IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(MR JUSTICE CHADWICK)

Royal Courts of Justice
28th July 1992

B e f o r e :

LORD JUSTICE DILLON
LORD JUSTICE RUSSELL
LORD JUSTICE FARQUHARSON

OLDHAM BOROUGH COUNCIL **Appellants**

v.

HER MAJESTY'S ATTORNEY GENERAL **Respondent**

(Transcript of The Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, WC2A 3RU).

MR DAVID LOWE Q.C. and MR HUBERT PICARDA Q.C., instructed by Messrs Sharpe Pritchards, London Agent for Messrs David Shipp (Civic Centre, Oldham), appeared for the Appellants (Plaintiffs).

MR DAVID UNWIN, instructed by The Treasury Solicitor, appeared for the Respondent (Defendant).

HTML VERSION OF JUDGMENT

LORD JUSTICE DILLON: By an originating summons dated 16th May 1991, the Oldham Borough Council, as trustee of a charity founded by a deed of gift of 16th April 1962, sought, by way of relief under paragraph 1 of the summons, that it might be determined whether the court has power to authorise the council to sell or exchange all or any part of the freehold land, referred to as "the blue land", vested in the council as a trustee of the charity, being the existing site of the Clayton playing Fields.

The summons further asked by paragraph 2 that if the answer to the question in paragraph 1 was Yes, the council might be authorised to sell or exchange the blue land on such terms as the court may think fit. What lies behind this is a proposal, which has been the subject of much local debate and controversy, that the existing site of the Clayton Playing Fields should be sold to developers for a very large price, and that with that price the council should acquire a new site for playing fields

which - because the price will be so high - will have much better facilities, in the way of changing rooms and car parking and so forth, than the existing site.

The originating summons came before Chadwick J., and by his order of 7th April 1992 he declared on paragraph 1 of the originating summons that the court does not have power to authorise the council to sell or exchange the blue land referred to in the originating summons. The council now appeals against that declaration. In the meantime, paragraph 2 of the originating summons stands adjourned generally under the judge's order.

The sole defendant to the originating summons, and sole respondent to the appeal, is Her Majesty's Attorney-General, as representing the interests of charities generally. He, through Mr Unwin of counsel, supports the appeal, as he supported the council in the court below in relation to paragraph 1; but he reserves his position in relation to the proposal, outlined above, and paragraph 2 of the originating summons.

It follows that we in this court are in no way concerned with the details of the proposal or with whether it is a good idea, and we express no opinion at all on that. We have merely to decide question 1 in the originating summons as a question of law, and to that end we assume that the proposal, if approved and carried through, would result in the council holding a new site on precisely the same charitable trusts as are declared, with regard to the existing site, by the deed of gift of 6th April 1962 already mentioned.

Question 1 of the originating summons has been referred to as a question of jurisdiction, but that is a bit of an over-simplification of the question.

It is not in doubt as a general proposition that charitable trustees who hold land as part of the permanent endowment of a charity or land which has been occupied for the purposes of the charity have power to sell that land with the consent of the court (or of the Charity Commissioners). That power may be classified as (i) a power conferred by section 29 of the Charities Act 1960, which replaced similar provisions in section 24 of the Charitable Trusts Act 1853, as qualified by section 29 of the Charitable Trusts Amendment Act 1855 or (ii) a general power at common law curtailed by section 29 of the 1960 Act and previously by the 1853 and 1855 Acts which made the consent of the court or the Charity Commissioners necessary or (iii) a power conferred by section 29 of the Settled Land Act 1925, which gives charitable trustees all the powers conferred by that Act on a tenant for life and on the trustees of a settlement; but for present purposes its precise classification is immaterial. In so far as the answer to question 1 depends on any of these Acts, the answer must be Yes.

The problem arises because of a different section, section 13 of the Charities Act 1960, subsections (1) and (2) of which provide as follows:

> "13.- (1) Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres shall be as follows:-
>
> (a) where the original purposes, in whole or in part,-
>
> (i) have been as far as may be fulfilled; or
>
> (ii) cannot be carried out, or not according to the
>
> (iii) directions given and to the spirit of the gift; or
>
> (b) where the original purposes provided a use for part only of the property available by virtue of the gift; or

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

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

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

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

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

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

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

Broadly the effect of that section is that an alteration of the "original purposes" of a charitable gift can only be authorised by a scheme for the cy-pres application of the trust property and such a scheme can only be made in the circumstances set out in subheads (a) to (e) of subsection (1) of section 13.

It follows that if the retention of a particular property is part of the "original purposes" of a charitable trust, sale of that property would involve an alteration of the original purposes even if the proceeds of the sale were applied in acquiring an alternative property for carrying out the same charitable activities. If so, a sale of the original property could only be ordered as part of a cy-pres scheme, and then only if circumstances within one or other of subheads (a) to (e) are made out. The particular bearing of that in the present case is that the council accepts, and the Attorney-General agrees, that the circumstances of this charity do not fall within any of these subheads.

