



IN THE FIRST-TIER TRIBUNAL

Case No. CA/2011/0007

GENERAL REGULATORY CHAMBER (Charity)

ON APPEAL/APPLICATION FROM:

Charity Commission decision reference: C-331865-ZQKS 661/1112

Dated: 11 November 2011

Appellants: RAYMOND ALISS and MARTIN HESKETH

First Respondents: THE CHARITY COMMISSION FOR ENGLAND AND WALES

Second Respondents: LYTHAM SCHOOLS TRUSTEE LTD

Third Respondents: THE UNITED CHURCH SCHOOLS TRUST

Heard at: FIELD HOUSE, LONDON, EC4A 1DZ

Date of hearing: 11th and 12th April 2012 (sitting in public)

Date of decision: 17 May 2012

Attendances:

For the Appellants: **Mr Hubert Picarda QC**

For the First Respondents: **Mr James Kilby**

For the Second Respondents: **Mr Matthew Smith**

For the Third Respondents: **Mr Mark Mullen**

By

Peter Hinchliffe (Tribunal Judge)

A'isha Khan (Member)

Manu Duggal (Member)

Subject matter: Appeal against the decision of the First Respondents to establish a Scheme on 11th November 2011 to govern the charities formerly known as The Lytham Schools and King Edward VII and Queen Mary School Prize Fund.

DECISION OF THE FIRST-TIER TRIBUNAL ON A PRELIMINARY MATTER

The Tribunal finds that the circumstances set out in sub-section 13(1)(c) of the Charities Act 2006 existed in respect of the property of The Lytham Schools at the time that the Scheme of 11th November was ordered. The Tribunal also finds that the terms of such Scheme create unnecessary risks and restrictions with regard to the effective use of the property of the Charity.

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

REASONS FOR DECISION

1. Background to the Appeal

1.1 The First Respondent (“the Commission”) established a scheme in respect of the charities formerly known as The Lytham Schools (“TLS”) and the King Edward VII and Queen Mary School Prize Fund on 11th November 2011 (the “Scheme”). The Scheme was established using the Commission’s powers under sections 14 and 16 of the Charities Act 1993. The Scheme established a charity to be known as The Lytham Schools Foundation (The “Charity”).

The objects of the Charity are set out in the scheme and are as follows:

“The objects of the Charity are for the public benefit to advance education in or near Lytham St. Ann’s including by, but not limited to, the provision of land, buildings and other facilities for the purposes of a school or schools and the provision of means-tested bursaries and other financial awards to children and young people in need of financial assistance for the purpose of assisting with the cost of their education (including extra-curricular activities undertaken for educational purposes).”

1.2 On 9th December 2011 the Appellants submitted a notice of appeal in respect of the decision of the Commission that established the Scheme. The Appellants act as representatives of a group of parents of pupils attending the King Edward and Queen Mary School in Lytham St. Annes (“KEQMS”). The grounds of appeal can be summarised as follows:

- 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 Decision Review carried out by the Commission which determined to make the Scheme was fatally flawed due to its failure to take account of the availability of alternative steps open to the Trustees of TLS and King Edward VII and Queen Mary School Prize Fund; it being based wholly or in part on factors which were insufficiently established or irrelevant; and the Commission’s failure correctly to interpret or adequately to test the assertions and evidence put forward on behalf of TLS.

- The objections to the proposed scheme should have established in the Commission’s mind that the Scheme was so controversial that under s. 16 (10) of the Charities Act 1993, the Commission should have concluded that it was inappropriate for it to establish the Scheme.
- The Decision Review was based on a mis-direction on certain legal questions including the meaning of the “spirit of the gift” in s. 13 of the Charities Act 1993.
- The Commission ought to have declined to make the Scheme until TLS had taken necessary steps to establish that the Scheme was the best option available to TLS at that time.
- The Commission should have ensured that the trustees of TLS had the relevant competence and had appropriate governance arrangements in place.

1.3 The Second Respondents are the Lytham Schools Trustee Limited (the “Trustee”). Under the terms of the Scheme, the Trustee was appointed as the trustee of the Charity.

