunal in April and May 2009 respectively.

- 3.11 The Respondent told the Tribunal that it considered the terms of the Scheme to be in the best interests of the charity because (i) the sale of the land appeared to be irreversible; (ii) the Respondent wished to facilitate the purchase of suitable replacement land out of the sale proceeds; and (iii) the purchase of the replacement land, and the establishment of an endowment to provide income for the charity, were in the best interests of the charity.

4. The Issues for the Hearing

- 4.1 As mentioned above, the Tribunal had previously ruled on the issues to be addressed at the final hearing. Those issues are contained in paragraphs 4.5 and 4.6 of that ruling and repeated, where relevant, below.

5. The Tribunal's Decision

- 5.1 In the light of the arguments presented at the hearing, the Tribunal finds it convenient to group the issues slightly differently here, for the purposes of explaining its decision. With the exception of the issues set out at paragraphs 4.5 (iii) and (iv) of the earlier ruling (in respect of which the Tribunal ruled it has no jurisdiction) the issues falling to be determined are now grouped as issues (a) to (d), as follows:
- (a) Issues about the construction of the original and proposed objects of the charity;
 - (b) The issue of good faith for the purposes of section 37(4) of the Act;
 - (c) Issues concerning the amenity value of the land;
 - (d) Issues concerning the governance of the charity.

⁵ This amendment related to a mis-description of the location of the land in the Scheme, and has no bearing on the appeals.

5.2 Issue (a): the construction of the original and proposed objects of the charity

*The correct interpretation of the Deed of Gift.*⁶

*The extent to which the scheme permits any future use of the land which was not permitted by the Deed of Gift.*⁷

*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*⁸.

5.3 Both Mr Robertson's and Mr Locke's written decision reviews made clear that the Respondent had decided to make the Scheme on the assumption that a *cy-près*⁹ occasion, falling within section 13 of the Act, had arisen. Mr Robertson's decision referred to the legacy land as "*designated*" or "*specie*" land¹⁰, and he had clearly taken the view that the retention of the original legacy land had been integral to the purposes of the charity. If this view were correct, it meant that the legacy land had not, as a matter of law, been capable of disposal by DBC, unless the Respondent itself was empowered to authorise that disposal in one of the circumstances set out in section 13 of the Act. The Respondent's intention in making the Scheme had therefore originally been to provide such authorisation retrospectively.

5.4 In presenting its case to the Tribunal, the Respondent no longer argued that a *cy-près* occasion had arisen, and asserted that the Scheme it had made was therefore purely administrative in effect. The Respondent's case was that the preservation of the original legacy land had never in fact been integral to the purposes of the charity and that the words "*in perpetuity*" referred to the perpetual furtherance of the charitable purposes (for which the land was held), rather than the perpetual retention of the land itself. The Respondent argued that DBC, as trustee, had therefore always had the power to dispose of the original land, provided it intended to continue the furtherance of the charity's purposes on (suitable) different land. The Respondent took the view that DBC could have relied upon the decision of the Court of Appeal in *Oldham Borough Council v Attorney General* [1993] Ch 210 as authority for the power to dispose of part of the land, without the Respondent's Scheme having been required. The Respondent

⁶ This issue was set out at paragraph 4.5(i) of the earlier ruling.

⁷ This issue was set out at paragraph 4.5(iii) of the earlier ruling.

⁸ This issue was set out at paragraph 4.6 (iv) of the earlier ruling.

⁹ *Cy-près* is a Norman French word meaning "near this". Application of the *cy-près* doctrine enables the Charity Commission and the Courts to prescribe new purposes for a charity whose existing trusts have "failed" (this definition is taken from the Respondent's published operational guidance).

