



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

Appeal Nos. CA/2013/0006, CA/2013/0007 and CA/2013/0008

(1) JACK SPARROW

First Appellant

(2) ROSEMARY CARNE

Second Appellant

(3) NIGEL WEPSER

Third Appellant

- and -

THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondent

THE TRUSTEES OF THE BATH RECREATION GROUND

Second Respondent

Heard at: Bath Magistrates Court

Date of hearing: 13th, 14th and 16th January 2014 (sitting in public)

Date of decision: 27th March 2014

Attendances:

The Appellants represented themselves

For the First Respondent: Kenneth Dibble of the Commission

For the Second Respondent: Francesca Quint

By

Peter Hinchliffe (Tribunal Judge)

Susan Elizabeth (Member)

Carole Park (Member)

Cases referred to

C J W Laing Stewards and Attorney General [1984] 1 All ER 50

Varsani and Jesani [1999] CH 219

Oldham BC and Attorney General [1993] 2 All ER

Subject matter: appeal against the Decision of the First Respondents to establish a Scheme on 12th June 2013 to govern the Recreation Ground, Bath (charity ref: 1094519)

DECISION

The Appeals are allowed in part and the Scheme is to be amended.

REASONS FOR THE DECISION

Background to the Appeal

1. The First Respondent ("the Commission") established a scheme in respect of the Charity known as The Recreation Ground, Bath, ("the Charity"). The scheme was established using the Commission's power under Section 69 of the Charities Act 2011 ("the Act").
2. The Charity owns and manages a recreation ground in the centre of Bath (the "Recreation Ground"). On 1st February 1956 the Recreation Ground was acquired by the Mayor Alderman and Citizens of the City of Bath from the Bath and County Recreation Ground Company Ltd and was held by them on trust under the terms on which the Recreation Ground was conveyed (the "1956 Conveyance").
3. On 31st July 2002 the High Court determined that the Recreation Ground was and had been held on charitable trust and that the trustee, Bath and North East Somerset Council ("BANES"), as successors to the Mayor Alderman and Citizens of the City of Bath, was charged with maintaining the Recreation Ground as a "*recreational facility available for the benefit of the public at large*". The trust was entered on the register of charities in November 2002.
4. The decision of the High Court resolved a long standing uncertainty about the status of the trust under which the Recreation Ground was held by BANES. The outcome was not expected and it created considerable difficulties for the Charity and for BANES in its capacity as the then trustee. The extent to which BANES had been aware of the charitable status of the Recreation Ground or their own duties as trustees of the Charity during the period from 1956 to 2002 is in dispute and, to the extent that it is relevant to these Appeals, this is considered in more detail below.

Prior to the Decision of the High Court two significant developments had occurred with regard to the use of the Recreation Ground:

- About 1974, an indoor sports and leisure centre and car park (the "Leisure Centre") was built by BANES in its capacity as local authority on the Recreation Ground, amounting to around 11,120 sq. m. in total. This construction took place despite the terms of the trust created by the 1956 Conveyance requiring BANES to "*not use the Recreation Ground otherwise than as an open space*".
- A 75 year lease dated 23rd May 1995 was granted to The Trustees of the Bath Football Club of about 14,907 sq. m. of the Recreation Ground (the "1995 Lease"). The 1995 Lease replaced an earlier lease and permitted part of the Recreation Ground to be used and occupied by the Bath Football Club as a rugby stadium and pitch. The terms of the trust created by the 1956 Conveyance not only required the land to be used for recreation purposes and preserved as an open space but also required that one sport should not be preferred over another. As the 1995 Lease only granted Bath Football Club the right to provide seating accommodation on three sides of the rugby pitch included in the lease, the Charity has made additional land available each year for the temporary provision of seating on the fourth side of the stadium (the "East Stand").

5. Following the decision of the High Court in 2002 that BANES held the Recreation Ground under a charitable trust, the Commission intervened. It opened a statutory inquiry that ran from October 2002 to March 2007. On 26th June 2003 the Commission appointed receivers and managers in respect of all affairs of the Charity. Negotiations took place between the receivers and managers and BANES, who continued to act as trustee of the Charity, regarding the future of the Leisure Centre. No resolution had been achieved by the time that the Commission closed the statutory inquiry and the receivers and managers handed responsibility for the management of the Charity back to BANES as the trustee. BANES subsequently undertook a strategic review of the options for the Charity, which included a review of the use of charity land by Bath Rugby Ltd ("Bath Rugby"), the successors to Bath Football Club, which had by this time become one of the premier professional rugby clubs in Europe.
6. In November 2012 the Commission published a draft scheme in respect of the Charity. The Commission proposed to use its powers under the Charities Act 2011 to amend the governance, powers and purposes of the Charity, where appropriate, in order to permit a resolution to be found to the problem of the occupation of the Recreation Ground by the Leisure Centre and by Bath Rugby under the 1995 Lease.
7. After a period of consultation that attracted a large response from interested parties, and a review of the draft scheme by Mr Neil Robertson, a senior and experienced member of staff at the Commission, the Scheme was revised and formally made on 12th June 2013 ("the Scheme"). The Scheme contains provisions that amend the purposes of the Charity on a cy-pres basis and amend the administrative powers and

governance of the Charity. The Scheme is intended to provide the means by which the Charity could resolve the difficulties over the use of the Recreation Ground site and pursue its objects in the longer term.

8. On the 20th July 2013 the First Respondent, Mr Jack Sparrow, submitted an appeal against the decision of the Commission to make the Scheme. On 23rd July 2013 both the Second Appellant, Ms Rosemary Carne, and Mr Nigel Websper, the Third Appellant, submitted appeals. All three of the Appellants are beneficiaries of the Charity by virtue of being local residents living close to the vicinity of the Recreation Ground. They have a long standing interest in the Charity. Mr Websper is Chairman of the Pulteney Estates Residents Association, who have around 300 households in their membership who border on or who are in close proximity to the Recreation Ground and who are affected by the activities that take place there.
9. Further appeals were received against the decision of the Commission to make the Scheme, which were out of time. Submissions were made by other parties either to be joined to the appeals or to be able to make representations in the appeals. The Commission sought to join additional parties as defendants to the appeals. The Tribunal considered these additional applications and submissions at a Directions Hearing held at Bristol Magistrates Court on 7th October 2013. The Directions of the Tribunal were issued on 14th October 2013. In summary, the Tribunal directed that:
 - The appeals brought by Mr Sparrow, Ms Carne and Mr Websper (the Appeals”) were to be heard together.
 - The application by the present trustees of the Charity, (those appointed under the terms of the Scheme), to be joined as party to the Appeals was accepted and the trustees (the “Trustees”) were joined as Second Respondents.
 - The application by the Commission to join BANES as a party was rejected.
 - Mr David Taylor, who had submitted an appeal that was outside of the time limit for appeals, Bath Rugby and The Real Friends of the Rec., who had both sought to make submission in the Appeals, were permitted to make submissions.
 - The directions also asked the parties to prepare an agreed List of Issues for the Tribunal to determine.

Agreed List of Issues to be Determined by the Tribunal

10. The parties to the appeals agreed the following list of issues to be determined by the Tribunal in the course of the Appeals: -
 - (1) Was the Scheme properly made by the Commission? In particular, but not limited to:

- (a) Did the Commission have the power to make the Scheme under Section 69 of the Act?
 - (b) Did the Commission comply with the publication requirements set out in Section 88 of the Act?
 - (c) Did the Commission consider all of the relevant information when deciding to make the Scheme?
- (2) Was the Scheme justified? In particular but not limited to whether it should have been made when there had been no authoritative determination of the validity of the lease dated 23rd May 1995.
 - (3) Are the proposals in the Scheme to provide a framework for the resolution of the occupation of the part of the property under the lease dated 23rd May 1995 by Bath Rugby Club expedient and in the interests of the Charity?
 - (4) Was the power conferred in the Scheme to authorise the exchange of the land subject to the lease dated 23rd May 1995 necessary, appropriate and expedient in the interests of the Charity?
 - (5) Are the arrangements in the Scheme for the administration of the Leisure Centre justified (by reference to the cy-pres doctrine or more generally), necessary and appropriate in all the circumstances?
 - (6) Is the new trustee body in the Scheme independently and appropriately constituted to secure the best administration and management of the Charity going forward?
 - (7) Are there sufficient safeguards in the Scheme to protect the interests of the Charity going forward?
 - (8) Overall, is the Scheme the best that can be made in all the circumstances to secure the proper and effective administration of the Charity for the future?
11. Additional issues arose during the course of the hearing as a result of the submissions of the parties and these submissions and the evidence from the witnesses are referred to below where these are relevant to the outcome of the Appeals.

The Powers of the Tribunal

12. The powers of the Tribunal in relation to these Appeals are derived from the entry in the table in Schedule 6 to the Act in respect of an "order made by the Commission under Section 69(1) of this Act". The Tribunal may dismiss the Appeal. If it allows the Appeal, the Tribunal has the following power:

"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."*

13. Under Section 319(4) of the Act the Tribunal is required to consider afresh the decision or order appealed against and may take into account evidence which was not available to the Commission.