1.4 The Third Respondents are the United Church School Trust (“UCST”). UCST is a registered charity founded in 1883 that operates a number of fee-paying independent schools in the UK. These include the Arnold School an independent fee-paying day school providing education to male and female pupils from a site in Blackpool approximately four miles from the site of KEQMS. Under the terms of the Scheme, the Trustee is permitted to grant a Lease to UCST of all or any part of the land presently occupied or used by KEQMS. UCST’s objects are:

“to provide in England and Wales, by the establishment and maintenance of schools, a liberal, practical, and general education for children and adults of all ages and both sexes, such education to include religious instruction in the doctrine and duty of Christianity principally as the same are taught by the Church of England, and otherwise to promote the establishment and maintenance of schools conducted, or to be conducted, by any charitable institution.”

1.5 Prior to the making of the Scheme, TLS was governed by a scheme dated 21st August 1998 (as amended in 2002). Under this scheme the objects of TLS were:

“The provision and conduct in or near Lytham St. Anne’s of a day school for boys and girls to be called the King Edward VII and Queen Mary School;

The provision of primary schools for girls and boys in or near Lytham St. Anne’s.”

TLS has since its inception provided funds for the education of children in or around Lytham St. Anne’s whose parents could not afford to pay for the education of their children. Since KEQMS was created means-tested bursaries have been provided each year to children attending the school.

1.6 During the course of 2011, negotiations took place between TLS and the United Church Schools Trust regarding the possible merger of KEQMS and the Arnold School.

1.7 It was accepted by all of the parties to this appeal that pupil numbers at KEQMS had fallen year on year since the 2006 – 07 academic year. The operating costs of KEQMS were not covered by its fee income. TLS has significant investment assets and TLS described its financial position as “strong” in its filing with the Commission for 2010/11.

1.8 On 25th August 2011, TLS and UCST entered into a transfer agreement in respect of the operations and undertaking of KEQMS (the “Transfer”) and a lease of the KEQMS site (“the Lease”). The Transfer and Lease were only to become effective upon the making of the Scheme by the Commission. The Scheme was made on 11th November 2011 and the Transfer and Lease became effective at that date.

2. The Preliminary Issue

2.1 The Commission has statutory powers pursuant to sections 13 and 16 of the Charities Act 1993 (“the Act”). Section 16 of the Act permits the Commission to establish a scheme for the administration of a charity. Section 13 of the Act sets out the circumstances in which the property of a charity can be applied cy-près. In the directions and ruling issued by the Tribunal on 12th March 2012, the Tribunal provided for the hearing of a preliminary issue in order to determine whether the circumstances set out in sub-section 13(1) (c) of the Act applied in respect of the property of TLS at the time that the Scheme was ordered pursuant to section 16 of the Act.

2.2 Sections 13(1), 13(1A) and 13(2) of the 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.

- 2.3 On 12th March 2012 the Tribunal issued directions and gave a ruling. The directions provided for a preliminary hearing to be held on 11th and 12th April 2012 to determine the issue of whether the circumstances set out in sub-section 13(1)(c) of the Act existed in respect of the property of TLS at the time that the Scheme was ordered. (The “Preliminary Issue”). The Tribunal ruled that the Commission was able to pursue its defence to this Appeal on the basis that any one of the circumstances set out in the sub-sections in section 13 (1) of the Act applied to the property of TLS. The Commission had elected to justify the making of the Scheme on the basis that the circumstances in sub-section 13(1)(c) applied at the time of the Scheme.
- 2.4 The preliminary hearing was held on 11th and 12th April 2012 to determine the Preliminary Issue.

3. The Powers of the Tribunal

- 3.1 The powers of the Tribunal in relation to this Appeal are derived from the entry in the table in Paragraph 5 of Schedule 1C to the Act in respect of an “order made by the Commission under s.16 (1) of this Act”. The Tribunal may dismiss the Appeal. If it allows the Appeal, the Tribunal has the following powers:

“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.”*

- 3.2 Under s. 2A (4) of the Act the Tribunal is required to consider afresh the decision appealed against and may take into account evidence which was not available to the Commission.

4. The Appellants’ Position

- 4.1 The main points of this Appeal are summarised in paragraph 1.1 above.
- 4.2 At the preliminary hearing the Appellants made the following submissions in respect of the Preliminary Issue:
- The Appellants stressed the inadequacy of the processes by which the Trustees of TLS had reached the decision to agree to the merger of the schools and the Commission had agreed to make the Scheme.
 - The terms of the Transfer and Lease did not reflect the terms of the Scheme.
 - The terms of the Transfer and Lease did not make a more effective use of the property of the Charity more likely as it created a number of significant risks to the Charity’s ability to achieve its purpose. In particular, the 999 year duration of the Lease was

the subject of strong objections by the Appellants.