If therefore, on a true appreciation of the deed of gift and of section 13, the retention of the existing site is part of the original purposes of the charity, the court cannot authorise any sale.

It is necessary therefore to look first at the terms of the deed of gift.

It is made between Ina Clayton of Oldham, a metal merchant, who is called "the Donor" of the one part and the Mayor, Aldermen and Burgesses of the County Borough of Oldham, the Urban District Council of Chadderton and the Urban District Council of Royton, collectively called "the Donees", of the other part. By local government reorganisation the present council became the successor to all three of the Donees; nothing turns on that.

There are then recitals:-

(1) of the Donor's seisin of the land thereby conveyed

(2) that the Donor was desirous of conveying that land to the Donees for the purposes of playing fields solely and had offered to convey it to the Donees by way of gift

(3) that the Donees had authority to acquire land for the purpose of playing fields and the land was required by the Donees solely for that purpose and

(4) that the Donees had accepted the Donor's offer with gratitude and had requested the Donor to convey the land in the manner and upon the trusts thereinafter appearing.

The land is then conveyed by the Donor to the Donees in pursuance of the said desire and without consideration in fee simple upon the trusts thereinafter declared.

These trusts are declared in clause 3 which is as follows:

"3. The Donees hereby declare that they will hold the said land upon trust to preserve and manage the same at all times hereafter as playing fields to be known as 'the Clayton Playing Fields' for the benefit and enjoyment of the inhabitants of the Oldham Chadderton and Royton aforesaid."

On that wording, I have no doubt at all that the original purpose, in ordinary parlance, of the Donor was, in one sense, that the particular land conveyed should be used for ever as playing fields for the benefit and enjoyment of the inhabitants of Oldham, Chadderton and Royton. In that, I agree with Chadwick J.

It is urged to the contrary, that, on recital (2), the only wish of the Donor was that the land should be conveyed for the purposes of playing fields solely and that, on recital (4) and the opening words of clause 3, it was only the Donees who wanted to declare the particular trusts which are to be found in clause 3. I do not agree. I have no doubt that the Donor would not have been conveying the land to the three local authorities which collectively constituted the Donees if it had not been his purpose also that the land should be used as playing fields for the benefit and enjoyment of the inhabitants of the districts of the three Donees as declared in clause 3, although there is no such limitation in recital (2). Clause 3 sets out the purposes of the Donor as well as of the Donees.

But even if clause 3 is to be read as being only the words of the Donees, it makes no difference, since clause 3 declares the trusts which are binding and which therefore show the purposes of the charity; it could not be said that because recital (2) in setting out the Donor's desire contains no territorial limitation, it was within the purposes of the trust to use the original land, or land purchased with the proceeds of sale of the original land, in providing playing fields for the benefit and enjoyment of the inhabitants of Blackburn or Bootle.

The actual words in clause 3 were, as set out above, "upon trust to preserve and manage the same at all times hereafter as playing fields" etc. Mr Unwin in his skeleton argument suggested alternatives viz:-

(1) upon trust to be used as playing fields etc.

(2) upon trust to be used as playing fields for ever etc.

(3) upon trust to be maintained and used as playing fields etc. and

(4) upon trust to be preserved and maintained as playing fields etc.

I see no difference in effect between any of these four forms of orders and the actual words used in clause 3. As Lord Cranworth L.C. said in St Mary Magdalen, Oxford v. A.G. (1857) VI H.L. Cas. 189 at 205:

"... it is plain that persons who give lands to a charity, devote them for ever to the

> purposes of that charity, and such is always the expression used in such gifts, the gifts being made to the charitable object 'for ever'. With the belief that the charity will endure for ever, it is extremely improbable that they can have contemplated the sale of the lands..."

That wording of Lord Cranworth suggests an alternative formulation of the effects of the deed of gift, viz. the Donor intended that the land he was giving should be used for ever for the purposes of the charity, sc as playing fields to be known as the Clayton Playing Fields for the benefit and enjoyment of the inhabitants of the Donees' districts - now the Council's district.

I come then to what I regard as the crux of this case, viz. the true construction of the words "original purposes of a charitable gift" in section 13 of the 1960 Act. Do the "original purposes" include the intention and purpose of the Donor that the land given should be used for ever for the purposes of the charity, or are they limited to the purposes of the charity, in the sense in which Lord Cranworth was using these words in the passage just cited?

Certain of the authorities cited to us can be put on one side.

Thus in In re J.W.Lainq Trust [1984] Ch.143 at 153 A-B Peter Gibson J. said, plainly correctly, that "it cannot be right that any provision, even if only administrative, made applicable by a donor to his gifts should be treated as a condition and hence as a purpose". In that case, however, the provision, which was held to be administrative and was plainly not a "purpose", was a provision that the capital was to be wholly distributed within the settlor's lifetime or within 10 years of his death.

