



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (Charity)**

Case No. CA/2011/0007

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: 26th July 2012 (Determined on the papers with the consent of the parties)

Date of decision: 31 August 2012

By

Peter Hinchliffe (Tribunal Judge)

A'isha Khan (Member)

Manu Duggal (Member)

Subject matter: Appeal against the decision of the First Respondents to order 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

The Tribunal finds that the circumstances set out in sub-section 13(1)(c) of the Charities Act 2006 (now s. 62 (c) of the Charities Act 2011) existed in respect of the property of The Lytham Schools and King Edward VII and Queen Mary School Prize Fund at the time that the Scheme of 11th November

was ordered. The Tribunal also finds that the terms of such Scheme created unnecessary risks and restrictions with regard to the effective use of the property of the Charity. The Tribunal decided to exercise its power under Schedule 6 of the Charities Act 2011 to substitute the order set out in the Annex to this Decision for the order of the Commission that effected the Scheme.

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. Annes 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 (now s.70 (8) of the Charities Act 2011), 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. The Trustee is a company limited by guarantee. The Tribunal was informed that many of its directors are ex-trustees of TLS.

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. Annes 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. Annes.”

TLS has since its inception provided funds for the education of children in or around Lytham St. Annes 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 had 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”). These agreements made it possible for KEQMS and the Arnold School to be merged and to operate from the site of KEQMS. 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 Powers of the Tribunal

2.1 The powers of the Tribunal in relation to this Appeal are derived from the entry in the table in Schedule 6 to the Charities Act 2011 in respect of an “order made by the Commission under s.69 (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.”

2.2 Under s. 319 (4) of the Charities Act 2011 the Tribunal is required to consider afresh the decision appealed against and may take into account evidence which was not available to the Commission.

2.3 The Tribunal’s power to amend the terms of the Lease and Transfer that had been agreed by the Trustee and UCST was the subject of submissions by the parties. UCST stated that; *“the Tribunal does not have the power to amend the Scheme in the way sought by the Appellants, namely, to amend the Scheme in order to engineer amendments to the terms of the Lease or the Transfer Agreement”*.

The Commission asserted that;

“any further modification to the Scheme by the Tribunal should be made if, and only to the extent that, the modification would give greater effect to (any of) the matters set out in section 67 (3).”

The Tribunal has considered the arguments of the parties. The Tribunal relies upon its authority as set out in para 2.1 above in exercising its powers to add terms to, or substitute terms in, the Scheme. However the Tribunal remains of the view expressed in the Decision on a Preliminary Matter dated 17th May 2012, that it will only seek to amend the Scheme to the extent required to secure the effective use of the property of TLS or the Charity for charitable purposes taking account of sections 61, 62 and 67 of the Charities Act 2011. The Tribunal takes the view that its authority in this respect cannot be restricted or constrained by the terms of any contract in to which TLS or the Charity has entered into in reliance upon the Scheme ordered by the Commission, which is the subject of an appeal to the Tribunal.

2.4 In the specific circumstances of this case, the Tribunal found the submission of the Commission in relation to its own powers and best regulatory practice in applying these powers to be persuasive. The Commission stated that it is required under section 16 of the Charities Act 2011 to ensure that its regulatory activities are proportionate and targeted only at cases where action is needed and that under section 20 (2) of the Charities Act 2011 the Commission is not authorised to exercise functions corresponding to those of a charity trustee. The Tribunal has been invited by the Appellants and to a lesser extent, the Trustee and UCST

to comment upon or pass judgment on a wide variety of issues that arise from or relate to the operation and management of the Charity and the merged school in considering the preliminary issue and the outstanding issues. The Tribunal has already recorded its view that neither it, nor the Commission, are required to ensure that charity property is put to the most effective use by means of a cy-près scheme; it is sufficient that the property can be put to more effective use. The Tribunal concludes that it should only require additions or substitutions to the Scheme in so far as these are necessary or prudent in order to secure the more effective use of the property that is the subject of the Scheme for charitable purposes taking account of sections 61, 62 and 67 of the Charities Act 2011 and these are a proportionate means of securing such use. It was within the power of the Tribunal to make provision for the good governance of the Charity and to interfere with the contractual rights and obligations of the charities that are subject to the Scheme to the extent that this is necessary and proportionate.