¹⁰ Designated land is land required to be used for a particular charitable purpose.. It is also sometimes referred to as *Specie* land, (This definition is taken from the Respondent's published operational guidance).

produced for the benefit of the Appellants and the Tribunal an extract from Professor Luxton's textbook on the Law of Charities, dealing concisely with the relevant legal principles. As the Tribunal had to consider the issues "*afresh*" in determining these appeals, it did not particularly matter that the Respondent had changed its analysis of the legal basis for the Scheme by the time of the hearing. It was perhaps surprising that the Respondent changed its view after having given this case such extensive internal consideration under its "decision review" procedures, however the Tribunal was satisfied that the Respondent's position was well explained to the Appellants in the exchange of documents which preceded the hearing, so they were able to prepare and present their cases well in relation to the relevant points.

- 5.5 The Tribunal notes that, although the Respondent's power to make all Schemes derives from section 16 of the Act (which gives it concurrent jurisdiction with the High Court for such purposes), the Respondent's original view that a *cy-près* occasion had arisen was significant, because it was only if exercising its *cy-près* jurisdiction that the Respondent would have had the power to alter the charitable trusts upon which the land was held. When the Respondent makes a Scheme in the absence of a *cy-près* occasion, it has no power to alter the terms of the charitable trusts themselves, and may only amend the administrative provisions relating to the charity. The Tribunal notes that the Scheme which the Respondent made purports, at clause 2, to "*replace the former trusts*" of the charity, whereas the provisions of a purely administrative Scheme would take effect subject to the original trusts.
- 5.6 The Respondent's case at the hearing was that it had not effected a change to the charity's Objects in making the Scheme, but had merely re-stated them, using a modern formulation, in accordance with its drafting manual. It accepted that it had not had the power to do otherwise in the absence of a *cy-près* occasion. It further argued that the Scheme had not permitted any different use of the land than had been provided for by the settlor, as the Respondent had not had the power to change the trusts in the absence of a *cy-près* occasion. The Respondent's counsel initially argued that clause 4.2 of the Scheme (which required DBC to retain the charity's land for use for the Objects) conferred greater protection on the legacy land than it had previously enjoyed under the terms of the Deed of Gift; however he subsequently preferred the view that the provisions of the Scheme conferred no greater or lesser protection on the land and that the land could therefore be dealt with only to the extent that had been permitted by the original gift, and as permitted by the law.
- 5.7 The Appellants both argued, to the contrary, that the preservation of the original legacy land was to be understood as integral to the charity's purposes and that DBC, as trustee, had not therefore had the power to dispose of part of that land to SJIL. They argued that DBL had a clear duty to preserve the land which was the subject of the

original gift, “*in perpetuity*”. Further, they argued that the Respondent should not, in any event, have authorised such a disposal retrospectively because a *cy-près* occasion, falling within s.13 of the Act, had not arisen - there having been no failure of the charity’s original purposes.

5.8 The Appellants opposed the re-statement of the charity’s Objects in the Scheme. They argued that the loss of the words “*in perpetuity*” from the new Objects clause was significant, because this would encourage DBC to think it could dispose of the remaining legacy land in the future. They also argued that the Recreational Charities Act Objects were less clear and less certain than the original Objects of the charity had been and that there was no good reason for the Respondent to have used them in preference to the original Objects. The Appellants pointed to an earlier proposal from DBC for use of the legacy land which (although now apparently abandoned) had, in their view, been encouraged by DBC’s misinterpretation of the new Objects clause. They argued that this misunderstanding would not have occurred in relation to the original Objects.

5.9 The Tribunal has considered the parties’ respective arguments most carefully. It now rules as follows:

(i) Following the decision of the Court of Appeal in *Oldham Borough Council v Attorney General* [1993] Ch 210, the Tribunal concludes that the retention of the original legacy land was not integral to the purposes of the charity. This is not a case in which “*the qualities of the property which is the subject of the gift are themselves the factors which make the purposes of the gift charitable*”¹¹. On the contrary, the charitable purpose of the gift (the provision of a public recreation ground) can be carried on, in perpetuity, on other land. The Tribunal notes that the Court in the *Oldham* decision specifically contrasted the case of a playing field charity with a charity which, for example, was established to preserve the home of a historical figure or an area of outstanding natural beauty, where the disposal of the land in question would involve the alteration of the charitable trusts themselves. In the case of a playing field, the Court held that a reference to particular land was merely an administrative provision, rather than one of the trust provisions. This Tribunal is bound by the Court’s decision in *Oldham* and so agrees with the Respondent’s latter argument to the effect that the legacy land was never “*designated*” or “*specie*” land.