The Appeals

14. Mr Sparrow submitted a detailed appeal and provided supplementary representations and arguments. Whilst the list of issues set out at paragraph 2 above set out the main contentious areas, Mr Sparrow's appeal recorded his concern over a number of items that were relevant to the Scheme. In particular: -

- The occupation of the Charity land by the professional rugby club was illegal. The lease of land on the Recreation Ground to Bath Rugby under the 1995 Lease was unenforceable. The lease was invalid.
- That the rights of the citizens of Bath had been overlooked in the course of trying to resolve the future of the Charity.
- That the conveyance of the Recreation Ground in 1922 and 1956 had imposed terms that were relevant to the proper exercise by the Trustees of their duties in relation to the Charity.
- The change in the status of the tenant under the 1995 Lease from the amateur sport club, Bath Football Club, to a professional club, Bath Rugby, owned by commercial interests represented a fundamental change in the use of the Recreation Ground.
- The terms of the Scheme were intended to facilitate a swap by the Charity of land at the Recreation Ground for land presently occupied by Bath Rugby at Lambridge on the outskirts of Bath. Such a swap was unsuitable and inappropriate.

15. The appeal submitted by Ms Carne raised the concerns set out in the List of Issues set out above and in particular:

- Set out her arguments regarding the illegality of the 1995 Lease between the Charity and Bath Rugby.
- Sought the enforcement of the covenants set out in the 1922 conveyance of the land on which the Recreation Ground stands.

- Sought the transfer from BANES to the Charity of the income streams arising from the car parking on the Charity's land both in connection with the Leisure Centre and the Bath Rugby stadium to the Charity.
 - Sought the appointment of a new trustee board.
16. The appeal brought by Mr Websper raised the concerns set out in the List of Issues set out above and in particular:
- Challenged the legality of the 1995 Lease.
 - Sought the transfer of the parking fees arising from cars parked on the Charity's land in connection with the Leisure Centre and objected to the terms of the Scheme that would cause the Charity to lose access to the car parking fees generated from users of the Leisure Centre
 - Pointed to the failures in the publication of the draft Scheme by the Commission and the misleading information about the Scheme that was made available by BANES and the local paper and others favouring Bath Rugby's continued occupation of the Recreation Ground during the period of the Commission's consultation on the draft Scheme.
 - Expressed concern at the conflict of interest faced by Mr Neil Robertson in conducting a review of the draft Scheme and the process operated by Mr Robertson in seeking comments on, and holding meetings in order to obtain views on, the draft Scheme.
 - Argued that there was a clear conflict of interest in the manner in which BANES had managed the Charity.
 - Raised objections to the commercial interests based in off-shore jurisdictions that were in control of Bath Rugby and which would benefit from the continuing illegal occupation of the Charity's land if the Scheme was allowed to continue in its present form.
17. The Commission submitted a response to each of the Appeals and in each of the responses summarised the overall intention of the Scheme and emphasised that the Scheme was designed to provide a newly constituted board of trustees of the Charity with the power and the capability required to exercise their own judgement about the best way for the Charity to be managed and the changes that were required to address the problems over the use of the Charity's land. The Commission stated that it was not in a position to decide upon the validity of the 1995 Lease between the Charity and Bath Rugby and was concerned about the Charity's ability to bear the legal expenses associated with any challenge to the validity of such lease. The Commission set out the process that it had undertaken in order to properly effect the Scheme including the steps that it had taken to carry out a proper consultation before the Scheme was made. The Commission pointed to the substantial changes in the draft scheme that arose as a result of the consultation and its own review process.

The Commission sought to distinguish between the administrative powers that it had created for the Charity under the Scheme and the change to its objects, which it said were limited and in the best interest of the Charity. The Commission argued that it did not have the power to resolve the issues surrounding the occupation of the Recreation Ground by third parties. The Commission recognised that the occupation of the Recreation Ground by both Bath Rugby and by BANES, as the operator of the Leisure Centre, were in breach of trust and should not have been allowed by BANES as the trustee of the Charity. The Commission also emphasised the steps it had taken to improve the governance of the Charity under the terms of the Scheme.

18. The Trustees submitted a single response to all three of the Appeals. The Trustees supported the establishment of the Scheme in its present form and argued that it was in the best interest of the Charity that the Scheme be allowed to stand. The Trustees believed that the consultation carried out in respect of the Scheme supported the making of the Scheme in its present terms. They argued that the Trustees had been advised that the 1995 Lease with Bath Rugby was legally enforceable, having been granted in good faith and for valuable consideration at a time when neither BANES, as the then trustee of the Charity, nor the Commission believed that the Recreation Ground was subject to a charitable trust. The Trustees believed that the Leisure Centre had been built at a time when BANES had not believed that the Recreation Ground was subject to a charitable trust. They believed that the Scheme made suitable provision for the governance of the Charity and for the administration of the Charity. The Trustees recognised the need to resolve the issues that affect the Charity in connection with the construction and operation of the Leisure Centre and the grant of the 1995 Lease to Bath Rugby of the pitch and three sides of the rugby stadium and an annual grant of a short lease to Bath Rugby for the construction of the East Stand. They believed that the Scheme offered them the powers that were required in order resolve such issues.

Submissions from other Parties

19. In the Directions dated 14th October 2013 three further parties were permitted to make submissions in connection with these appeals. These parties all had an interest in the outcome of the Appeals and had either sought, or had been the subject of requests from the parties, to be admitted as parties to the appeal. The three parties are Bath Rugby, The Real Friends of the Rec. and Mr David Taylor on behalf of a group of interested parties and beneficiaries.
20. The submission from Bath Rugby accepted that the use of the Recreation Ground for elite rugby was not within the objects of the Charity and that the advancement of professional sport is not a recognised purpose in charity law. Bath Rugby welcomed the proposed Scheme to amend the trust of the Charity. They supported the creation of an independent board of trustees of the Charity who will be able to consider all options open to them for the stewardship and future direction of the Charity in the interest of the local community and all involved with the Recreation Ground. The Rugby Club confirmed its interest in the development of the recreational facilities at the Recreation Ground and its desire to assist in the encouragement of amateur sport

and in working for the benefit of the local community. It sought a constructive dialogue with the Trustees in order to resolve the issues relating to its occupation of a part of the site.

21. The Real Friends of the Rec. stated that they were a community based, membership association established to speak for the citizens of, and visitors to, the City of Bath who wish the Recreation Ground to continue to provide sporting facilities for the benefit of the city. The Real Friends of the Rec. stated that they had almost 5000 members and had helped secure the support of the citizens of, and visitors to, Bath for the development and improvement of the Recreation Ground. They recognised that the use of the Recreation Ground by Bath Rugby is not within the objects of the Charity. Nevertheless, they were strongly supportive of the continuing use of the land by Bath Rugby and were concerned that the Appeals should not ignore the advantages that the presence of Bath Rugby brought to the Charity and to the City and its residents. They pointed out the benefits of the land swap that would be facilitated by the terms of the Scheme whereby the Rugby Club would be granted additional rights to use the Recreation Ground in return for the offer to the Charity of the use of a site owned by Bath Rugby at Lambridge. The Real Friends of the Rec. argued that the Scheme would permit the Trustees to decide upon a basis upon which a wide range of sports can be provided at the Recreation Ground including the continuation of premier league rugby.
22. The submission from Mr Taylor pointed to the extensive failures in the operation of the Charity by BANES over a number of years and expressed strong concern that the Scheme was not adequate to address these failures. He and his supporters wished to achieve a position where elite rugby could be played on the Recreation Ground without excluding other sports such as cricket. He was particularly concerned at the approach that was being adopted to the selection of Trustees under the provisions of the Scheme and the dominant position of BANES in this process. Mr Taylor was concerned that the new Trustees should be free from conflicts of interest, contain all the necessary skills and experience necessary to enable the board to be strong and independent and to act in the best interest of the beneficiaries of the Charity. He argued that a properly run charity could use the Recreation Ground to provide good facilities for a number of sports, including but not limited, to rugby.

Matters not in Dispute

23. The range of factual and legal disagreements between the parties was extensive. There was considerable dispute between the parties over the historic facts that had led to the position where a scheme was thought to be desirable and over the implications of the Scheme and the practical steps that should not be taken to ensure the proper stewardship of the Charity's assets and the successful pursuit of its objects. Nevertheless, it became clear during the course of the Appeals that certain key issues were not in dispute by the parties and the Tribunal was grateful to each of the parties for their confirmation that the following matters of fact and law were accepted.