- 2.5** UCST pointed to the duty on the Tribunal to take account of human rights legislation and in particular, referred to Article 1 of the First Protocol to the European Convention on Human Rights and the case of *Marckx v Belgium* A31 (1979), 2 EHRR 330. UCST expressed concern that its property rights may be breached if its property rights under the Lease were to be lost or amended to its disadvantage by a decision of the Tribunal. The Tribunal has taken account of the parties' human rights in determining this Appeal. The Tribunal notes that Article 1 rights to the peaceful enjoyment of property are qualified by reference to the "*the public interest and subject to the conditions provided by law and by the general principles of international law*". The Tribunal regards the proper application of charity law in determining this Appeal as a legitimate basis for interfering with the peaceful enjoyment of the property that is the subject of the cy-près scheme, to the extent that this is required.

3. The Preliminary Issue

- 3.1** The Commission has statutory powers pursuant to sections 62 and 69 of the Charities Act 2011 ("the Act"). Section 69 of the Act permits the Commission to establish a scheme for the administration of a charity. Section 62 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 s. 13(1) (c) of the Charities Act 1993 (now sub-section 62 (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 Charities Act 1993 (now s. 69 of the Act).
- 3.2** Sections 13(1), 13(1A) and 13(2) of the Charities Act 1993 (now sections 62 (1) to (3) of the Charities Act 2011) 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.

- 3.3** The position of the four parties to the Appeal on the preliminary issue in the Appeal are summarised at paragraphs 4-8 of the Tribunal’s Decision on a Preliminary Matter dated 17 May 2012 and are not repeated here.
- 3.4** The preliminary hearing was held on 11th and 12th April 2012 to determine the Preliminary Issue. The Tribunal found that that circumstances set out in sub-section 13(1)(c) of the Charities Act 1993 existed in respect of the property of The Lytham Schools at the time that the Scheme of 11th November was ordered. The Tribunal also found that the terms of such Scheme created unnecessary risks and restrictions with regard to the effective use of the property of the Charity. The full decision of the Tribunal is set out in the Decision on a Preliminary Matter dated 17 May 2012.

4. The Terms of the Scheme

- 4.1** The Tribunal is concerned that the misinterpretation by the Commission of certain aspects of s. 13(1)(c) of the Charities Act 1993 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.
- 4.1** 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.

- 4.2 The Tribunal proposes to exercise its power, pursuant to Schedule 6 of the Charities Act 2011, to substitute for part of the order an order which could have been made by the Commission when implementing the Scheme. The Tribunal invited the written representations and submissions of the parties in respect of the proposed substitutions to the Scheme that the Tribunal set out in the Appendix to the Decision on a Preliminary Matter dated 17 May 2012 (the “Proposed Scheme”).
- 4.3 The Tribunal noted the proposal to amend the terms of the Lease that the Trustee and UCST circulated on 20th April 2012, after the conclusion of the preliminary hearing, to the Appellants. The Tribunal regarded 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 invited the written representations of the Appellants and the Commission on these proposed amendments to the terms of the Lease.
- 4.4 The Appellants were directed to notify the Tribunal and the other parties 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.