(ii) It follows that the Tribunal is satisfied that DBC, as trustee, could have relied, in 2004, upon the authority of the *Oldham* decision to dispose of a part of the legacy land, provided it did so with a view to acquiring replacement land which would be suitable for the furtherance of the charity’s purposes. It would, of course, have

¹¹ Per Dillon L J at p.222E

needed to comply with the statutory formalities of the Act in so doing. The Tribunal notes, however, that in the *Oldham* case the decision of the Court did not determine the issue of whether the proposed replacement land was in fact suitable for the charitable purpose. The Tribunal further notes that, in view of the fact that neither DBC nor the Respondent directed their minds to the *Oldham* criteria at the relevant time, they did not ask themselves the relevant questions about the suitability of the replacement land in this case. The Tribunal considers that issue further at paragraph 5.24 below.

- (iii) The Tribunal notes that, notwithstanding its ability to rely on the *Oldham* decision, DBC would have needed to ask the Respondent to make an administrative Scheme for the charity in any event. This was because, firstly, it was also the owner (in its capacity of local authority) of the land acquired as the replacement for the land which had been sold, and it therefore needed the Respondent's permission to engage in self-dealing; secondly, because the charity had no administrative machinery, and needed, inter alia, investment powers for the proceeds of sale¹².
- (iv) As noted above, the Scheme describes itself as governing the charity by replacing its former trusts whereas, in the absence of a *cy-près* occasion, it could only provide administrative powers, subject to the original trusts. The Respondent argued at the hearing that it had, notwithstanding this fact, been appropriate for the Scheme to re-state the Objects of the charity, because they were old-fashioned and ambiguous. The Respondent's counsel explained that current practice is for the Respondent's officers to take the opportunity, in the case of recreation ground charities, to re-state their Objects clauses in the Recreational Charities Act format. However, it only did so when such opportunities presented themselves and did not require such charities to adopt this formula as a matter of general practice. He confirmed to the Tribunal that there was, in the Respondent's view, no legal imperative to re-state the Objects in this case. In the circumstances, the Tribunal concludes that the Respondent's contentious re-formulation of the Objects has proven unhelpful. The Tribunal concludes that the original Objects from the 1903 Deed should stand so that the administrative provisions imposed by the Scheme are subject to those provisions. As noted above, the original formulation of the Objects, and in particular the reference to the legacy land being held "*in perpetuity*" would not have prevented a land exchange of the type permitted by the Court in the *Oldham* case in the past and would not prevent a similar exercise (appropriately conducted) in the future. The land is thus no more and no less protected by the

¹² In the *Oldham* case, there was a straightforward land swap rather than, as here, the acquisition of replacement land plus proceeds of sale falling to be invested as permanent endowment. It did not seem to the Tribunal that this difference was material to the legal principles established or to the issues at stake in these appeals.

Scheme than it had been previously. However, it does not seem to the Tribunal that the Respondent's re-statement of the Objects in the Scheme was any less ambiguous than the original formulation; the important issue here is for DBC to take appropriate advice about the permitted treatment of the land of which it is trustee rather than the format of the Objects themselves. These appeals therefore succeed in relation to issue (a). The appropriate order for the Tribunal to make is considered at section 6 below.

5.10 Issue (b): "Good Faith" for the purposes of section 37(4) of the Act

*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.*¹³

5.11 As noted in the Tribunal's earlier ruling on the issues, the Tribunal had originally been asked by the Appellants (and other local residents, through a petition) to set aside the disposal of part of the legacy land to SJIL, or otherwise order its return to the charity. As explained at paragraph 2.2 above, the Tribunal may only exercise the powers conferred upon it by Parliament, as set out in column 3 of the table in Schedule 1C. The Tribunal has already ruled that it could not therefore set aside the land transaction, or indeed order DBC or SJIL to return the land to the charity.