- TLS and UCST did not have similar purposes: TLS was a local charity with local beneficiaries. Whereas, UCST, was a national charity with beneficiaries throughout England and Wales and with an ability to redistribute its unrestricted assets to other areas of the country. Furthermore, the ethos of KEQMS and that of the Arnold School were very different and the two schools provided a different style of education to pupils who may benefit from such differences. Parents were aware of the distinct nature of the educational service that the two schools offered and would not have regarded the two schools as being similar when they selected one for their child.
- The Scheme did not provide for a more effective use of the property of TLS. The uncertainties and risks that the Lease had created were sufficient to cause doubt over the effectiveness of the use of the property in the future. The Appellants took the view that the burden of proof in establishing that the property of TLS could be put to more effective use had been on the Trustees of TLS when they sought the approval of the Commission to the Scheme.
- The “spirit of the gift” was to educate children and young people in the locality of Lytham St Annes with a traditional Christian education within an ethos of collegiate spirit, a sense of the local community and a loyalty to the school and its continuance.
- The Appellants took the view that the social and economic circumstances prevailing in respect of KEQMS at the time of the making of the Scheme did not prevent the school from being viable without being merged.

4.3 It was the contention of the Appellants that the circumstances in s. 13(1)(c) had not arisen at the time that the Scheme was made.

5. The Commission’ Position

5.1 The Commission’s decision to make the Scheme is the subject of this Appeal. The Commission takes the view that the Tribunal is not required to consider the means by which the Scheme was to be implemented. The implementation being a matter for the trustees of TLS and the Trustee and not within the ambit of the Commission’s decision or this Appeal.

5.2 The Scheme was established by the Commission after a brief period of consultation. The Commission was asked to introduce the Scheme as a matter of urgency. The Commission confirmed during the hearing that it recognises the need for charities considering a merger of fee-paying schools, to avoid periods of uncertainty about their future that might harm the schools ability to secure and retain fee-paying pupils.

5.3 In its submissions to the Tribunal, the Commission set out its view that s. 13(1)(c) applied where there was a cy-près occasion in which two or more items of charity property held for similar purposes could be used more effectively for a common purpose. The Commission was of the view that charity law seeks to encourage the merger of charities in order to increase the efficiency of the sector. The Commission argues that sections 267-274 of the Charities Act 2011 and sections 305-314 of that Act are evidence of this underlying intention. The Commission asserted that they have a statutory objective to promote the effective use of charitable resources. The Commission pointed to section 14 of the Charities Act 2011 to

further support this argument. The Commission's view is that the Tribunal should only consider whether the Scheme was properly made and that the issues arising out of the Trustees' implementation of the Scheme should not be taken into account in determining this Appeal. The Commission did not seek to interfere with or form a judgement on the terms of the Transfer and Lease.

5.4 The Commission stated that the charitable purposes of TLS and UCST were similar, but not identical, and that the property of TLS and UCST could be more effectively used in conjunction with each other. The running of the two schools on one site can reasonably be expected to result in economies of scale and a saving in administrative costs. The sale of the Arnold School site would free up substantial sums for charitable educational purposes. The Commission argued that the 'spirit of the gift' in respect of TLS was the provision of schooling for children (including schooling in accordance with Christian doctrine) in the Lytham area. The economic and social circumstances that were relevant were primarily those relating to the current and future demand for private education in the Lytham area. The common purpose to be pursued by the Charity and UCST is the use of the KEQMS site as a school. Overall, the Commission regarded the common purpose of the Charity and UCST in providing and operating the merged school as being virtually identical to the original purpose of TLS and falling squarely within the 'spirit of the gift' of TLS and being suitable having regard to the prevailing social and economic circumstances.