Conversely there are cases where the Donor has imposed a condition as part of the terms of his gift, which limits the main purpose of the charity in a way which, with the passage of time, has come to militate against the achievement of that main purpose. The condition was there part of the purpose, but the court found itself able on the facts to cut out the condition by way of a cy-pres scheme under the cy-pres jurisdiction, on the ground that the subsistence of the condition made the main purpose impossible or impracticable of achievement. See In re Dominion Students' Hall Trust [1947] Ch. 183 where a condition of a trust for the maintenance of a hostel for male students of the overrseas dominions of the British Empire restricted the benefits to dominion students of European origin. See also In re Robinson [1923] 2 Ch. 332 where it was a condition of the gift of an endowment for an evangelical church that the preacher should wear a black gown in the pulpit. But unlike those conditions, the intention or purpose in the present case that the actual land given should be used as playing fields is not a condition qualifying the use of that land as playing fields.

It is necessary, in my judgment, in order to answer the crucial question of the true construction of section 13 to appreciate the legislative purpose of section 13. Pennycuick V.C. has said in In re Lepton's Charity [1972] Ch. 276 at 284F that the section in part restates the principles applied under the existing law but also extends those principles. But the principles with which it is concerned are the principles for applying property cy-pres and nothing else. The stringency of those principles as stated in In re Weir Hospital [1910] 2 Ch. 124 had been somewhat mitigated, but to nothing like the extent contended for by the unsuccessful parties in In re Weir Hospital.

But there is nothing to suggest any legislative intention in enacting section 13 to extend the cases, where'a cy-pres scheme is necessary if anything is to be done, to cases where before the 1960 Act no scheme was required.

The cases seem to be consistent, before the 1960 Act, that mere sale of charitable property and reinvestment of the proceeds in the acquisition of other property to be held on precisely the same charitable trusts, or for precisely the same charitable purposes, did not require a scheme. See especially Re Ashton Charity 22 Beav 288 where, in a case decided in relation to the law in force before the passing of the Charitable Trusts Act 1853 and the 1855 Act, Sir John Romilly M.R., rejecting a submission of Mr Dart of counsel that it does not form part of the administration of a

charitable purpose to sell the very estate which the founder intended to uphold it, held that the Court of Chancery had a general jurisdiction, as incidental to the administration of a charity estate, to alien charity property where the court clearly sees that the alienation is for the charity's benefit and advantage. Other cases where the court decreed a sale of charity lands, otherwise than by way of cy-pres scheme, because the court was satisfied that the sale of those lands would be beneficial to the charity are In re Parke's Charity 12 Sim. 329, a decision of Shadwell V.C. under Sir Samuel Romilly's Act (52 Geo. 3, C. 101) and In re The North Shields Old Meeting House 7 W.R. 541, a decision of Kindersley V.C. under the Charitable Trusts Act 1853 as amended by the 1855 Act. This seems to have been the standard practice in the last century and I see no reason why Parliament should have intended to alter it by section 13 of the 1960 Act. That section is concerned with the cy-pres application of charitable funds, but sales of charitable lands have, in so far as they have been dealt with by Parliament, always been dealt with by other sections not concerned with the cy-pres doctrine.

There are of course some cases where the qualities of the property which is the subject-matter of the gift are themselves the factors which make the purposes of the gift charitable - e.g. where there is a trust to retain for the public benefit a particular house once owned by a particular historical figure or a particular building for its architectural merit or a particular area of land of outstanding natural beauty. In such cases sale of the house, building or land would necessitate an alteration of the original charitable purposes and therefore a cy-pres scheme because after a sale the proceeds or any property acquired with the proceeds could not possibly be applied for the original charitable purpose. But that is far away from cases such as the present, where the charitable purpose - playing fields for the benefit and enjoyment of the inhabitants of the districts of the original Donees, or it might equally be a museum, school or clinic in a particular town - can be carried on on other land.

Accordingly, I would allow this appeal, set aside the declaration made by the learned judge and substitute a declaration to the opposite effect.

Whether there should be a sale, or whether the existing site should continue to be used as the Clayton Playing Fields as now, is one of the matters for the court to consider under paragraph 2 of the originating summons with which we are not concerned. Accordingly, we should remit the proceedings to the Chancery Division for consideration of paragraph 2.

I should add finally that we were referred by counsel to the provisions of the Charities Act 1992, which have not yet come into force. That Act changes the law in various respects; therefore its provisions cannot help us in deciding the questions with which we have been concerned on this appeal. Equally, however, we have not had to consider whether our decision would have been different if all the provisions of the 1992 Act had already come into force.

LORD JUSTICE RUSSELL: I agree.

LORD JUSTICE FARQUHARSON: I also agree.

Order: Appeal allowed; declaration of judge below set aside and declaration made to the contrary effect; proceedings remitted to the Chancery Division for consideration of paragraph 2 of originating summons; order as to costs to be agreed and indorsed on counsel's briefs.