5.12 However, the Tribunal previously ruled that a relevant issue for it to consider was the adequacy of the Respondent's own investigation of the circumstances in which the land was disposed of in breach of trust and without the relevant formalities and whether, in consequence, the sale of the land to SJIL should have been regarded by the Respondent as having been valid. It would be open to the Tribunal, if quashing the Scheme, to remit this matter to the Respondent for further consideration.

5.13 Section 37 (4) of the Act¹⁴ provides that:

"(4) Where-

(a) any land held by or in trust for a charity is conveyed, transferred, leased or otherwise disposed of by a disposition to which subsection (1) or (2) of section 36 above applies; but

¹³ This was issue 4.5 (iii) in the earlier ruling.

¹⁴ This provision is shown here as currently in force, having been amended by paragraph 129 of schedule 8 to the 2006 Act. The issues in this case are not affected by the different wording which was applicable at the time of the legacy land transaction in 2003/4.

(b) *subsection (2) above has not been complied with in relation to the disposition, then in favour of a person who (whether under the disposition or afterwards) in good faith acquires an interest in the land for money or money's worth, the disposition shall be valid whether or not-*

- (i) *the disposition has been sanctioned by an order of the Court or of the Commission, or*
- (ii) *the charity trustees have power under the trusts of the charity to effect the disposition and have complied with the provisions of that section so far as applicable to it."*

5.14 The Appellants' case in relation to this point was that the Respondent should not have accepted that SJIL had validly acquired the land "*in good faith*" in circumstances where its own lawyers' advice (and that of DBC's lawyers) was, in their submission, perverse. They argued that DBC, SJIL and their respective lawyers (who, the Appellants argued, list themselves on their websites as specialising in charity law) should have been assumed by the Respondent to have been aware of the charitable status of the land in view of the following factors:

- (i) the terms of the Deed itself (as referred to at the public meeting prior to completion of the land sale) which could only have been valid if a charitable trust had been created;
- (ii) the incontrovertible evidence that the legacy land had been enrolled in the books of the Charity Commissioners. The Tribunal was shown in this regard not only the copy Deed (in copperplate handwriting) which had been obtained by the Appellants from the National Archives at Kew, but also a typed transcript of the original Deed, prepared by Messrs Berwin Leighton Paisner and dated 17 February 2005, which included on the front page, an endorsement referring not only to its enrolment by the Charity Commissioners but also the date on which it was ordered to be enrolled and also a reference to the specific volume of the Charity Commissioners' books in which it had been entered. (The Tribunal was told by Counsel for the Respondent that the version with the volume number shown must have been obtained from the Land Registry because the version at the National Archives did not contain this detail. It followed, in his submission, that Berwin Leighton Paisner must have obtained the document they transcribed from the Land Registry and not from Kew);
- (iii) the fact that the National Archives records showed that the Deed had been viewed on a number of occasions prior to the completion of the land sale (although it had been unable to confirm who had viewed the Deed, for data protection reasons)

and, the Appellants argued, it should be inferred by the Tribunal that it was the parties/their lawyers who had done so;

- (iv) the fact that, although Berwin Leighton Paisner had reportedly advised its client SJIL that the Deed created restrictive covenants only, there was no reference to an agreement to obtain restrictive covenant insurance in the contract for the sale of the legacy land and Berwin Leighton Paisner had subsequently refused to confirm to the Appellants whether restrictive covenant insurance had in fact ever been obtained by its clients ¹⁵.

5.15 The Respondent's case in relation to this point was that it must assume that those with whom it deals have acted honestly - especially when they are public officials and professionals subject to high standards of conduct - unless there is clear evidence to the contrary. The Respondent argued that the Appellants had not put before the Tribunal any evidence which went beyond what the Respondent had known when it had made its decision to seal the Scheme. It was accepted by the Respondent that DBC and SJIL had been made aware of the terms of the Deed of Gift by various means, but, it argued, that did not affect the fact that they had followed the incorrect legal advice given as to the interpretation of the Deed. Whilst this advice had not been disclosed (and the Tribunal took the view it had no power to order its disclosure in these proceedings) the Respondent had made a number of inquiries about the advice, which it had found surprising, and had been informed by DBC's replacement solicitors, Messrs Bond Pearce, that its own review of Hewitsons's files disclosed no evidence of bad faith. The Respondent had seen no reason to doubt this view in all the circumstances.