- The construction and operation of the Leisure Centre represented a breach of trust as the objects of the Charity did not permit the use of the Recreation Ground "otherwise than as an open space".
- The lease of the pitch and the land required in order to build and operate three stands on three sides of the Bath Rugby Club stadium under the 1995 Lease represented a breach of trust.
- The grant by the Charity of a right to Bath Rugby to erect the East Stand of the rugby stadium on a temporary basis was likely to be a breach of trust and had only been possible as the trustee had been authorised by the Charity Commission to grant this in each year since the High Court decision of 2002.
- The grant of the right to erect the East Stand is essential if Bath Rugby is to continue to meet the requirements placed on clubs seeking to play in the premier league of English Rugby.
- The Charity would benefit from the appointment of independent Trustees either alongside or in place of BANES.
- The ownership and professional status of Bath Rugby meant that it should now be regarded as a commercial business. Its predecessor had been an amateur and non-commercial club at the time of the grant of the lease in 1995.
- The Leisure Centre was being operated for the benefit of the residents of Bath and surrounding areas and provided a public benefit.

The Tribunal's Findings

The Objects of the Charity Prior to the Making of the Scheme

24. The judgement of Mr Justice Hart in the High Court in the case of Bath and Northeast Somerset Council v HM Attorney General [2002] EWCA 1623 (CH) dated 31st July 2002 confirmed that the Recreation Ground was held on trust by BANES as a charitable trust. The judge emphasised that the decision was a difficult one:

"the case struck me throughout the argument as poised uncertainly on the borderline between various of the difficult distinctions to which this branch of the law of charity has given rise".

Mr. Justice Hart indicated that he had been "*narrowly persuaded*" of the outcome. His conclusion was that:

"the dominant intention of the trusts, to which all the express provisions should be regarded as ancillary, was to provide a recreational facility for the public, and that, construed as such, the trust are valid charitable trusts".

The decision was based upon a finding that the conveyance of the Recreation Ground from its previous owners to the Mayor, Alderman and Citizens of the City of Bath

under the 1956 Conveyance had the effect of creating a trust and that this trust was charitable. The terms of the conveyance set out the objects of the charity. Mr Justice Hart recorded that the conveyance was in the following terms:

" TO HOLD the same unto the Corporation in fee simple upon trust that the Corporation for ever hereafter shall manage let or allow the use with or without charge of the whole or any part or parts thereof for the purpose of or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character and for no other purpose and shall maintain equip or lay out the same for or in connection with the purposes aforesaid as they shall think fit but so nevertheless that the Corporation shall not use the property hereby conveyed otherwise than as an open space and shall so manage let or allow the use of the property for the purposes aforesaid as shall secure its use principally for or in connection with the carrying on of games and sports of all kinds and will not show any undue preference to or in favour of any particular game or sport or any particular person, club body or organisation."

The Agreement for Sale dated 2nd January 1956 contained the following provisions which were relevant to the judge's decision in this case:

- "12. THE property will be conveyed to the Corporation upon trust that the Corporation for ever thereafter shall manage let or allow the use with or without charge of the whole or any part or parts thereof for the purpose of or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character and for no other purpose and shall maintain equip or lay out the same for or in connection with the purposes aforesaid as they shall think fit but subject nevertheless to the restrictions conditions and stipulations hereinafter contained.*
- 13. THE Corporation shall in the conveyance enter into the following covenants with the Company or their assigns.*
 - (1) THAT the Corporation will observe and perform the covenants and conditions contained in the said conveyance to the Company dated the 6th day of April 1922 so far as the same are still subsisting and capable of being enforced and will indemnify the Company and their assigns against any breach or non-observance thereof so far as aforesaid.*
 - (2) THAT the Corporation will observe and perform the restrictions covenants and stipulations specified in the Second Schedule hereto.*

THE SECOND SCHEDULE before referred to Restrictions conditions and stipulations.

The Corporation will not use the Recreation Ground otherwise than as an open space and will so manage let or allow the use of the ground for the purposes herein before mentioned as shall secure its use principally for or in connection with the carrying on of games and sports of all kinds and will not show any undue preference to or in favour of any particular game or sport or any particular person, club body or organisation".

25. Mr Justice Hart concluded from his review of this conveyance that:

“it was for some reason decided that the covenant contained in the Second Schedule should not be included as a covenant in the subsequent conveyance but that instead its wording should be tagged onto the wording of the trust”.

The judge went on to conclude that in order to arrive at his overall conclusion that the trusts are valid charitable trusts;

“it is necessary to read words into the conveyance such as “to maintain the same as a recreational facility for the benefit of the public at large”.

He expressly stated that such reading seemed to him permissible.

26. The Tribunal is bound to follow the decision of the High Court with regard to the charitable status of the Charity. The Tribunal considered this decision and the representations of the parties when considering the objects of the Charity. The Tribunal came to the conclusion that the objects of the Charity prior to the making of the Scheme were as set out in the 1956 Conveyance with the addition of the wording; *“to maintain the same as a recreational facility available for the benefit of the public at large”.*

27. The Tribunal concluded that it follows from the decision of the High Court that the covenants and conditions contained in the conveyance of the Recreation Ground dated 6th April 1922 are not part of the objects of the Charity. This is despite these covenants and condition being expressly referred to in paragraph 13(1) of the extract from the 2nd January 1956 Agreement for Sale set out above. This finding does not mean that those covenants and conditions are not enforceable in law. The covenants and conditions are to be interpreted and enforced as a matter of property law. This Decision will have no effect on the enforceability or otherwise of those covenants and conditions as a matter of property law. The Tribunal recognises that the Appellants have considerable difficulties in accepting that the covenants and conditions contained in the conveyance of the Recreation Ground dated 6th April 1922 and expressly referred to in the 1956 Agreement for Sale do not operate as a limit on the powers of the trustees of the Charity or of the Commission and the Tribunal in deciding upon the proper terms of the Scheme. However, the Tribunal regards the effect of the decision of the High Court as clear on this point and as a consequence has determined that it is not necessary for the Scheme to be effected in such a way as to limit the objects or activities of the Charity to those that are compatible with the covenants and conditions set out in the conveyance of 6th April 1922.

28. Having determined what the objects of the Charity were prior to the Scheme, the Tribunal considered the proper interpretation of these objects. The objects as set out in the extract from the 1956 Conveyance above and in paragraph 12 and the second schedule of the 1956 Agreement for Sale are primarily concerned with the property being used for games, sports and recreation. The terms of paragraph 12 are reasonably clear in this respect. The second schedule refers to the objects as set out in paragraph 12 (*“the purposes here and before mentioned”*) and repeats that the *“Recreation Ground”* shall principally be used for the carrying on of games and sports of all

kinds. However, the Tribunal notes that the 1956 Conveyance and the second schedule go on to make two separate points:

Firstly they say that the Recreation Ground shall not be used "*otherwise than as an open space*". The Tribunal considers that this is a separate requirement from the requirement that the property be used for the playing of games and sports and other recreational facilities. It seems reasonable to conclude that this was intended to achieve a specific and particular purpose and that the objects require that the activities set out in paragraph 12 of the Agreement for Sale and summarised in the second schedule must be carried out in such a way as to preserve the Recreation Ground as an open space. The Tribunal concluded from this that the intention in the creation of the trust was not only to provide an area of land on which games and sports could be played and other recreational purposes pursued, but was also to provide that this specific piece of land, the Recreation Ground, should be preserved as an open space and used for the purposes of the trust. The Tribunal accepts that the trust was intended to preserve an area of open space for recreation purposes immediately adjacent to some of the most attractive and historic parts of Bath.

The second particular provision included in the 1956 Conveyance and in the second schedule of the Agreement for Sale is the requirement that the Trustee should manage the Recreation Ground in such a way as "*shall not show any undue preference to or in favour of any particular game or sport or any particular person club body or organisation.*" The Tribunal notes the clear intention behind this wording and concludes that this was intended to take effect in such a way as to constrain the manner in which the purposes set out in paragraph 12 of the Agreement for Sale could be pursued.

In construing the terms of the 1956 Conveyance that created the trust, Mr Justice Hart referred to the conveyance adopting "an elaborate formula" with three limbs:

"namely (a) used as open space (b) principal use for games and sports and (c) the obligation not to show undue preference to particular sport or persons".

The Tribunal took this analysis into account in interpreting the objects of the Charity prior to the making of the Scheme.