5 The Outstanding Issues in the Appeal – Agreed Changes to the Scheme and the Transfer

- 5.1 The Appellants raised a large number of issues in their final submission in this Appeal. The Appellants referred to the first ground of the Appeal, in which they argued that the term of the Lease is excessive and the Lease terms were insufficiently detailed to safeguard the essential interest of TLS. The Appellants also raised additional issues in respect of the seventh and eighth grounds of the Appeal. These dealt with the governance of the merged school and the Charity. The Appellants expressed the view that as; *“the Tribunal does not have the power to order amendments to the Lease itself the Scheme as amended by the Tribunal should specify the conditions that a Lease of the Lytham School must satisfy”*. On this basis the Appellants submitted a response to the Proposed Scheme. This response to the Proposed Scheme set out those amendments that had been agreed by all of the parties to the Appeal and those additional provisions or amendments that the Appellants wished the Tribunal to make when substituting a new Order. This included an 11 page addendum amending the terms of the Lease.
- 5.2 Each of the Respondents made submissions in response to the Appellants’ final submission. The Tribunal reviewed all of these submissions and noted that the Appellants and each of the Respondents had agreed to the terms set out in the Proposed Scheme and to a number of amendments that incorporated references to the Charities Act 2011 in place of references to earlier charities legislation that has been consolidated into the Charities Act 2011.
- 5.3 The Tribunal was informed that each of the parties had agreed that Clause 6.2 of the Transfer was to be deleted. The Tribunal relies upon the assurance of the solicitors representing the Trustee and the UCST that this provision, (which provided for a review after five years by the Trustee and UCST of the arrangements between them and of the operation of the school resulting from the merger of KEQMS and the Arnold School,) will cease to have effect.

6 The Outstanding Issues in the Appeal

- 6.1** The Tribunal reached the following conclusions on the outstanding issues that were raised by the Appellants in the form of proposed amendments to the Scheme and which were not accepted by one or more of the Respondents:
- 6.2** The Tribunal finds that the proposed amendments to the Scheme that have the effect of requiring that the school operated on the property that is the subject of the Lease (the “School”) must be an independent school financed out of fees, gifts and investment returns are contrary to the spirit of the gift and are likely to inhibit the more effective use of the property of the Charity in the longer term. The Tribunal concluded in its Decision on a Preliminary Matter dated 17 May 2012 that the spirit of the gift of TLS is the provision of education for the poor children of Lytham. Whilst KEQMS has been operated as an independent school, the trustees of the Charity should not be constrained by the terms of the Scheme from advancing the objects of the Charity through a different form of School if that is a more effective use of the Charity’s property at any time.
- 6.3** The Tribunal finds that the proposed amendments to the Scheme that have the effect of requiring that the grants, award, prizes and donations provided by the Charity for the benefit of pupils of the School be limited to those pupils resident in or near Lytham St Annes are unnecessary in the light of the revised objects of the charity set out in the Proposed Scheme. These revised objects achieve the same purpose and have been agreed by the parties.
- 6.4** The Tribunal finds that the proposed amendments to the Scheme that have the effect of requiring that the rent payable under the Lease be on commercial open market terms are unnecessary in terms of securing the effective use of the property of the Charity. The revisions already proposed and agreed by the parties at paragraphs 4 and 8 of the Proposed Scheme provide for the property to be applied in a manner that directly furthers the objects of the charity. It is not necessary for the Lease to be on commercial terms in these circumstances.
- 6.5** The Tribunal finds that the proposed amendments to the Scheme that have the effect of reducing the term of the Lease to 125 years and provide for the Lease to be terminated by the Charity in certain circumstances where the use of the property has changed, are not necessary to secure the most effective use of the property of the Charity. The Proposed Scheme states, at paragraph 8 (2), that the Lease terms must “permit and require such land to be occupied for use as a school that will further the object of the Charity”. The Tribunal believes that this term provides sufficient protection and clarity to prevent the property that is the subject of the Lease being used by UCST for purposes that are inconsistent with the furtherance of the Charity’s objects. It is the responsibility of the Trustee to ensure that the terms of the Lease reflect this provision. The Tribunal has been informed by the representatives of the Trustee and UCST that the term of the Lease will be reduced from 999 to 150 years. The Appellants state that UCST may extend the duration by a further 150 years on the same terms at their discretion. The Tribunal is not clear what benefit the Trustee is achieving by granting an option to UCST to extend the Lease for a further 150 years after the first 150 years has expired, however the Tribunal finds that this is a matter for the Trustee to decide as part of its management of the overall property of the Charity. The Tribunal relies upon the assurances of the representatives of the Trustee and UCST that the lease will be surrendered and re-granted with the reduced term. The Tribunal took the view in deciding the Preliminary Matter that the Scheme needed to provide for the use of the property that is the subject of the Lease for

purposes that further the charitable objects of the Charity. Where this is the case, the terms of the Lease and Transfer need to be such that more effective use is made of the School premises and the Charity's ability to devote a larger proportion of its funds and income to achieving its objects by means and activities other than operating the School, or providing the premises for the School, is enhanced. By these means, the overall property of the Charity would be put to more effective use.