5.15 The Respondent asked the Tribunal to consider, firstly, that the conduct of SJIL had been consistent with it having relied on incorrect advice. It asserted that this did not amount to "bad faith" so as to displace the protection given to the transaction by s.37(4) of the Act. Secondly, that there was nothing to be gained by the parties in deliberately ignoring the charitable status of the land, because the Respondent would have been likely to have approved the land sale if it had been asked to do so prospectively (relying on the *Oldham* decision) and such approval could have been provided to DBC relatively quickly and so need not have delayed completion. Thirdly, that it would be a disproportionate use of the Respondent's resources for it to be required by the Tribunal to investigate this issue further, especially as it now seemed unlikely that further evidence would become available.

¹⁵ The Tribunal saw an e mail exchange (dated 20 and 21 April 2004) between DBC's solicitor and a lawyer at Hewitsons, referring to an earlier discussion between DBC and SJIL about restrictive covenant insurance, which stated that "nothing further on this issue was raised by the developer".

- 5.16 DBC had, as mentioned above, taken Counsel's advice, inter alia, on the question of the validity of the land transaction in the absence of the usual formalities for a charity land sale. Francesca Quint's advice dated 30 March 2005 (which was before the Tribunal) considered the decision of the Court of Appeal in *Bayoumi and Perkins v Women's Total Abstinence Educational Union Limited* (2003) The Times 5 November, in which the question of the "good faith" requirement in s.37(4) of the Act had been considered. She had advised that the test of good faith for these purposes was one of subjective honesty rather than a question of what a reasonable person, properly advised, should be assumed to have known. In the current case, where there was evidence that the purchaser did not know that the land was subject to charitable trusts (having been advised to the contrary), she did not see how a court could find that the purchaser had acted otherwise than in good faith. The Tribunal respectfully agrees with this analysis.
- 5.17 The Tribunal has considered this issue most carefully. It is concerned not to make a decision which would appear to drive a coach and horses through the statutory scheme for the protection of charity land. The Tribunal understands the Appellants' concern that there is a risk of contracting parties in future transactions "hiding behind" plainly inadequate advice and thus evading the statutory scheme with impunity. The Tribunal can also well understand the Appellants' deep mistrust of the circumstances surrounding the land transaction, given what they have been told and what they have managed to find out for themselves through their own persistence. Nevertheless, the Tribunal takes the view that the Appellants have not demonstrated in these proceedings that the Respondent was plainly wrong to have taken the view that it did. Neither have they presented any new evidence to persuade the Tribunal that it would be a fruitful or proportionate exercise for it to remit this matter for further investigation by the Respondent. In the absence of fresh evidence to suggest that SJIL lacked the requisite good faith, the Tribunal has decided that it should not direct that there be any further consideration of this issue by the Respondent if it quashes the Scheme. In that respect, the appeals fail.

5.18 Issue (c): Issues concerning the amenity value of the land

*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;*¹⁶

- 5.19 Having determined that DBC had disposed of a part of the legacy land in breach of trust, the Respondent advised that it must pay compensation to the charity. The level of compensation was agreed to be £275,000 following receipt of an independent surveyor's report prepared by Stanley Hicks Chartered Surveyors on 10 June 2005.

¹⁶ Issue 4.6 (ii) in the earlier ruling.