6. The Trustee's Position

6.1 The Trustee was concerned to ensure that the hearing did not amount to a "trial" of the trustees of TLS and their decision to pursue the merger of the schools and seek the Scheme. The Trustee recognised the strong feelings that had arisen surrounding the inadequacy of consultation with the parents of fee-paying pupils at KEQMS. It asked the Tribunal to look beyond the merits or otherwise of the decision-making process that led to the merger of KEQMS and the Arnold School (while not accepting that the decision to seek the merger was wrong) and to concentrate on the issue of whether the Scheme effected by the Commission was appropriate. It urged the Tribunal to recognise that the circumstances set out in section 13(1)(c) existed in respect of the Scheme as the use of the charitable assets of TLS in the merged school represents a more effective means of achieving TLS's charitable purpose.

6.2 The position of the Trustee on the issues that are relevant to the application of s.13(1)(c) is largely consistent with that of the Commission as set out in para. 5 above, save that the Trustee took the view that the *spirit of the gift* included the need to ensure that poor children from the Lytham parish could be educated.

7. UCST's Position

7.1 UCST submit that there is insufficient demand in the region in which KEQMS and the Arnold School operate to sustain both schools in the medium term. UCST states that this view was the primary motivator of the decision to pursue a merger of the two schools and that the Transfer and Lease were the necessary legal and contractual means by which the merger could be effected.

7.2 UCST argued that the 'spirit of the gift' in relation to TLS was based on advancing education and purposes beneficial to the community. However, the ethos of the school was too

subjective and imponderable to be taken into account in identifying the ‘spirit of the gift’. They agreed with the Commission’s view that the relevant social and economic circumstances that were prevailing at the time that the Scheme was made were those relevant to the financial viability of KEQMS. They also argued that the adverse effect that KEQMS’ falling pupil roll was having on the activities and curriculum at KEQMS should be taken into account. They were clear in their view that TLS and UCST had similar purposes in advancing education through similar schools.

7.3 UCST expressed the benefits of the merger as follows: The Scheme relieves the Charity from the burden of subsidising KEQMS and enables the Charity to apply its resources to other schools and education in the Lytham area. The merger of the two schools will permit investment by UCST in the school buildings on the KEQMS site. The merger removed the competition between the two schools and ensured the continuance of a high quality independent school in Lytham.

8. The Preliminary Issue

8.1 In order for the Tribunal to decide whether or not the circumstances in section 13(1)(c) existed at the time that the Scheme was made, the Tribunal considers it necessary to form a view on the following matters: -

- Whether the charitable assets employed in KEQMS and the Arnold School were being applied for similar purposes?
- What was meant by the “spirit of the gift” in relation to the Charity?
- What were the social and economic circumstances prevailing at the time of the Scheme?
- Whether the site and the undertaking of KEQMS is capable of being used more effectively in conjunction with the Arnold School for a common purpose?

The Tribunal conclusions on these matters are set out below:

8.2 Whether the charitable assets employed in KEQMS and the Arnold School were being applied for similar purposes?

8.2.1 The objects of UCST are set at paragraph 1.7 above. The objects of TLS prior to the Scheme were as follows:

“3. *The object of the Charity shall be –*

1. *The provision and conduct in or near Lytham St. Anne’s of a day school for boys and girls to be called the King Edward VII and Queen Mary School (hereinafter referred to as the School);*
2. *The provision of primary schools for girls and boys in or near Lytham St. Anne’s (hereinafter referred to as the primary schools).*

8.2.2 In assessing whether all or some of the property of TLS and UCST were being used for *similar purposes*, the Tribunal took account of the charitable purposes as set out in the objects of TLS and UCST. In this case the objects were similar in that they provided for the advancement of education by the operation of schools. The schools were to educate pupils of

both sexes. The objects of UCST have an express reference to the teaching of Christianity, “*principally as advanced by the Church of England*”. In the governing document of TLS there is provision for ex-officio governors, which include the incumbents of three Church of England parishes in the Lytham area. The principle difference in the objects of the two charities lies in the geographical areas in which the beneficiary classes are situated.