Tribunal's Findings on the Agreed List of Issues

29. The Tribunal considered the agreed list of issues set out at paragraph 2 above and, having taken account of its conclusions regarding the objects of the Charity and the matters not in dispute, came to the following conclusions for the following reasons in relation to each of the individual issues:
30. **Was the Scheme properly made by the Commission? In particular, but not limited to:**
 - (a) **Did the Commission have the power to make the Scheme under Section 69 of the Act?**

31. The Tribunal found that the Commission did have the power to make the Scheme under Section 69 of the Act. There was nothing in the constitution or operation of the Charity that prevented the exercise of such jurisdiction and this was not argued by any of the parties. The Appellants argued that the Commission should not exercise its jurisdiction as it was prevented from doing so by Section 70(8) of the Act, which states that the Commission must not exercise its jurisdiction under Section 69 where the matter is more fit to be adjudicated on by the High Court (because of its contentious character, or any special question of law or a fact which it may involve). The Appellants argued strongly that it was necessary to determine the effectiveness of the 1995 Lease in order to understand the position of the Charity and to decide whether a Scheme was necessary and, if so, what particular form the Scheme should take. The Tribunal accepted that the enforceability or otherwise of the 1995 Lease is a matter of great significance in terms of assessing the need for and the terms of a Scheme in respect of the Charity. The Tribunal heard evidence as to the steps that the Trustees had taken and the legal advice that they had obtained in relation to assessing the validity of the 1995 Lease. Neither the Commission nor the Tribunal has the power to determine the legal status of the 1995 Lease. Some time was given at the hearing to considering whether or not it was credible to believe that the 1995 Lease could have been entered into in good faith and for consideration. However, Ms Quint for the Trustees argued that the question of good faith required a determination of the understanding and the position of the other party to the 1995 Lease, that is Bath Rugby. The Tribunal accepted these submissions and noted that Bath Rugby is not a party to these proceedings and no evidence was available that would have permitted the Tribunal to come to a conclusion that they could not have acted in good faith. Nevertheless, the Tribunal noted the strong grounds that exist for concluding that the initial terms of the 1995 Lease were unlikely to have been in the best interest of the Charity at that time. In overall terms, the 1995 Lease committed the Charity to granting greater rights to Bath Rugby in return for lesser remuneration and benefits when compared with the lease that had been in force between the parties in respect of the rugby pitch and stands and which was cancelled in order to permit the grant of the 1995 Lease. However, the Tribunal noted that the 1995 Lease also provides for rent reviews to take place and that these commit Bath Rugby to pay the market rent at the time of the review. If the lease is operated properly and effectively by the Charity, it is likely that any of the terms that had the effect of undervaluing the benefits of the lease in 1995 would have been remedied at the first rent review. The Tribunal notes that BANES, as trustee of the Charity, has failed to carry out any of the rent reviews at the time that they were due under the 1995 Lease. However, the Tribunal heard evidence from the Trustees that indicated that the rent reviews were now being carried out and that no limitation periods had expired and therefore the Charity should make a full recovery of amounts properly due to it under the 1995 Lease.
32. The Tribunal considered whether the circumstances surrounding the Scheme and the Charity gave it a particularly contentious character and whether there were special questions of law or fact which meant that this issue should be considered in the High Court and any Scheme that was appropriate should be made by the High Court

rather than by the Commission. The Tribunal did not find that there is any matter, other than the validity of the 1995 Lease, that were of such complexity or of such contentious nature that they could not be resolved by the Commission. After hearing all of the submissions and considering the issues, including those surrounding the 1995 Lease, the Tribunal concluded that this was not a matter that was more fit to be adjudicated on by the High Court. The Commission had the experience to deal with this matter and had in place a process that would permit it to effect the matter in a reasoned and transparent manner. A right of appeal to this Tribunal existed that could be pursued by those concerned at the Commission's decision. The complications arising from the dispute over the validity of the 1995 Lease could be addressed by providing the Trustees with power and responsibility under the terms of the Scheme and permitting some exercise of judgement on their part as to what was in the best interest of the Charity in determining the way forward in respect of the 1995 Lease and the Charity's future dealings with the Bath Rugby. The Scheme does not preclude a challenge to the validity of the 1995 Lease. There was no reason to conclude that the High Court alone was capable of dealing with this matter or that those affected by the decision were adversely affected by the fact that the Commission rather than the High Court decided upon the making of a scheme in respect of the Charity.

33. Did the Commission comply with the publication requirements set out in Section 88 of the Act?

The Tribunal concluded that the evidence provided by the parties and in particular by the Commission, established that the publication requirements set out in the Act in respect of the Scheme were satisfied. However, it is clear that the publication requirements and the operation of the consultation in respect of the Scheme by the Commission gave rise to considerable dissatisfaction and concern amongst those who were mistrustful of BANES and concerned about the proper stewardship of the Charity by BANES and its ability to protect the best interests of the Charity when dealing with Bath Rugby Club. The Tribunal understands the concerns about the consultation process and the timing of the publication and consultation process over the Christmas and New Year period. Nevertheless the provisions of s. 88 of the Act impose particular requirements in respect of publicity; these include giving public notice and inviting representations within a specified period, providing the notice to the local authority, taking account of representations made to it and making a copy of the Scheme available for public inspection both at its offices and at a convenient place that is local to the charity. The Tribunal found that all of these requirements were achieved by the Commission. Notice of the draft scheme was given on the Commission's website. Notice was served on the local authority. The Commission and BANES agreed that notice would be provided on the Recreation Ground, at the Bath Guildhall and in an advertisement in a local newspaper, the Bath Chronicle. A month was provided for the submissions of representations.

The Tribunal accepted the Commission's submissions and found that the Commission complied with the publication requirements set out in Section 88 of the Act.

34. The Appellants were greatly concerned that the public response to the publication had been influenced by information and the guide produced by BANES on the future of the Charity and the implications of the scheme. The Appellants argued that this was misleading in a number of material respects. The Commission initially denied that it had any responsibility for the contents of this guide. However, in evidence that was not provided by the Commission until the last day of the hearing, following specific requests by the Appellants, it emerged that the Commission had been consulted on the content of this guidance booklet and had approved its contents. The Tribunal considered what effect the publication of misleading guidance may have on the publication requirements placed on the Commission under the Act and in this case formed the view that the process put in place by the Commission to publicise the scheme and to receive and consider representations in writing and in meetings was sufficient to overcome the effect of any inaccuracies in the materials circulated by the Trustee with the knowledge of the Commission.

35. **Did the Commission consider all of the relevant information when deciding to make the Scheme?**

The evidence of the Commission and other parties pointed to the extraordinarily long and close involvement of the Commission with the operation of the Charity from 2002 onwards and to a consultation process in respect of the draft Scheme that yielded the largest number of responses that the Commission has ever received. It is therefore clear that the Commission had access to a great deal of information and views in deciding whether to make the Scheme and in drawing up the terms of the Scheme. The Appellants have pointed to a number of areas in which they regard the Commission as having failed to consider relevant information. It is the view of the Tribunal that some issues that are of great importance to the Appellants in this regard are not relevant to the Commission's decision. In particular, the Appellants pointed to the clear terms of the 1922 conveyance of the Recreation Ground and the fact that these terms were included in the 1956 Conveyance and argued that these provisions were not reflected in the terms of the Scheme. For the reasons set out above these provisions are not, as a matter of law, relevant to the making of the Scheme. The Appellants were also concerned that information that was important in deciding upon the legality and validity of the 1995 Lease was not sought by the Commission in the course of making the Scheme. For the reasons set out above the Tribunal has found that this information is also not essential to the decision to make the Scheme. Other factors such as the effect of the Scheme on the local inhabitants who live closest to the Recreation Ground are of very limited relevance to the making of a Scheme that would assist in furthering the objects of the Charity. It is also clear that there is a significant disagreement between the Appellants and the Commission and the Trustees over the proper purpose of the Scheme. The Commission has elected to make a Scheme that provides for a change in the objects and enables a new body of Trustees to exercise certain powers in order to provide the Trustees with the basis for finding a pragmatic way forward for the Charity. The Trustees support this approach to the making of the Scheme. The Appellants favour a Scheme that would be much more prescriptive and would give a clear direction to the Trustees over the activities that the Charity should pursue. The Appellants point to the prolonged and

complete failure of all those involved in the management of the Charity, including the previous trustee, BANES, the Commission and the receivers and managers that the Commission appointed, to resolve any of the breaches of trust affecting the charity or to effectively manage its assets and finances. In the circumstances, they argue forcefully that the Scheme needs to set out clearly what is now required in the management of the Charity. As a result of this difference it is likely that there is a difference in the views of the parties over what information is relevant to the decision to make the Scheme. The Tribunal has considered all of these matters and has come to the view that the Commission did consider all of the relevant information when deciding to make the Scheme. Having considered the relevant information the Commission has taken a particular view on the terms of the Scheme that are most suitable for the Charity, the merits of which are considered below. The Tribunal does not regard this decision as having been made on the basis of irrelevant information nor does it find that the Commission had failed to consider information that was relevant.

36. **Was the Scheme justified? In particular but not limited to whether it should have been made when there had been no authoritative determination of the validity of the lease dated 23 May 1995?**

The Tribunal accepts that the Scheme is justified. The Tribunal largely accepts the arguments of the Commission on this point. The Commission has the same power as the courts to make a Scheme that amends the administrative provisions of a Charity where it is “expedient to regulate the administration of the Charity” by doing so (C J W Laing Stewards and Attorney General [1984] 1 All ER 50). The Commission has a statutory duty to encourage and facilitate the better administration of charities under Section 15(1) 2 of the Charities Act 2011. The Tribunal accepts that the Scheme is a proportionate use of the Commission’s powers in respect of a charity that has been poorly run for a long period of time. The Tribunal has also considered the criteria under which the Commission may implement a Scheme that amends the purposes of a charity. These powers are set out in Sections 61- 69 of the Charities Act 2011 and require that there must have been a cy-pres occasion. (The Tribunal wishes to thank the Appellants for their patience in the course of the appeals and in the hearing in understanding and coming to terms with the operation of this particular and obscurely named principle of charity law.) Having heard the arguments of the parties the Tribunal accepts that the Charity was in a position prior to the scheme where the provisions of Section 62(1)(e)(iii) of the Charities Act 2011 would have applied. This provision states that:

“Where the original purposes, in whole or in part, have, since they were laid down,....