- 5.20 The Respondent authorised the charity to spend £5,000 of this sum on purchasing replacement land¹⁷, of the same size as that disposed of, from DBC. This was land already within Central Park so this arrangement did not make up for the reduction in the overall area of available recreational land that had resulted from the sale of part of the legacy land to SJIL. The Appellants objected to the use of charity money by DBC to buy land from itself, although this self-dealing was of course authorised by the Respondent in the Scheme.
- 5.21 The Tribunal heard that the replacement land was, in an immediate sense, more suitable for use as a public recreation ground than the land which had been sold because the land sold apparently had derelict buildings and rubble on it. The Appellants argued, however, that this land (abutting Lowfield Street) had only become derelict after the land sale was completed and that previously it had been functional. They also argued that the legacy land which had been sold to SJIL had enjoyed a special quality, being the provision of access to the park from the West, via Lowfield Street, so that it should either have been preserved for local people or the charity should have been specifically compensated for the loss of that access, because it had been lost by virtue of the sale of that part of the legacy land to SJIL.
- 5.22 The Tribunal was initially concerned that the Respondent's approach to this issue (and the surveyor's valuation) may have taken insufficient account of the question of access to the public highway and that this may have been a matter meriting remittal to the Respondent for further consideration. The Tribunal acknowledges that the original gift included land which provided such access and that, without the inclusion of that land in the gift, the legacy land would have been "marooned" or land-locked. Nevertheless, as noted above, the Tribunal finds that the original gift was for the *purpose* of a public recreation ground and that the location of the land was not integral to that purpose. It follows that, in the opinion of the Tribunal, the trusts did not require the preservation of access from the public highway and no more specific compensation for the loss of that access is therefore required.
- 5.23 In the circumstances, the Tribunal is not satisfied that this matter ought to be remitted to the Respondent for further investigation if it quashes the Scheme. The Tribunal noted Neil Robertson's evidence that his understanding was that the current development proposals for central Dartford included alternative arrangements for access to the legacy land from the public highway.
- 5.24 As noted above, neither DBC nor the Respondent appeared specifically to have considered the suitability of the replacement land

¹⁷ Also independently valued by the surveyors on 29 September 2005.

for the charity's purposes, because they did not have the *Oldham* decision in mind at the time of making the Scheme. The Tribunal considers that, although it was unfortunate that the replacement land did not compensate for the total reduction in the recreational space available to the public in central Dartford, the Respondent was not obliged to have regard to this factor in making the Scheme. The Tribunal concludes that the replacement land was suitable to the purpose of a public recreation ground. The Tribunal further notes that the charity is now in possession of substantial funds which could be used to purchase additional land for recreational purposes should this become available in Dartford. The appeals therefore fail in relation to this issue.

5.25 Issue (e): The Governance of the Charity.

*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.*¹⁸

*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.*¹⁹

5.26 The Respondent's Scheme provided that DBC would continue to be the trustee of the charity for all purposes.²⁰ The Tribunal heard from Neil Robertson that he had considered the suitability of this arrangement in the light of the Respondent's published Operational Guidance OG 56 B1, which suggests that the Respondent should ask any local authority occupying this role to consider retiring in favour of a body of individual administrative trustees. Mr Robertson told the Tribunal that he had concluded, in the circumstances of this case, that DBC should continue as trustee for all purposes because the legacy land was land-locked within Central Park so that there were advantages in the land being managed in a "holistic" fashion; also DBC was now aware of the status of the legacy land so the charity was not at risk of future inappropriate treatment by DBC; and that the land had been well-maintained by DBC in the past (at its own expense) and he perceived there to be a danger that if it were removed as trustee it would cease to do so, to the detriment of the charity²¹. This issue is considered further at paragraph 5.30 below.

¹⁸ Issue 4.6 (i) in the earlier ruling.

¹⁹ Issue 4.6 (iii) in the earlier ruling.

²⁰ In this context, "a trustee for all purposes" both holds the legal title to charity property and administers the charity. In some charities, these roles are split between different persons.