8.2.3 The Tribunal accepts the argument of the Commission that the reference in s. 13 to “similar purposes” should not be construed as requiring the purposes to be identical. The Tribunal takes the view that in assessing whether the charities had similar purposes it was appropriate to take account of the full range of potential charitable purposes set out in s. 2 of the Charities Act 2006. The objects of both of the charities that are affected by the Scheme committed them to the advancement of education through the operation of schools for children of both genders with an emphasis on Christian values and the provision of some means tested bursaries. The Tribunal took account of the clear difference in the beneficiary classes of the two charities. It also considered the arguments of the Appellants regarding differences in the style, content and ethos of the education offered by KEQMS and the Arnold School. These differences in the education being offered do not arise from differences in the charitable objects of the TLS and UCST prior to the Scheme being made; instead they arise from the strategic, operational and management decisions made by the trustees of the charities and those to whom they have delegated authority. The Tribunal understands that the two schools may provide a different style of education and may offer a different approach in terms of pupil selection, ethos and ‘feel’ of the schools and in the attitude to pastoral or sporting activities. However, the Tribunal concludes that these differences in the manner of the implementation of the charities’ purposes and in the beneficiary class do not make the underlying charitable purposes of the charities dissimilar. The Tribunal concludes that the property of TLS that was being used in order to operate KEQMS and the property of UCST that was being used in order to operate the Arnold School were being used for similar purposes.

8.3 What was meant by the “spirit of the gift” in relation to the Charity?

8.3.1 The Commission and the Tribunal are required to have regard to the spirit of the gift in assessing whether the property of TLS can be used more effectively if a scheme is implemented. The Tribunal concluded that the *spirit of the gift* of TLS is the provision of education for the poor children of Lytham.

8.3.2 The Tribunal was referred by the representatives of the parties to *Varsani v Jesani* [1999] Ch 219 and to the law in relation to the “spirit of the gift”. There was little disagreement between the parties on this issue. In coming to its conclusion the Tribunal took particular account of the witness statements of Peter Shakeshaft and David Webb. Mr. Shakeshaft’s witness statement was submitted by the Appellants. He produced a helpful and interesting analysis of the history of TLS and its predecessor charities. The Tribunal noted the very similar intentions of three of the four original charities that worked in collaboration in the 18th Century and which formed TLS. These intentions were; in one case “to make a free school”; in the second case funds were to be used exclusively for “poor children’s schooling” in Lytham and in the third; the purpose of the gift was to “teach and instruct without any other gratuity or reward all such poor children within the parish of Lytham”. The fourth charity referred to by Mr. Shakeshaft had as its original purpose “such charitable purposes as its Trustees think proper for the township of Lytham.” Mr. Shakeshaft stated that this gift was applied from the very beginning by the then trustees for the support of Lytham

School. The witness statement of David Webb was submitted by the Second Respondents and provided a brief but very similar outline of the history of TLS. Mr. Webb referred to the history of TLS that had been written by a local historian and heritage campaigner. It seems likely that the local historian had made use of some of the same sources as Mr. Shakeshaft. The Tribunal noted the similar conclusion as to the original intentions of those providing the gifts that were amalgamated during the 18th Century in order to support the schooling of poor children in Lytham. During the course of the hearing the Tribunal understood that all parties accepted that the *spirit of the gift* is the provision of education for the poor children of Lytham St Anne's, notwithstanding some differences in their initial arguments.

8.4 What were the social and economic circumstances prevailing at the time of the Scheme?

8.4.1 The Tribunal took a broad view of the prevailing *social and economic circumstances* to which regard must be had in considering the efficacy of the Scheme. The relevant circumstances were much wider than those that were affecting the financial position of KEQMS now or in the near future. The Tribunal regarded the following circumstances as being of particular relevance in considering the need for and the efficacy of the Scheme and in taking account of social and economic changes since the time of the original gifts:

- The availability of universal free education for children in the UK.
- The continuing demand for fee-paying and means tested access to independent schools in the Fylde and in the UK.
- The excess of school places in fee-paying independent schools in the Fylde region over demand for such places in recent years and forecast for the near future.
- The awareness amongst parents as well as teachers and educationalists of the relative merits of different approaches to the education of children and the likelihood that some schools may be more effective than others for children with different needs, personalities or capabilities.
- A broader understanding in society of the factors that enable children to benefit from education and schooling.

8.4.2 The question of the supply of, and demand for, fee-paying secondary school places in the Fylde region is one that on first sight appeared to separate the parties. The Commission, the Trustee and UCST all argued that there was a surplus of places in fee-paying schools in the Fylde region. However, the Tribunal understands that the Appellants accept the competitive nature of the fee-paying secondary school market in Fylde and that there may be more school places than are required at present. The Appellants and other parents of KEQMS were of the view that the school could attract more pupils by suitable marketing in the Lytham St Annes and Fylde regions and also by considering new and more innovative proposals, such as the provision of boarding places. The expert witness evidence provided by both parties did not come to materially different conclusions about the size of the market that had existed in the period up to the making of the Scheme

8.5 Whether the site and the undertaking of KEQMS is capable of being used more effectively in conjunction with the Arnold School for a common purpose?