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

The appropriate considerations being:

“The spirit of the gift concerned, and ... the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.”

The Tribunal determined that the construction of the Leisure Centre on the Recreation Ground and the expense required to remove it placed the Charity in a position where its original purpose of using the Recreation Ground “as an open space” was not possible for that part of the ground that is occupied by the Leisure Centre. The practical options in remedying this position were not straightforward and the expense of doing so, or requiring BANES to do so, presented a serious and possibly insurmountable problem for the Charity. The Tribunal heard evidence from the Trustees and the Commission about their serious concerns that the existence of this problem and the potential liabilities that it brought with it were likely to be a barrier to the recruitment and retention of suitable trustees for the Charity. The Tribunal took into account the Court of Appeal decision in *Varsani v Jesani* [1999] CH 219 that established that a cy-pres occasion may arise where a breach of trust is not easily remediable, rather than requiring that it be impossible to remedy. The Tribunal decided that the difficulties arising from the presence of the Leisure Centre on the Charity’s land meant that the original purposes for which this part of the Recreation Ground was held had ceased by 2012 to be a suitable and effective method of using that part of the property.

37. The Tribunal considered the position of the Charity in relation to the 1995 Lease to Bath Rugby and took the view that a Scheme was justifiable in so far as the problems arising out of the existence of the 1995 Lease meant that the Charity required improved administrative and governance arrangements. It was not argued that the 1995 Lease gave rise to a cy-pres occasion and the Tribunal did not find it necessary to reach this conclusion in order to determine these Appeals.
38. For the reasons set out above the Tribunal accepted that it was not possible for the Commission to have provided an authoritative determination of the validity of the 1995 Lease. The Tribunal also noted that the provisions of Section 70(1) of the Charities Act 2011 states that:

“The Commission does not have jurisdiction under Section 69 to try or determine

(a) the title at law or in equity to any property as between –

(i) a charity or trustee for a charity

(ii) a person holding or claiming the property or an interest in it adversely to the charity, or

(b) any question as to the existence of extent of any charge or trust.”

It is therefore not possible to use the Scheme to determine the validity of the 1995 Lease.

39. The Tribunal determined that there was a further reason that justified the need for the Scheme. It is clear from the facts and history of this matter that the Charity has not been well managed. There has been confusion over the status of the Trust from the time of its creation up until 2002. The Tribunal acknowledges that at various points the legal advice to BANES pointed to the trust having charitable status. When the Property Board of BANES met in March 1993 to consider the grant of a new lease to Bath Football Club, it was noted that the Council *"had been advised that the land is subject of a charitable trust"* and an application was being made to the Commission at that time. It is also clear that there have been genuine reasons for the uncertainty over the status on which BANES held the Recreation Ground and that the issue is not straightforward. In a letter dated 21 June 1993 the Commission responded to the City Solicitor at BANES on the issue of the charitable status of the trust and to the legal opinion that BANES had obtained on this issue. The Commission provided a reasoned analysis of its construction of the 1956 Conveyance and stated:

"it seems to me that the necessary element of public benefit is lacking and that the effect of the deed is therefore not to constitute a charitable trust"

The letter went on to say that:

"I am not formally refusing your application for registration, but rather indicating that I would not be prepared to register Bath Recreation Ground as a charity".

This response, which went on to describe the steps that BANES could take if it wished to pursue the application for registration, preceded the decision by BANES to execute the 1995 lease. The Tribunal took into account this advice from the Commission and the fact that the High Court decision that confirmed its charitable status was stated to be a finely balanced decision and does not find it appropriate to criticise or look for the motives behind the management of the Charity up until 2002. However, it is clear that there has been mismanagement since that point. The position of BANES as the continuing trustee after the point at which the trust was found to be charitable, as the operator of the leisure centre on the Charity's land and as a local authority supportive of the successful rugby club in Bath presented real conflicts of interest. The history of the Charity, as outlined by the Appellants and accepted by the Commission and the Trustees, indicates that there has been no adequate process for recognising and addressing these conflicts. The administration of the Charity by BANES is a further cause for concern. The Tribunal notes that BANES had failed to carry out the rent reviews when they became due under the 1995 Lease and has failed to come up with any proposal to resolve the position of the Leisure Centre and its financial position in respect of the Charity. This has left the Charity short of funds and with limited options. The Tribunal notes that BANES is required under the 1956 conveyance to:

"observe and perform the covenants and conditions contained in the said conveyance to the company dated the 6th day of 1922 so far as the same are still subsisting and capable of being enforced and will indemnify the Company and their assigns against any breach or non-observance therefore."

It is not clear to the Tribunal how BANES has discharged these obligations. The Tribunal has not sought to make any decision or judgement on the extent to which BANES may be liable for any breach of its duty as Trustee, it merely notes that the evidence and submissions that it received indicated that no such option has been considered and this presents a further potential conflict of interest. Given the circumstances of the Charity in 2012 and the long running, extensive and serious failures by BANES as trustee, a Scheme was justified in order to put in place appropriate governance arrangements for the Charity to ensure the proper management of conflicts of interests and the proper stewardship of the property and assets of the Charity.

In all circumstances of this case the Tribunal accepted that a Scheme was justified.

40. The Tribunal is of the view that there was no necessity to have an authoritative determination of the validity of the 1995 Lease prior to the making of the Scheme. The determination of the validity of the lease involved a risk that the Charity would incur considerable legal expense in any dispute with Bath Rugby. The Tribunal heard evidence that the Charity was unlikely to be able to afford to pay such legal expenses. It is also likely that the Charity required new governance arrangements in order for it to form an independent and objective judgement in relation to the need to investigate the validity of the 1995 Lease and to fully enforce the terms of such lease in a manner that would protect the interest of the Charity.
41. **Are the proposals in the scheme to provide a framework for the resolution of the occupation of the part of the property under the 1995 Lease expedient and in the interest of the Charity?**

For the reasons set out above the Tribunal takes the view that the proposals in the Scheme that relate to the governance and the powers of the Charity are expedient in assisting in resolving the issues surrounding the occupation of part of the Recreation Ground by Bath Rugby under the 1995 Lease. However, The Tribunal does not regard the specific powers set out in paragraph 4 of the Scheme as necessary to protect the interests of the Charity. The Tribunal was informed that the main intention behind the express power given to the Charity in paragraph 4 is to swap land so that it can enter into a new lease with Bath Rugby that will provide Bath Rugby with more extensive access to the Recreation Ground and in turn receive a lease of, or possibly a freehold interest in, land owned by Bath Rugby at Lambridge on the edge of Bath. The Tribunal notes that paragraph 4 of the Scheme merely provides the Trustees with the power to enter into such a transaction and sub-paragraph 4(7) states the basis upon which the Trustees should determine whether or not such a transaction is appropriate. The Tribunal accepts that such a power could be expedient and in the interest of the Charity. It is possible that the swap that is being contemplated could be in the interest of the Charity. It is helpful to expressly provide that it may operate on another site in addition to the Recreation Ground. However, the Tribunal did not, on the evidence presented to it, conclude that this proposal was the only, or the best, practical solution that the Trustees should consider in deciding how to further the objects of the Charity in its dealings with

Bath Rugby. The Charity already has the power to enter into leases, licences or other arrangements that would grant access to its land.

The Tribunal takes the view that the objects of the Charity require that the Recreation Ground cannot be used otherwise than as an open space and that its use will not show any undue preference for one sport in favour of any other or for one club in favour of any other. It is therefore unlikely that any grant of significant additional land, including the land on which the East Stand can be erected, to Bath Rugby will be justifiable on the basis that such a grant is in furtherance of the objects of the Charity. The effect of a lease of additional land that permitted the pitch and all four sides of the rugby stadium to become a permanent presence on the Recreation Ground would, on the face of it, conflict with the requirement in the objects of the Charity that the Recreation Ground be preserved as an open space and that it should not show a preference for one sport or club over another. However, it is possible for a Charity to use its land or property in order to raise funds where, by doing so, this will enable the Charity to better pursue its objects. The Tribunal accepts that this may be the position that the Trustees find the Charity to be in, but notes that this did not form part of any submission by the Trustees or the Commission in the course of these appeals. It will, in the view of the Tribunal, be necessary for any additional lease or grant of rights to Bath Rugby to be justified on a basis that the overall effect will be to put the Charity in a stronger position to achieve its charitable objects. The Tribunal does not accept that the administrative provisions of the Scheme, such as paragraph 4, should be used in such a way as to cause or permit any departure from the objects of the Charity. Therefore, the Tribunal has sought to consider whether the proposals in the Scheme to provide a framework under which the occupation of part of the Recreation Ground by Bath Rugby can be resolved in such a way that the overall effect will be to

permit the Trustees to further the existing objects of the Charity. The Tribunal finds that significant improvements are required to this aspect of the Scheme in order to ensure that they are expedient and in the interests of the Charity. These improvements are considered in more detail below.