- 6.6** The Tribunal finds that the proposed amendments to the Scheme that have the effect of inserting additional terms, on a commercial basis, in respect of repair, insurance and alterations should not be included in the Scheme as these are matters for the Trustee to decide as part of its management of the overall property of the Charity.
- 6.7** The Tribunal finds that the proposed amendments to the Scheme that have the effect of requiring the School to be operated in a particular way and in accordance with a particular ethos should not be included in the Scheme as these are not necessary in order to ensure that the property of TLS or the Charity is put to more effective use. The precise form of education provided within or by the School is a matter for the Trustee to decide from time to time. Permitting the Trustee to exercise its judgement on these issues will permit the form of education offered in the School to evolve and develop over time in order to meet changing needs and social and economic circumstances. Amongst the circumstances that the Trustee will need to take account of will be the educational needs of the current and future pupils of the School resident in or near Lytham St Annes.
- 6.8** The Tribunal finds that the proposed amendments to the Scheme that have the effect of ensuring that any surplus revenue arising from the operation of the school can only be applied for the benefit of the School are not necessary for the more effective use of the property of the Charity. If the School can be successfully operated and provide education of a high standard at a materially lower cost to the Charity than KEQMS would have been to TLS, then the Scheme will have enhanced the Charity's ability to devote a much larger proportion of its funds and income to achieving its objects by means and activities other than operating the School or providing the premises for the School. In such circumstances it is not necessary to restrict the ability of UCST to apply any surplus revenue toward its other educational activities. The Trustee will, of course, have to ensure that it is in a position to ensure that UCST is not depriving the School of adequate funding.
- 6.9** The Tribunal finds that the proposed amendments to the Scheme that have the effect of giving the Charity control over the disbursement of the funds that it provides to the School in order to award bursaries or other financial assistance raise a legitimate concern. The revised terms of the Scheme require the Trustee to ensure that such funds are expended in accordance with the objects of the Charity. The Tribunal takes the view that it is not necessary for the Trustee to retain full control of all decisions on how these funds are applied in order to assist individuals. However, it would not be appropriate for the Trustee to agree to a long term arrangement to hand over such funds to a third party, such as UCST, for disbursement without ensuring that the funds will be applied in furtherance of the objects of the Charity. This is likely to require consideration of whether such funds can be reclaimed and/or further disbursement cease if the conditions attached to the disbursement are not met. The Tribunal regards this as implicit in the terms of the revised Scheme and is content to remind the Trustee of their continuing duty in this regard and the need to ensure that its contractual arrangements with UCST are adequate in this respect.