8.5.1 In assessing whether TLS' property could be used more effectively in conjunction with that of UCST, the Tribunal concludes that the effectiveness is to be assessed by reference to the charitable purposes of TLS. The assessment to be made is therefore, not whether a new merged school could be more financially efficient or successful, but whether the new merged school could be more effective in advancing education for the public benefit

as a result of the Scheme. However, the Tribunal recognises that improvements to the financial efficiency of the Charity are relevant in assessing the effective use of the Charity's property as it will extend the time over which the Charity was able to meet its charitable purpose and consequently the number of beneficiaries.

8.5.2 The advancement of education for the public benefit is a common purpose of UCST and the Charity. The provision of financial assistance to those who cannot otherwise access the educational services provided by the Charity or UCST is also a common purpose and activity. The Tribunal regarded the effectiveness of the Charity in carrying out charitable activities other than the operation of, or provision of land buildings and property for, an independent school in Lytham St. Annes, as being relevant to the effective use of its property. The Tribunal was interested to understand whether the full range of the Charity's charitable activities would be more effective as a result of the Scheme.

8.5.3 Having considered all of these factors and the arguments of the parties, the Tribunal concludes that the property of TLS that is used to support and operate KEQMS is capable of being used more effectively in conjunction with the business and goodwill of the Arnold School for the *common purpose* of providing a merged secondary school in Lytham St Annes. This use was capable of increasing the effectiveness of the Charity in advancing education for the public benefit in the area over the longer term, both through the activities of the new merged school and through the increase in charitable funds available for other purposes that could advance education in the area.

9. Determining the Preliminary Issue

9.1 In the light of the conclusions set out in paragraph 8.2 and 8.5 above and the potential for the KEQMS site and undertaking to be used more effectively in conjunction with the Arnold School for a common purpose, the Tribunal sought to determine whether, in the particular circumstances applying at the date of the Scheme, the use proposed in the Scheme could be more effective having regard to the "*spirit of the gift*" as set out in paragraph 8.3 above and the prevailing social and economic circumstances including those set out in paragraph 8.4 above.

9.2 The Tribunal noted that the Appellants, The Trustee and UCST all accepted that the quality of educational services provided by KEQMS would suffer if pupil numbers fell below a certain minimum number. The parties also all accepted that the total number of children being educated at the merged school was unlikely to exceed that at the two individual schools added together. However, there was disagreement over whether an increase in the number of pupils at the KEQMS premises up the maximum permissible would adversely affect the quality of the education being received by pupils at the site.

9.3 The Tribunal took account of all of the submissions, witness statements and evidence of the parties in coming to its conclusions as to the effectiveness of the use of the property that is the subject of the Scheme. The parties had different views as to which factors were relevant in reaching this conclusion as well as differences on the conclusion to be reached. The tribunal summarises its conclusion on the issues raised by the parties as follows:

9.3.1 Factors that make the use of the property that is affected by the Scheme more effective in meeting the relevant charitable purpose include the following:

- The assets of KEQMS, including the school buildings themselves would be put to more intensive use in the short and medium term.
- It was likely that the merged school would be able to provide a broader range of educational subjects and sporting activity.
- It was likely that there would be efficiencies of scale and economies for the merged school in providing an education, to a larger number of pupils from one location. This would include management and administration as well as technology and other infrastructure.
- The merged school was likely to be more economically successful in the short term and to survive thereby providing educational services for a longer period to more beneficiaries than if KEQMS were to continue alone.
- Following merger, it would be more likely that UCST's substantial resources could be brought to bear on problems affecting the merged school if it were to face further difficulties.
- A greater proportion of the investment assets of the Charity could be applied for the broader charitable purposes of the Charity. KEQMS should be able to operate with less need of support from the Charity's investment income or capital.
- The capital value of the Arnold School site could be applied for the furtherance of the charitable purposes of UCST, which might include support for the merged school.