42. **Was the power conferred in the Scheme to authorise the exchange of the land subject to the lease dated 23rd May 1995 necessary, appropriate and expedient in the interest of the Charity?**

For the reasons set out above the Tribunal is of the view that the power to authorise the exchange of land is not necessary to preserve the interest of the Charity, but may be expedient. This is an area where the Tribunal believes the Scheme requires improvement. These improvements are considered in more detail below.

43. **Are the arrangements in the Scheme for the administration of the Leisure Centre justified (by reference to the cy-pres doctrine or more generally), necessary and appropriate in all the circumstances?**

Paragraph 3 of the Scheme provides for the suspension of the requirement in the existing trust that the Recreation Grounds may only be used as an open space. This

suspension is limited to the land occupied by the Leisure Centre. The Scheme provides that this land may be used during the period of the suspension:

"for indoor recreation for the benefit of the public at large (including ancillary car parking)."

Upon the date;

"on which the existing sports and leisure centre building can no longer be used for indoor recreation for the benefit of the public at large the Trustees must return the land to open space suitable for the furtherance of the Charity's objects".

Paragraph 3 goes on to provide that during this period the land is vested in BANES as Trustee of the Recreation Ground (Sports and Leisure Centre) Trust. The Tribunal understands the intended effect is that a new Charity will come into existence during the period of the useful life of the Leisure Centre and the Trustee of this new charity will be BANES. The Commission explained that this proposal was intended to avoid a position where new trustees of the Charity were faced with accepting liability for the operation of the Leisure Centre and to permit time for the Trustees and BANES to reach an agreement relating to the continued presence of the Leisure Centre on the Charity's land. The Trustees supported this approach.

44. The provisions of the Scheme referred to above represent a pragmatic and innovative approach to a difficult practical question. It is clear that all parties to these Appeals and all parties who have previously looked into the arrangements regarding the Leisure Centre and the Charity since 2002 have sought to achieve a sensible and pragmatic position that recognises both the interest of the Charity and the valuable public benefit provided by the local authority leisure centre. The Leisure Centre provides a range of sports and leisure facilities to residents in Bath and surrounding areas. The Tribunal understands that these are predominantly, but not exclusively, indoor facilities. The Tribunal heard evidence that appropriate arrangements are in place to encourage and maximise participation in sports and exercise within the Leisure Centre amongst a broad range of ages and levels of sporting capability.
45. The provision of indoor sports and leisure facilities appear to be close in spirit to the intention set out in the 1956 Conveyance in terms of providing a broad range of sports, leisure and other recreational facilities to local residents. The distinction between the provision of those facilities in an open space and in part, within a building may reflect the change in the social and economic circumstances in which the public will participate in sports and exercise between 1956 and 1974 when the leisure centre was built. Indoor sport and leisure centres are much more common now than in 1956 and their growth has been driven by and has, in turn, facilitated a change in the activities that individuals participate in in order to keep fit. Continued operation of the Leisure Centre for the useful life of the building is in the broader public interest. As indicated above, the Tribunal accepts the arguments by the Commission and by the Trustees that a cy-pres occasion has arisen under Section 62(1)(e)(iii) of the Charities Act 2011 in that the original purpose of the Charity ceased to provide a suitable and effective method of using that part of the Recreation

Ground that is occupied by the Leisure Centre building (excluding the external sports and leisure facilities). The Tribunal therefore takes the view that the Scheme should provide for the change in the objects of the Charity by reason of a cy-pres occasion. The Tribunal also accepts that this change should not be permanent and should require and facilitate the return of the land occupied by the Leisure Centre building to open space at an appropriate time in the future.

46. The Tribunal is, however, concerned at the provisions of the Scheme that have the effect of creating a separate trust and leaving BANES in control of that trust. The history of the Charity to date does not give rise to any confidence that the Trustees and BANES will be able to reach a swift, effective and independent agreement relating to the future of the Leisure Centre and that part of the Recreation Ground that it occupies on terms that fairly protect the interests of the Charity. The Tribunal therefore proposes to amend the Scheme in order to make improved provision for the administration of the Charity with regard to the Leisure Centre and the effective resolution of the issues arising from both its historic and continuing presence on the Recreation Ground. The Tribunal did not find any reason why the Trustees should not assume immediate responsibility for and control over the land occupied by the Leisure Centre. The Leisure Centre is operated by an independent charity under a contract that BANES has entered into and under which BANES has legal liability for making payments to, or receiving payment from, the operator in respect of the operation of the Leisure Centre. The Commission and the Trustees expressed concern at the potential liability of the Trustees if they were to assume responsibility for the Leisure Centre. The Tribunal anticipates that the change in the objects of the Charity would permit the Trustees to enter into a lease or other agreement on acceptable terms that enable the Leisure Centre to occupy a part of the Charity's land. This lease or other agreement would permit and require BANES to fulfil its contract with the operator of the Leisure Centre, whilst furthering the revised objects of the Charity and providing appropriate recompense for past and future use of the Charity's land. Such a lease or other agreement should provide an adequate basis on which the Trustees should be able to limit their legal liability, if any, to issue and risks that are capable of being insured. In so far as they are unable to agree acceptable terms for entering into an agreement with BANES, and the Trustees remain concerned about potential legal liability, they may have to exercise their right to take control of the Leisure Centre and either close it down or agree alternative arrangements under which it can continue without risk to the Charity or the Trustees. The possibility of such action should assist the Trustees in negotiating an acceptable agreement with BANES in a reasonable timescale. The Tribunal notes that the evidence before it suggested that a lease of the land on which the Leisure Centre is located from the Charity to BANES, in their capacity as local authority, had been under discussion prior to the making of the Scheme.

The BANES nominee who serves as a trustee of the Charity will be in a position of conflict in any discussion regarding the Leisure Centre. The Trustees will have to enter into an arrangement with BANES that is in the best interest of the Charity. That best interest is to be judged by reference to the revised objects of the Charity after the Scheme has been made. It will remain the case that any arrangement in

respect of the Leisure Centre will have to have the effect, on balance, of enhancing the ability of the Charity to achieve its charitable purposes.

47. Is the new Trustee body in the Scheme independently and appropriately constituted to secure the best administration and management of the Charity going forward?

The Tribunal heard helpful and positive submissions from all of the parties regarding the governance of the Charity and the qualities required of the new Trustee body. All parties supported the provisions of the Scheme that required the creation of a new body of Trustees and the Tribunal was in a position to hear about progress that had been made in appointing new Trustees with the appropriate mixture of skills, qualities, experience and independence. The Tribunal noted the submissions of Mr. Taylor and his concern that the influence of BANES in the creation of the new body of Trustees was greater than desirable. The Tribunal considered the evidence and the submissions of the parties and also formed the view that the role of BANES in the Charity remained so great as to give rise to issues of confidence about its ability to act independently and to be perceived as having done so. Under the terms of the Scheme BANES has the right to nominate two trustees of the Charity. Two other organisations have the right to nominate one trustee each. These four trustees can then co-opt other trustees. Since the Scheme was made the Trustees have co-opted six trustees and elected a BANES nominee as Chairman of the Charity.

48. The Tribunal shared the concerns expressed by the Appellants and Mr Taylor about the continuing conflict of interest for the BANES Trustees. The Tribunal noted that two witnesses appeared on behalf of the Trustees; one of whom was self-employed and appointed by the Trustees and the other was an employee of BANES who amongst his other responsibilities continues to fill a senior role for BANES, which created some conflicts of interest. The Tribunal noted the concerns expressed by the Appellants that none of the co-opted Trustees were residents of Bath. The Tribunal noted the quality and breadth of the experience and skills that the co-opted Trustees have brought to the Charity and had no reason to doubt that the recruitment process had been carried out in an independent and professional manner. The Tribunal takes the view that the independence of the Trustees is important both in practice, as the Trustees must deal with BANES over contentious matters, and in terms of perception and public confidence, given the history of the Charity. For this reason the Tribunal take the view that the arrangements in the Scheme regarding the new Trustees could and should be improved in order to secure the best administration and management of the Charity going forward. This was also desirable and in the interests of the Charity in order to ensure that public confidence was restored to a charity whose difficulties are widely known and whose performance is likely to be closely monitored by the significant number of Bath residents, Rugby Club supporters and others who have been interested in the Recreation Ground and in the consultation over the Scheme.