²¹ The Tribunal initially wondered whether DBC had created an enforceable contract through its maintenance of the legacy land, at its own expense, for 100 years. The Appellants argued that DBC had a "moral obligation" to continue to maintain the legacy land, which the Tribunal understood to be

- 5.27 The Appellants' arguments diverged in relation to this issue. Mr Ryan argued that the governance arrangements, in particular those for managing conflicts of interest, should be strengthened through the appointment of additional independent members of the DBC Committee which manages the charity. Mr Maidment argued that DBC should be displaced as trustee so that the charity could be run by local people. They both rejected Mr Robertson's arguments in favour of retaining the status quo and argued that he had not provided convincing reasons for departing from the Respondent's stated policy on this issue.
- 5.28 The Tribunal heard that DBC had proposed to the Respondent that it should appoint "up to three" individuals onto its "Deed, Trust and Obligations Committee" which manages the legacy land. It was proposed that these persons should be nominated by the party political leaders in the Council and by Groundwork Kent and Meadway, as they would have relevant horticultural experience. It had, perhaps surprisingly, not been suggested that they should be residents of Dartford. The Respondent's Counsel suggested that if the Tribunal were broadly happy with these arrangements, it should use its powers to substitute the relevant provisions of the Scheme or allow DBC to exercise its power of amendment to achieve them, rather than quash the Scheme and remit this issue.
- 5.29 The Tribunal has considered this issue very carefully. On balance it sees no reason to disturb the present trustee arrangements provided that the arrangements for managing future conflicts of interest are robust. The Tribunal notes that the Committee of DBC which administers this charity will need for the future to manage situations in which a conflict of interest inevitably arises. The Tribunal takes the view that all members of the Committee who are elected members of the local authority (i.e. not just members of the ward in which the legacy land is situated) or who are otherwise connected to DBC, would have to declare their interest and not vote on any issue where such a conflict arose. If (as is apparently being suggested) the Committee should be constituted so that its non-conflicted members could not form a quorum, then DBC would in future need to approach the Respondent to authorise all future transactions affected by the conflict of interest. This is clearly undesirable.

an argument that DBC might now be estopped from denying the existence of an obligation to continue. In the event, draft accounts for the charity appeared to show that although DBC had paid for the maintenance of the legacy land out of its local authority funds, it had also inappropriately received in income from the use of the legacy land as local authority income. In the circumstances, the Tribunal concludes that if it had been accounted for correctly, the charity may always in fact have been able to pay for the maintenance of its own land or, at least, to have reduced the amount of any local authority subsidy. In the circumstances, Mr Robertson's concern appears, in this respect, to have been misconceived.

5.30 The Tribunal saw the Committee minutes of a discussion about how much of the overall maintenance costs for Central Park should be recovered from the charity. These illustrate the importance of constituting the committee so that there is a quorum of members who are independent of the Council and able to take such decisions. The Committee seemed to have considered only two options for the apportionment of the maintenance costs: that of dividing the total charges paid to the maintenance contractor engaged by Central Park in proportion to the area of charity land within the Park, or, that of asking a contractor to quote for maintaining only the small area of legacy land. The Tribunal observes that, unlike the formal parts of Central Park, the charity's land should only require minimal maintenance and there is no reason why the charity should not benefit (as it always has done in the past) from the fact that it is maintained as part of a larger recreational area. The Tribunal saw estimates for the maintenance of the legacy land ranging from £5,000 to £18,000 per annum. The Tribunal notes that the charity has some income of its own (from the use of the land for a Fair plus its investment income) but that if the maintenance costs were towards the higher end of those estimates then the charity's capital would start to be eroded. This issue is clearly of vital importance to the charity's future and must be taken by those unaffected by the obvious conflict of interest involved in apportioning costs between the charity and DBC.

5.31 Other situations in which a conflict of interest would inevitably arise would be decisions concerning the future use or development of the legacy land and/or adjoining land; the payment of legal costs by the charity in relation to proceedings arising from DBC's breach of trust²²; or the granting of a lease or easement over the legacy land to DBC. In the circumstances, the Tribunal is concerned to see governance arrangements put in place which will provide for the Committee of the Council which administers the charity to be able to make quorate decisions in the absence of those affected by a conflict of interest. The Tribunal notes that such an arrangement would accord with the Respondent's Operational Guidance OG 56 B2. It therefore seems to the Tribunal that the important issue for the Respondent to provide for in amending the Scheme is the number of independent (i.e. non-conflicted) persons who are able to form a quorum of the Committee under its standing orders, rather than merely the number of independent persons who are appointed to that Committee, but unable to form a quorum. The Tribunal concludes that this issue should be addressed in providing a machinery of governance for the charity and these appeals therefore