9.3.2 Factors that make the use of the property that is affected by the Scheme less effective in meeting the relevant charitable purpose include the following:

- There would be a reduced choice in terms of the style, ethos and method of delivery of secondary education in the Fylde region as result of the merger, given the evidence that the Tribunal heard about the different approaches and teaching styles of KEQMS and the Arnold School.
- There would be a reduced commitment to the Lytham St Annes area as a result of the merged school being operated by a national charity with a focus on national objectives and a national pupil base. The Tribunal accepts that UCST intends to ensure the success of the merged school and the continuing provision of high-quality fee-paying education in the area. However, it is possible that, were the merged school to cease to be successful at any point, UCST would be able to pursue other activities in other locations, whereas TLS would be solely focused on the provision of education in the Lytham St Annes area.
- The creation, whether intentional or not, of financial incentives to find alternative and more valuable uses of the KEQMS site that arose as a result of the terms of the Scheme and of the Transfer and Lease.

9.3.3 Factors that the Tribunal concluded were neutral in assessing whether the use of the property that is affected by the Scheme will be more effective in meeting the relevant charitable purpose include the following.

- The provision of education outside of the merged school to the poor or less well-off children of Lytham St Annes. A merger could have the effect of making more resources available to pursue this objective, however the terms of the Scheme risks limiting the ability of the Charity to pursue such activities and the Tribunal was not provided with any clear evidence that the Charity or UCST intended to take advantage of this opportunity.
- Access by those of limited means to the merged school. Whilst the intentions of UCST and the Charity to increase access on a means-tested basis to the merged school was clearly stated at the hearing, it was not apparent from the evidence that the commitment to make available places to those who could not otherwise afford to pay for the school would be

greater after the Scheme had permitted the merger of the schools than it was prior to the Scheme being made.

- 9.4** In reaching the conclusions set out in this paragraph, the Tribunal is aware that it is making a judgement on the likely effect of the implementation of the Scheme by the Charity and is not solely drawing its conclusions from the new objects of the Charity. The Commission expressed its concerns on this approach and the Tribunal heard arguments from the parties on this issue. The Tribunal concludes that the test set out in s.13(1)(c) with regard to the effectiveness of the use of the property of a charity must involve considerations that are wider than just the drafting of the objects. S. 13(1)(c) refers specifically to the *use* of the property and therefore the existing and potential future use must be considered by the Commission and by the Tribunal in coming to a view on whether the circumstances in s. 13(1)(c) apply in relation to a particular scheme.
- 9.5** The overall conclusion of the Tribunal is that, on balance, the factors that would cause the property of TLS and UCST affected by the Scheme to be more effectively used in conjunction, regard being had to the “*appropriate considerations*”, outweigh the factors that would cause such use to be less effective.
- 9.6** However, the Tribunal was concerned that the terms of the Scheme have created unnecessary, and possibly unintended, risks and restrictions that reduce the likelihood of the property of the Charity being applied more effectively in achieving its charitable purpose.

10. The Terms of the Scheme

- 10.1** The Tribunal noted the understandable concern of Appellants at the manner in which the merger was announced and pursued. The concern of UCST, TLS and the Commission about the effect of protracted uncertainty over the future of a school was understandable. The effect of a sudden announcement of a radical change to a school that was trusted by parents and which may have been chosen for its specific educational qualities also needed to be taken into account in considering an effective process making a scheme. However, the Tribunal does not regard the process by which the trustees of TLS negotiated and agreed to the terms of the Transfer and Lease and sought the Scheme from the Commission as relevant to its decision on the Preliminary Issue or on the Appeal generally.
- 10.2** The Tribunal did, however, have regard the manner in which the Commission chose to implement the Scheme. The Tribunal has reached a different conclusion on some issues to those expressed in the Decision Review carried out by the Commission when taking account of representations and consultation with interested parties and deciding the terms of the Scheme. The Decision Review by the Head of Operations, Wales at the Commission noted that 120 representations had been received by the Commission and all but two of them objected to the merger and to the proposed scheme. The Decision Review stated, “there was great concern about the lack of consultation with parents and other stakeholders regarding the proposed merger”. The Decision Review went on to say that the majority of the representations asserted that there was no need for a scheme to change the existing charity because the school could have a viable economic future on its own. The Decision Review went on to apply “the legal test”. In applying the terms of s. 13(1)(c) the reviewer stated that he considered that the “spirit of the gift” that was relevant to the charitable property that is the subject of the Scheme was “the carrying on of a successful school”. The Review also stated, in coming to a conclusion on the application of s. 13(1)(c), that the Decision Reviewer agreed with the Trustees conclusion that a merger represents the best prospects of securing a

