



IN THE FIRST TIER TRIBUNAL (CHARITY)

GENERAL REGULATORY CHAMBER

Appeal No. CA/2011/0007

BETWEEN:

RAYMOND ALISS and MARTIN HESKETH

Appellants

- and -

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondents

(2) LYTHAM SCHOOLS TRUSTEE LTD

Second Respondents

(3) THE UNITED CHURCH SCHOOLS TRUST

Third Respondents

DIRECTIONS AND RULING

UPON reviewing the Replies of the Appellant to the Responses of each of the three Respondents, the Appellant's request for expert witnesses evidence and the representations by each of the three Respondents to these submissions.

AND UPON noting the requests for the Tribunal to decide certain preliminary matters

The Tribunal issues the following directions and ruling:

Preliminary Matters

1. The Appellants seek the quashing of the Scheme of 11 November 2011 creating the Lytham Schools Foundation (the "Scheme") that is the subject of the Appeal and an

Order terminating the Lease and the Transfer Agreement that the Second Respondent and the Third Respondent entered in to in order to effect an operational merger of the two charities. The Appellants request that, if the Tribunal considers that it does not have the power to make such orders relative to the Lease and Transfer Agreement, the Tribunal agrees to refer the Appeal to the President of the General Regulatory Chamber with a request that the Appeal be transferred to and be determined by the Upper Tribunal, which the Appellant asserts does have the power to make such orders.

2. Pursuant to Paragraph 5 of the Order issued by the Tribunal on 16th February 2012 the Appellants seek leave to submit expert witness statements and expert evidence on educational factors and financial, commercial and risk factors relative to the issues in the Appeal. The Appellants have set out the scope of such evidence in their submission and have, as requested, by the Tribunal explained how this evidence will assist in the determination of the Appeal. The Second Respondent and the Third Respondent submit that all of the expert evidence proposed by the Appellants is unnecessary and that it will delay the hearing of the Appeal. Each of them also state that if the Appellants request for expert evidence is granted they will need time to submit expert evidence of their own.
3. The First Respondent requests the Tribunal to consider determining exactly what the issues are in this case as a preliminary matter before making a decision about the Appellants' proposed expert evidence. The First Respondent is concerned that the Appellants' grounds for appeal include the assertion that there were insufficient grounds under either s. 13(1)(a)(ii) or s. 13(1)(c) of the Charities Act 1993 for the establishment of the Scheme and that the Appellants seek to submit expert evidence to support their position on each of these sub-sections. The First Respondent believes that the issue in this Appeal is whether the Scheme was properly made under s. 13(1)(c) and suggest that a ruling on this issue may be regarded as determinative of the whole Appeal by the Appellants or themselves.
4. The Tribunal recognises the importance of the preliminary matters raised by the parties in deciding the case fairly and justly and with the minimum of cost and delay and proposes to exercise its powers under Rule 5 (3) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to determine certain of the preliminary matters and give further directions in relation to the conduct of these proceedings.

(For ease of reference, all statutory references in these directions are to the law as it existed prior to the coming into force of the Charities Act 2011).

Ruling on Preliminary Matters

5. The First Respondent issued the Scheme "*under the powers given in the Charities Act 1993*". No further details were provided in the Order of the legislative basis for the Scheme.

6. The grounds of Appeal clearly stated that *there were insufficient grounds under either s. 13(1)(a)(ii) or s. 13(1)(c) of the Charities Act 1993 for the establishment of the Scheme*". The Appellants have maintained this position since and now seek to bring expert evidence that would be relevant to both subsections of s. 13(1).
7. The Response of the First Respondent states that they would rely only on s. 13(1)(c) in defending or justifying their decision to approve the Scheme.
8. Sections 13(1), 13(1A) and 13(2) of the 1993 Charities Act read as follows:

13 Occasions for applying property cy-près.

(1) Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows—

(a) where the original purposes, in whole or in part—

(i) have been as far as may be fulfilled; or

(ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or

(b) where the original purposes provide a use for part only of the property available by virtue of the gift; or

(c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes; or

(d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift; or

(e) where the original purposes, in whole or in part, have, since they were laid down,—

(i) been adequately provided for by other means; or

(ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or

(iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.

1A) In subsection (1) above "the appropriate considerations" means—

(a) (on the one hand) the spirit of the gift concerned, and

(b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

(2) Subsection (1) above shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près except in so far as those conditions require a failure of the original purposes.

9. It is clear from the drafting of section 13(1) that it is to be interpreted so that each of sub-sections (a), (b), (c), (d) or (e) represent circumstances in which the original purposes of a charitable gift can be altered to allow it to be applied cy-pres. Each of the sub-sections are linked by an "or" and there is nothing in s. 13(2), to which s. 13(1) is subject, that would indicate that this straightforward interpretation should not be followed. It therefore follows that the First Respondent is able to pursue its defence of the Appeal on the basis that any one of the circumstance set out in s. 13(1) were applicable to the property of The Lytham Schools. The First Respondent has elected to justify the Scheme solely on the basis that the circumstances in s. 13(1)(c) apply.