49. The Tribunal considered the submissions that were made about the possible means of providing some clear evidence of independent scrutiny of the Charity in the

future. These include the appointment of a 'protector' or other office holder with a particular duty to scrutinise and report on the performance of the Trustees and the Charity and the pursuit of the Charity's objects. The Appellants raised particular points regarding the desirability of transparency in relation to the operation of the Charity. They suggested that the Charity should operate a Freedom of Information policy and that all trustee meetings should be open to the public and other similar steps should be taken to ensure that the decisions taken by the Trustees were open, independent and transparent. The Tribunal considered these proposals at some length. The need for public confidence as well as efficient, independent governance was recognised. However, the contentious circumstances in which the Trustees are undertaking their work and the presence of strong vested interests amongst the immediate neighbours of the Recreation Ground, the supporters of the Rugby Club and others indicated to the Tribunal that open Trustee meetings might be inefficient in so far as they were required to make decisions and hold debates in an atmosphere that may be partisan and subjective. The Tribunal also regarded it as in the best interest of the Charity to reduce any unusual or abnormal features in its operation, where possible, and to permit the Trustees to establish their roles in an atmosphere more typical of a small independent charity. The Tribunal proposes appropriate arrangements are put in place to ensure that the governance of the Charity is carried out by a body that is clearly independent, has appropriate methods for ensuring that Trustees are independent, has the right mix of skills and is transparent in terms of reporting upon the decisions they have made and explaining how their decisions and actions are intended to achieve the particular objects of the Charity. It must, however, be recognised that furthering the objects of the Charity may not be compatible with furthering the interests of other parties who are interested in the future of the Recreation Ground.

50. In all the circumstances of this case and having taken account of the submissions of the parties and the evidence provided by the parties and the witnesses, the Tribunal has concluded that the governance of the Charity would be improved if the following amendments were made to the Scheme:

- BANES will have the right to nominate only one trustee.
- The BANES nominated trustee may not serve as Chair or Deputy Chair of the Charity.
- The existing Trustees, other than one of the BANES nominated trustees, will all remain and will be full Trustees with the power to vote on the appointment of new or replacement Trustees in the future.
- BANES and Fields in Trust and the Somerset County Playing Fields Association will all have the right to nominate one Trustee, however, all Trustees when appointed shall have the same status as each other and they shall vote collectively on appointing new trustees.
- Not less than three of the Trustees shall be residents of the City of Bath.

- The Trustees shall ensure that they hold an AGM in public each year and that details of the AGM and an Annual Report that is targeted at the beneficiaries of the Charity shall be widely disseminated to potential beneficiaries in good time for any interested party to be able to appear at the AGM and ask questions or make comments.

51. **Are there sufficient safeguards in the Scheme to protect the interests of the Charity going forward?**

The Tribunal requires a number of additional safeguards on the basis set out in this decision in order to protect the interests of the Charity in the future.

52. **Overall, is the Scheme the best that can be made in all the circumstances to secure the proper and effective administration of the Charity for the future?**

The Tribunal proposes to make amendments to the Scheme in order to enhance the proper and effective administration of the Charity and to provide for the amendments to the purposes of the Charity in the light of the cy-pres occasion that has arisen.

Amending the Scheme

53. Having considered all of the arguments and evidence submitted by the parties to the Appeals, the Tribunal's decision is that the circumstances in which the Charity found itself in 2012 justified the making of a Scheme in respect of the Charity. The circumstances include a need to resolve the serious conflict of interest affecting the then trustee, the need to improve the administrative arrangements and governance of the Charity, the need to provide for express powers for the Trustees in managing the Charity and the occurrence of a cy-pres occasion in respect of the occupation of part of the land belonging to the Charity by the local authority Leisure Centre. The Tribunal finds that the terms of the Scheme that were effected by the Commission are inadequate in addressing the conflict of interest between BANES and its nominees and the Charity. Furthermore, the proposals in respect of the administration and governance of the Charity and the approach adopted to the cy-pres occasion are capable of improvement and should be improved. The Charity has benefitted from the creation of an independent body of Trustees with a good range of skills and experience. The Tribunal finds that the Trustees need to be clear about the objects of the Charity and would benefit from some clarity in relation to these objects from the Tribunal. In clarifying the objects and the purposes of the Charity, the Tribunal proposes that the Scheme should have the effect of requiring the Trustees to focus on the furthering of these objects. The Charity has to reconcile the differing objects that it has and these include not only the creation of a facility or facilities in the Bath region for the carrying out of sports and leisure activities but also the need to preserve the Recreation Ground as an open space and to ensure that one sport or club is not favoured over another. It will be important for the Trustees to evaluate the overall effect of any arrangement that they enter into on the ability of the Charity to achieve its purposes and further its objects.

54. The Trustees will need to ensure that any arrangements that it enters into with Bath Rugby will have the overall effect of enabling the Charity to further its objectives of not only providing sports and recreation facilities for the public but also preserving the Recreation Ground as open space and ensuring that no one sport or club that uses the Charities' facilities is preferred over another. It is the view of the Tribunal that there is nothing in the objects of the Charity that will prevent it from operating on other sites in addition to the Recreation Ground and there is no reason for the Scheme either to prevent or to encourage such a possibility. However, the Trustees must work to ensure that the Recreation Ground is preserved as an open space on which a range of games and sports and recreational activities can take place. The existence of an elite Rugby Club and of three stands surrounding an open space that can be used for rugby or for other sports are not, in themselves, incompatible with the purposes of the Charity. It is for the Trustees to assess whether or not such arrangement can further the purposes of the Charity. However, the enclosure of a large area of the Recreation Ground by the erection of the East Stand and the restriction on entry to, or use of, this enclosed area by the requirement of a payment to a sports club operating as a profit making business raises considerable concerns about how this will assist the Charity in furthering its purposes. Any further grant of land for the exclusive use of Bath Rugby, over and above that provided for in the 1995 Lease would only be permissible in so far as the Trustees were able to demonstrate that such a grant was made in order to further the objects of the Charity. The Tribunal takes the view that there will be limits upon the extent to which any such grant of land could have this effect and proposes to include such limits in the terms of the Scheme. In each and any arrangement for the grant of further rights of short or long-term use of the Charity's land by Bath Rugby, the terms of any such grant would have to be such that the Trustees establish that the Charity was more able to fulfil its overall purpose if such grant took place than if it did not. It is for the Trustees to determine the best way forward on the basis of amendments to the Scheme that will have the following effect:

- The Trustees will have the power to grant a lease of additional land to Bath Rugby in return for replacement land but only where the land received reflects the full commercial value of the land rights being granted.
- The Trustees may not enter into an agreement for the grant of land to Bath Rugby over and above the 1995 Lease unless they have decided that the grant will assist the Charity to achieve its purposes either directly or by the raising of funds or other resources that will assist it to do so.
- Any such agreement shall only be concluded on terms that fully reflect the value of the land being granted to Bath Rugby and its status as a commercial entity operating for private benefit. The popularity of Bath Rugby within Bath and the surrounding area shall not be a relevant factor for the Trustees, save in so far as Bath Rugby and its supporters and its reputation are the source of resources that can be utilised to assist in encouraging and supporting the use of the Charity's facilities by a wide range of individuals and clubs carrying out a wide range of sporting and recreational facilities.

- Any such agreement shall only be concluded on a basis that continues to permit the playing of other sports and the carrying out of other recreational activities on the Recreation Ground. Therefore the Trustees shall ensure that the land made available under any agreement with Bath Rugby for the site of the East Stand and for any other use that restricts free public access to, or the use of, any part of the Recreation Ground as open space, shall not exceed in surface size the maximum extent of any grant that has been approved by the Commission for the erection of the East Stand on a temporary basis since 2002. All such land shall be returned to open space and made available to the Charity for its own purposes for a least three consecutive months in the summer of each year in a condition that permits the playing of other sports for the full three month period.
 - The Trustees shall take such steps as are expedient and in the interest of the Charity to assess the validity or otherwise of the 1995 Lease and any liability to the Charity for the breach of trust arising from the grant of the 1995 Lease and shall ensure that the terms of the 1995 Lease are enforced in a manner that protects the interests of the Charity. Where necessary independent advice shall be taken.
 - The trustee nominated by BANES shall not participate in any discussion or decision in respect of any of the matters listed in this paragraph.
55. The terms of the Scheme will provide for the improved administration and governance of the Charity. It is important that the Charity's Trustees act independently and are seen to do so. The Charity is in the position where its interests and those of BANES as local authority may not be identical. In relation to any review of BANES' activity as the past trustee of the Charity it is likely that the new Trustees will find themselves in a position where the interest of the Charity conflict with those of BANES. It will be important for the Trustees to take such action as is appropriate and obtain such advice in these circumstances as is prudent and expedient and that any conflict of interest is properly managed and the BANES nominee and any BANES employees or officials who are seconded to or who advise the Charity are not in a position where they could or may be seen to be conflicted. The Tribunal does not propose to amend the Scheme to require particular action to be investigated with regard to any past failures by BANES as trustee.
56. The Tribunal has been referred to the case of *Oldham BC and Attorney General* [1993] 2 All ER, the effect of which is potentially important to the Charity. In particular, arguments were submitted in relation to whether or not the Charity was of a nature where the sale of the Recreation Ground and reinvestment of the proceeds in the acquisition of other property to be held on charitable trust for precisely the same charitable purposes would not require a scheme. The Tribunal is reluctant to make decisions on matters that are not specifically required in order to justify the decision on the case in hand. However, in terms of amending the provisions of the Scheme in order to provide for the effective and good governance of the Charity and the effective use of charitable property, it appears necessary for