- 6.10** The Tribunal finds that the proposed amendments to the Scheme that have the effect of imposing requirement for the governance of the School raise a legitimate concern. However, the Tribunal does not accept that it is necessary or desirable for the Scheme to impose detailed requirements for the governance of the School as this is not essential to secure the more effective use of the property that is the subject of the Scheme and may be a disproportionate use of the Tribunal's powers. The Scheme requires that the Lease must permit and require that the land is used as a school that will further the objects of the TLS. It is not essential that this School should be governed or managed in a particular manner in order to ensure that it is being used to further the charitable purposes of the Charity. However, the Tribunal recognised that the property that is the subject of the Lease represents an important part of the assets of the Charity and that its effective use is important to the Charity's ability to achieve its charitable purpose. The Tribunal also took account of good practice in operating a charity and running a school and considered the Appellants' concern that the Trustee and their successors and the beneficiaries and potential beneficiaries of the Charity were precluded from any say in or influence over the manner in which the School is to be operated. The beneficiaries of the Charity are likely to include, but not be limited to, the pupils and the families of the pupils being educated at the School at any time. It is good practice for charity trustees to take account of the interest of beneficiaries of a charity and in some circumstances to arrange for their views and interest to be represented within the decision making process of a charity. The Tribunal notes that the Scheme does not make any reference to the manner in which the School should be run or indicate that any responsibility lies with the Trustee to ensure that they are monitoring the effective use of the Charity's property or that the interests of the beneficiaries are being protected as decisions are made about the School. The Tribunal therefore proposes to add an additional provision to the Scheme that will seek to address this omission.
- 6.11** The Constitution of the Lytham Schools Foundation was identified in the Appeal as a cause for concern. In their final submissions the Appellants proposed that the Tribunal remit this case to the Commission with direction that it provides advice to the directors of the Trustee as to what it considers to be the best interest of the Charity. However, the Appellants acknowledge that; *"resolving the constitution of the Lytham Schools Foundation is not a factor which would give rise to any continuing uncertainty in respect of the merged school."* The Appellants repeat that the Commission is best placed to resolve the problems that the Appellants identify around the lack of representation on the board of the Trustee and the unclear responsibility of the Trustee. The Commission stated in its submission that its current practice is to prefer flexible arrangements that enable charities to obtain the expertise that they need from time to time and points out that the Trustee has various powers to enable it to change its governance provisions. The Tribunal considered this issue and the submission of each of the parties and noted that there seemed to be a general acknowledgment that the present position needs to be improved. The Trustee stated that it; *"is still considering how best to structure its governance arrangements, to be reflected in new articles of association. These will of course include provisions governing how the directors of the corporate trustee are appointed."* The Trustee said that it will take on board the Appellants view, as well as the Charity Commission's guidance but that it needs more time. The Tribunal does not regard it as necessary to provide in the Scheme for the constitution of either the Charity or its corporate trustee to take a particular form. Nor does it find that it is necessary to remit the whole Scheme to the Commission in order to resolve this issue. However, it notes that it would be good practice for the Trustee to put in place a system of governance that reflects the requirement to have particular skills and expertise available to the Trustee, as the Appellants have always

argued, and to permit the representation of a range of views that exist amongst supporters of the School and present and potential beneficiaries of the Charity. Any improvement in representation in this respect may assist in addressing the concern identified in para 6.10 above and the Tribunal therefore proposes to address this issue in an additional provision to the Scheme.

7 Additions and Substitutions to the Terms of the Scheme

7.1 In the light of the conclusions set out in paragraphs 6.10 and 6.11 above the Tribunal proposes to make a further addition to the terms of the Proposed Scheme. This addition is to insert a new paragraph 6 (3) in the Scheme in the following terms:

- (3) *The Trustee shall at all times take necessary steps to ensure that:*
- (a) *The property of the charity is being utilised effectively and in accordance with the objects of the charity for the benefit of the public;*
 - (b) *It is independent and recognises that it exists to pursue its own purposes and not to carry out the policies or directions of any other body and that it retains adequate control or supervision over the property of the charity;*
 - (c) *Its board has the appropriate mix of skills, knowledge and experience necessary for the efficient and effective administration of the charity and that the recruitment and appointment of new board members provides adequate opportunities for re-assessing and achieving that mix;*
 - (d) *it has adequate systems and procedures in place to enable it to receive and respond to the views of supporters, funders, beneficiaries, potential beneficiaries and others with a legitimate interest in the charity's work. "*

8. The Decision of the Tribunal

Having considered all of the arguments and evidence submitted by the parties to the Appeal, the Tribunal's decision is that an occasion for applying property cy-près existed 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 created an unnecessary risk that such effective use may be jeopardised or lost. In order to remove this unnecessary risk the Tribunal hereby exercises its power under Schedule 6 of the Charities Act 2011 to substitute the order set out in the Annex to this Decision for the order of the Commission dated 11th November 2011 effecting the Scheme.

Signed:

**Peter Hinchliffe
Tribunal Judge**