10. In considering the preliminary matters, it is relevant to understand the powers of the Tribunal if the Appeal is successful. The powers are set out in the Table in Schedule 1C of the 1993 Act and are as follows:

"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."

11. In the event that the Appellants are able to establish that the circumstances set out in section 13(1)(c) did not apply and that the Scheme cannot stand in its original form, the Tribunal will need to consider whether to:

- Quash the Order making the Scheme as a whole or in part and remit the matter to the First Respondent for further review and possible action (in which case that will be the end of this Appeal); or
- Quash the Order making the Scheme as a whole or in part without remitting the matter to the First Respondent; or
- Substitute any other order which could have been made by the First Respondent; or
- Add to the Order anything which could have been contained in an order made by the First Respondent.

In either of these last two circumstances, the parties may wish to make submission about any of the other circumstances set out in section 13(1) that may or may not exist and which may permit the property of The Lytham Schools to be applied cy-pres. If such arguments were to be pursued the scope of evidence including expert evidence that could be relevant in determining these issues would be broader than those required in determining if s. 13(1)(c) applies and many of the matters that the Appellants presently seek to address in their request for leave to submit expert evidence may become relevant. The Third Respondents' submissions suggest that they would also seek to advance additional evidence in this instance.

12. It also the case that if the Appellants are able to establish that the circumstances set

out in section 13(1)(c) did not apply and that the Scheme cannot stand in its original form, then the issue of the powers of the Tribunal or of the Upper Tribunal in respect of these arrangements and agreements entered in to between the Second Respondents and the Third Respondents as a consequence of the Scheme may become an issue. The Appellants request for a transfer of the Appeal to the Upper Tribunal may then need to be addressed. However, if the First Respondent can establish that the circumstances in section 13(1)(c) did apply then the issue of the powers of the Tribunal and the possible referral of the Appeal to the Upper Tribunal may not need to be addressed.

13. In the light of this analysis of the preliminary matters the Tribunal proposes to issue the following directions and ruling in order to ensure that the Appeal proceeds in a fair, just, timely and proportionate manner.

Directions

14. The hearing of the Appeal already listed for 11th and 12th April shall be an initial hearing to determine the issue of whether the circumstances set out in sub-section 13(1)(c) existed in respect of the property of The Lytham Schools at the time that the Scheme was ordered. (The "Preliminary Issue").
15. All Directions already issued in the Appeal in respect for the preparation for a hearing shall continue to apply, save as modified below, but shall be interpreted so that all references to submissions evidence, witness statements, documents and similar material shall be limited to these that are relevant to the Preliminary Issue.
16. The Appellants request to submit expert evidence submitted on 29th February 2012 is agreed only in so far as the expert evidence is limited to those matters that are relevant to the Preliminary Issue. In view of the much reduced scope of the evidence that will be relevant the Tribunal does not propose to defer the initial hearing date and such expert evidence shall be lodged with the Tribunal and served on the other parties on or before Monday 2nd April.
17. The Respondents are given leave to submit any expert witness statements and expert evidence that they believe will assist the Tribunal and which is relevant to the Preliminary Issue on or before Monday 2nd April 2012.
18. Each Respondent and the Appellants are permitted to lodge with the Tribunal and serve on the other parties on or before Thursday 22nd March 2012 any statements of witnesses of fact which are relevant to the Preliminary Issue and on which they wish to rely in this Appeal.
19. Such witness statements are directed to stand as evidence in chief at the hearing, although supplementary questions in chief may be asked with the permission of the Tribunal. No party is to call any witness in respect of whom a written statement has not been exchanged with the other parties and served on the Tribunal in accordance with this paragraph, unless the Tribunal gives permission. The parties are to notify

each other on or before 4th April 2012 if they wish any witness in respect of whom they have received a witness statement to attend the hearing for cross-examination.

20. The Appellants and each of the Respondents shall prepare an agreed statement of facts, an agreed list of matters to be determined in resolving the Preliminary Issue and an agreed bundle of documents and shall lodge these with the Tribunal and shall serve the same on the other parties on or before Wednesday 4th April 2012.
21. The parties shall lodge with the Tribunal and serve on the other parties a skeleton argument and agreed bundle of authorities in respect of the Preliminary Issue by 12 p.m. on Thursday 5th April 2012. If the Appellants or any of the Respondents wish any part of the initial hearing to be held in private they shall apply to the Tribunal at least seven days before the hearing.
22. The parties are to provide the Tribunal with an agreed timetable for the initial hearing, with estimated times for opening statements (if any), witness evidence and closing submissions by 12 p.m. on Thursday 5th April 2012.
23. Consideration of the Appellants' request that the Tribunal refers the Appeal to the President of the General Regulatory Chamber with a request that the Appeal be transferred to and be determined by the Upper Tribunal is deferred until after the initial hearing.

Signed

Peter Hinchliffe
Tribunal Judge

Dated 12 March 2012