the Tribunal to form a view on this case. Accordingly, the Tribunal has considered the arguments of the parties and the helpful contributions of Mr Dibble for the Commission and Ms Quint for the Trustees. It is the Tribunals' view that in this case the qualities of the property which is the subject matter of the gift, i.e. the Recreation Ground, are themselves amongst the factors which make the purposes of the gift charitable. The original conveyance of the property was intended to benefit the public by requiring the local authority to hold the property on trust, not only so that games and sports and other recreational and entertainment facilities were made available to the public, but also so that the Recreation Ground itself should be maintained as an open space for the benefit of the public and that a range of games and sports should be carried out on that land. No evidence was provided and none may exist as to the original intention of the sellers of the Recreation Ground. However, it seems reasonable, given the location of the land and its status as an area of green space alongside the heart of the historically and culturally important centre of the city of Bath and the desire that the land be used for a range of entertainment as well as for games and sports, to interpret the terms of the trust on the basis that the reference to preserving the Recreation Ground as open space reflected the particular characteristics of this land and that these characteristics were relevant to the decision to create a charitable trust for the benefit of the public. With this view in mind, the Tribunal has suggested amendments to the Scheme that are intended to provide for the Charity to be operated on a basis that will enable it to pursue its full range of purposes and therefore, to the extent it is possible, to provide sporting and recreational facilities on open space on the Recreation Ground. The means by which this is achieved does not preclude entering into arrangements in order to secure finance or other resources that will further the objects of the Charity and does not restrict the Charity to pursuing its purpose of providing sports and recreation facilities only at the Recreation Ground.

Additions and Substitutions to the Scheme

57. In the light of the conclusions of the Tribunal in respect of the list of issues prepared by the parties set out at paragraph 9 above, the Tribunal proposes to make further additions to and substitutions in respect of the terms of the Scheme. These additions and substitutions are intended to continue the approach adopted by the Commission and supported by the Trustees in terms of providing the new Trustees with the powers and modified objects that are required in order to further the objects of the Charity in the most effective manner in the long term. The requests from the Appellants that particular requirements are imposed upon the Trustees in order to achieve particular outcomes or goals are therefore largely rejected. The Tribunal's reasons for adopting this approach reflect the need for the Charity not only to find an acceptable way out of its present difficulties but also to ensure that it is managed effectively and independently and in its own best interest for the long term. The arrangements that the Charity has entered into are already of a long term nature. The conflicts that exist in relation to the preservation of open space in the middle of a busy and thriving city are also of a long term nature. Therefore, the Tribunal has determined that it is appropriate to allow flexibility to the Trustees in determining the best means of achieving the Charity's objects. In order that this process can be

achieved successfully it is important that the Trustees are well equipped with the experience, skill, financial resources and expert advice required in order to stand up to stakeholders who may have strong views or significant commercial or financial interests that may lead them to encourage the Trustees to adopt a course of action that is not in the best interests of the Charity.

58. The Tribunal proposes to use its powers under Schedule 6 of the Act to substitute for part of the order and add to the order terms that could have been made by the Commission. The existing Scheme is to be amended substantially in the manner set out in the Annex to this Decision.
59. The amendments proposed by the Tribunal to the Scheme will have the effect of:
 - (a) Improving the governance of the Charity.
 - (b) Providing the necessary power to the Trustees to ensure that the objects of the Charity are pursued with a degree of practicality, innovation and resolution.
 - (c) Amending the purposes of the Charity to the minimum extent required in order to address the issues surrounding the Leisure Centre and to do so in a manner that takes account of the spirit of the gift and the change in economic and social circumstances since the creation of the Charity.

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60. In all the circumstances of this case the Tribunal hereby exercises its powers under Schedule 6 of the Charities Act 2011 to make an order substantially in the terms set out in the Annex to this decision amending the order of the Commission of 12th June 2013 effecting the Scheme.

Directions Regarding the Form of Order to be Made

61. The Tribunal invites representations from the parties on the terms of the order to be made by the Tribunal. The substantive effect of the order will be as set out in this decision and in the Annex. The parties should confine themselves to representation and submissions that relate to whether the proposed terms properly reflect this decision and are practical and unambiguous. The Commission is invited to prepare a draft Order that sets out the full revised terms of the order to be made by the Tribunal, including the objects of the Charity, and to circulate this to all of the parties. Representations shall be submitted to the Tribunal in writing within seven days of the date of this decision and shall be circulated to all parties.

Signed

Dated 27th March 2014

Peter Hinchliffe
Tribunal Judge

ANNEX

Amendments to the Scheme for the Recreation Ground, Bath dated 12 June 2013

Paragraph 1

Delete the definition of the “Order” in its entirety.

Insert a statement of the objects of the charity.

[Draft to be provided by the Commission and /or the Trustees]

Paragraphs 2 (3) and 2 (4)

Delete in their entirety and substitute the following:

“2.3 The charity may carry out its activities on other sites in addition to the Bath Recreation Ground.

2.4 The charity shall not enter into any transaction that permits the use of part of the Bath Recreation Ground otherwise than as open space or on a basis that favours any particular game or sport or any particular club over another unless and until the trustees have considered such transaction and have decided that the overall effect of the transaction is to provide a net benefit to the charity in furthering its charitable purposes.”

Paragraph 2 (5) (a)

Delete “including provision for the” and substitute the following:

“its continued occupation of part of the charity’s land and its”

Paragraph 2 (5) (b)

Delete in its entirety and substitute with:

“seek to negotiate and enter into a binding settlement of any claims that the charity has against the Council in respect of the past operation of the Sport and Leisure Centre and car parks on the Charity’s land.”

Paragraph 2 (6)

Add the following new paragraph:

“The trustees constituted under clause 6 shall ensure that they hold an AGM in public each year and that details of the AGM and an Annual Report that is targeted at the beneficiaries of the charity shall be widely disseminated to beneficiaries in good time for any interested party to be able to appear at the AGM and ask questions or make comments to the trustees”

In the heading to Paragraph 3

Delete “(Sports and Leisure Centre)”

In Paragraph 3 (3)

Insert “custodian” before “trustee”.

Delete “(Sports and Leisure Centre)”

In the heading to Paragraph 4

Delete “(excluding The Bath Recreation Ground (Sports & Leisure Centre) “

Para 4 (4) (b)

Add after “suitable for”; “and further”

Para 4 (4) (c)

Add a new sub-paragraph as follows:

“ the Trustees shall have satisfied themselves that the overall effect of the grant of any such lease or leases and the terms of such grant will be to further the charity’s ability to achieve its charitable purposes.”

Para 4 (5) (b)

Add a new sentence at the end of this sub-paragraph as follows:

“The three months shall be consecutive summer months. The site, including all grass surfaces, shall be made available at the start of the three month period in a condition that is immediately suitable for the playing of sports and the use of the land for leisure purposes”

Para 4 (6) (b)

Add new sub-paragraph (iii) at the end:

“be better suited to the achievement of the charity’s purpose than any other suitable land available at that time at an equivalent cost to the charity”

Para 4 (6) (d) (i)

Delete “except to subsequent owners of Bath Rugby Club”

Para 4 (6) (d) (v)

Add new sub-paragraph (v) at the end:

“minimise any adverse effects of the grant of such lease on the ability of the charity to pursue its charitable purpose”

Paragraphs 6, 7 and 8

Delete “co-opted” throughout and substitute “individual”.

Para 6 (1)

Delete “2 trustees” and substitute “1 trustee”.

Add at the end of this sub paragraph the following:

“The first six individual trustees are listed in Part 6.”

Para 7 (1)

Delete “nominated”.

Para.s 7(2) and 7 (3)

Delete in their entirety.

Para 8 (2)

Add the following at the end of the existing sub-paragraph:

“At least three of the trustees must be resident within the former boundaries of the City of Bath”.

Paragraph 8 (4)

Add the following sentence:

“All trustees shall have a vote on the appointment of new individual trustees.”

Para 11 (4)

Add new paragraph 11 (4) as follows:

“Not appoint the trustee nominated by the Council as their Chairman or Deputy Chairman”.

Part 4

Delete the existing text and substitute the following:

“Any land not subject to the 1995 lease and not exceeding in total [1042 square metres or such other amount as is established to be the largest gross amount of the surface area of the land that has been made available by the charity to Bath Rugby for occupation by the East Stand in any year since 2002].

Part 5

Add:

“Nominated by Fields in Trust
Don Earley for a period of 3 years.”

[Add the names of the trustees who have already been co-opted and who are willing to continue and provide for a term of three years from the date of their first appointment]