²² The Tribunal saw the unconfirmed minutes of DBC's Deed Trust and Obligations Committee meeting of 5 October 2009, in which it was suggested that the charity's funds would be used to meet legal costs incurred by DBC in relation to the Tribunal proceedings. The Tribunal expressed its concern about this suggestion, given that these proceedings arose in no small part from DBC's breach of trust in selling part of the charity's land. DBC then indicated, via the Respondent, that it would not make any such payments without the Respondent's specific authority. The Tribunal was grateful for this indication.

succeed in relation to this issue. This matter is considered further at section 6 below.

6. Next Steps

- 6.1 The Tribunal has concluded above that the Scheme made by the Respondent was inadequate in relation to some, but not all, of the issues identified. These appeals therefore succeed in part. The Tribunal concludes that 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.
- 6.2 The Tribunal will also direct that this charity is entered onto the Register of Charities forthwith and that the replacement land should be registered with the Land Registry so that its charitable status is recorded in both locations. These measures will provide some reassurance to the Appellants, and to local people in Dartford, that the legacy land could not be disposed of in breach of trust or in breach of the relevant statutory requirements in the future.
- 6.3 The Tribunal has, after due consideration, rejected the option suggested by the Respondent's Counsel of asking DBC to exercise its power of amendment to achieve the above measures. This is in view of its external solicitors' unwarranted stance towards both the Tribunal and the Appellants, as demonstrated in their correspondence with the Tribunal; also in view of the misleading and inappropriate description of these proceedings as damaging to the charity and "vexatious" in the Committee minutes of 5 October; and in view of the inclusion of highly partisan material relating to DBC's trusteeship of the legacy land which was contained in a leaflet shown to the Tribunal, published in July 2009 by the leader of the Council ("The Kidd Legacy – Fact and Fiction"). The Tribunal hopes that the relationship between DBC and the Appellants, as local people who are amongst the charity's beneficiaries, will now improve and that DBC will re-consider the appropriateness, for a charity trustee, of some of its previous public statements about the legacy land.

- 6.4 The Tribunal considers that the amendments to the Scheme could be achieved either by (i) quashing the Scheme (in whole or in part) and remitting the matter to the Respondent with a direction to make a fresh Scheme including the provisions outlined above; or (ii) exercising its own powers to substitute and/or add to the existing Scheme. It seems to the Tribunal that the former course may involve a good deal of future uncertainty for all involved, as the new Scheme would presumably be subject to the normal public consultation procedures and the Respondent may wish to include other new measures in it. The second course of action seems preferable to the Tribunal, however, the Tribunal recognises that its findings and proposals have an impact upon DBC as trustee. Although DBC chose not to be a party to these proceedings, its views must now be sought and presented to the Tribunal by the Respondent. If DBC indicates to the Respondent that it is content with the Tribunal's proposals for the alteration of the Scheme as set out at paragraph 6.1 above, then the Tribunal will exercise its own powers to amend the existing Scheme. If DBC is not so content, the Tribunal will quash the Scheme and remit this matter to the Respondent for a fresh determination in accordance with the Tribunal's findings and directions.
- 6.5 The Tribunal now invites all parties' written representations on the course it should take, to be provided no later than 14 days after the date of this decision.
- 6.6 This is the decision notice of the Tribunal for the purposes of rule 38 (2) (a) of the Rules. The Tribunal's decision was unanimous. The Tribunal hereby extends the time for applying for permission to appeal so that the relevant written decision for the purposes of any such application will be the Tribunal's further decision following receipt of the written representations invited above.

Signed:

Dated: 16 November 2009
Amended: 16 February 2010

Alison McKenna
Principal Judge

Vivien Rose
Tribunal Judge

Carole Park
Tribunal Member