successful school. The context in which this was written led the Tribunal to be concerned that the reviewer was referring to success in terms of the economic and financial viability of KEQMS. Viability also the main focus of the representations from the parties at the time of the Decision Review and of the Appellants, the Trustee and UCST in their responses to the Appeal. The Tribunal also noted that the Decision Review took too narrow a view of the social and economic circumstances that were relevant to the decision and focused on the economic position of KEQMS and the immediate financial issues that it faced. The Decision Review fails to take due account of the need for the Charity to be more effective in advancing education for the public benefit, rather than looking at the success in financial terms of KEQMS. It also fails to take account of the underlying financial strength of TLS and the use to which its overall property and assets are to be put and underestimates the significance of the intention to assist poor children in the Lytham area when having regard to the ‘spirit of the gift’.

- 10.3** The Tribunal is concerned that these misunderstanding by the Commission on certain aspects of s. 13(1)(c) led to the Scheme placing too much emphasis on the need for the Charity to provide support to the merged school that is to be run by UCST and created some avoidable risks or obstacles to the effective use of the property in achieving the Charity’s purpose. The Tribunal accepts the view of the Appellants that the terms of the Lease create an unnecessary risk of conflict with the objects of the Charity. For example, the premises of the KEQMS could be used for purposes other than the provision of a school that will benefit local residents and UCST could be in a position to gain a financial advantage from some changes of use.
- 10.4** The Tribunal concludes that a modified Scheme could provide more effectively for the Charity property to be used for the public benefit in providing education in or near Lytham St. Annes.

11. The Decision of the Tribunal

The Tribunal’s decision in relation to the Preliminary Issue is that the circumstances provided for in s. 13(1) (c) of the Charities Act 1993 did exist at the time that the Scheme was established by the Commission. However, the Tribunal finds that the terms of the Scheme and the manner in which the Charity and UCST had already agreed to implement it creates an unnecessary risk that such effective use may be jeopardised or lost.

12. Next Steps and Directions

12.1 The Tribunal has decided the Preliminary Issue. In order to determine the Appeal in a timely and cost effective manner, the Tribunal hereby issues the following directions:

12.2 The Tribunal proposes to exercise its power, pursuant to Schedule 1(c) of the Charities Act 1993, to substitute for part of the order an order which could have been made by the Commission when implementing the Scheme. The Tribunal now invites all parties’ written representations and submissions in respect of the proposed substitutions to the Scheme that the Tribunal has set out in the Appendix to this decision. Such representations and submissions shall be submitted within fourteen days of the date of this decision. The Tribunal has proposed these amendments in an attempt to ensure the swift and cost effective resolution of this Appeal. The proposals from the Tribunal may be revised, withdrawn or

extended by the Tribunal on its own initiative as well as in response to any representations or submissions by the parties. This draft reflects the Tribunal's current view as to the substitutions that may increase the prospects for the property of the Charity to be put to more effective use in conjunction with the goodwill and assets (other than the site) of the Arnold School.

12.3 The Tribunal notes the proposal to amend the terms of the Lease that the Trustee and UCST have circulated to the Appellants, the Commission and the Tribunal since the conclusion of the preliminary hearing. The Tribunal regards this initiative as helpful and, mindful both of the limits on its jurisdiction and of its obligations pursuant to Rules 2 and 3 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 to ensure flexibility and to facilitate the use of alternative procedures in dealing with an appeal, the Tribunal invites the written representations of the Appellants and the Commission on the proposed amendments to the terms of the Lease that were circulated on the 20th April 2012 within fourteen days of the date of this decision.

12.4 The Appellants shall notify the Tribunal and the other parties within fourteen days of the date of this Decision of any matters or issues, over and above the terms of the Scheme and the terms of the Lease, that were raised in the grounds of Appeal and which the Appellants believe that the Tribunal needs to resolve in order to finally determine this Appeal.

Signed:

**Peter Hinchliffe
Tribunal Judge**

Dated: 17 May 2012