Neutral Citation Number: [2024] EWHC 2857 (Ch)

Case No: PT-2023-000980

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 11 November 2024

Before :

MR JUSTICE RAJAH

- -

Between :

THE KEEPERS AND GOVERNORS OF THE POSSESSIONS, REVENUES AND GOODS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON, WITHIN THE TOWN OF HARROW-ON-THE-HILL	**Claimant**
- and -	
HIS MAJESTY'S ATTORNEY-GENERAL	**Defendant**

- -
- -

Matthew Smith KC (instructed by **Cripps LLP**) for the **Claimant**
Jonathan Fowles (instructed by **Commercial Law Group - Litigation Government Legal Department**) for the **Defendant**

Hearing dates: 11-12 July 2024

- -

APPROVED JUDGMENT

Mr Justice Rajah :

Introduction

1. The Claimant is an incorporated charity which runs Harrow School and The John Lyon School. It has applied for a cy-près scheme to alter the objects of the charity and for a declaration that its Governors have the power under the Public Schools Act 1868 to amend those objects in future.

2. The cy-près jurisdiction is the court's inherent jurisdiction to make schemes altering the purposes for a which a charity's assets are applicable. The jurisdiction is only exercised if a cy-près occasion has occurred.

3. The Claimant says that its current objects are in Latin, are archaic and limit its ability to operate outside Harrow. This, it says, is preventing it from maximising the public benefit which its reputation, staff and educational resources would otherwise allow it to achieve. It seeks new objects in clear English which will allow it to operate without geographical restrictions.

4. The Attorney General is joined as a necessary defendant to all charity proceedings. The Attorney General's position is that the evidence does not establish that a cy-près occasion has occurred. The Attorney General contends that any power conferred on the Claimant under the Public Schools Act cannot be exercised to undermine the main objects of the charity.

The constitution of the charity

The 1572 Charter and 1591 Statutes

5. In 1572, Queen Elizabeth I granted John Lyon, a wealthy farmer of the Preston area of the then Harrow parish, a Royal Charter (**"the Royal Charter"**). The Royal Charter declared (as translated from Latin) that John Lyon

> "*hath purposed in his mind a certain Grammar School, and one Schoolmaster and Usher, within the Village of Harrow-on-the-Hill, in the said County of Middlesex, of new to erect, found and for ever to establish for the perpetual education teaching and instruction of Children and Youth of the said Parish; and Two Scholars within our University of Oxford, liberally to endow and maintain, and other common ways, as well between Edgware and London as in other places, at his own very great charge, intends to repair and mend, and other endowments and works of piety, to the very great comfort and encouragement of the Scholars within the said parish applying themselves to learning, thereby giving a very good example to all others to imitate the like hereafter, and also to the common profit of all our subjects*
> *We therefore …of our special grace, and also of our certain knowledge and mere motion do will, grant and ordain … that for ever hereafter there shall be one Grammar School in the Village of Harrow-on-the-Hill … which shall be called the Free Grammar School of John Lyon, for the bringing up, teaching and instruction of Children and Youth in Grammar, for all time hereafter coming".*

6. The "*Free Grammar School of John Lyon*" referred to in the Royal Charter is now known as Harrow School.

7. The Charter incorporated six persons as "*the Keepers and Governors of the Free Grammar School of John Lyon in the village of Harrow-on-the-Hill*" (**"the Original Corporation"**). As appears below, the Claimant has succeeded to the property, trusts and liabilities of the Original Corporation.

8. The Royal Charter gave John Lyon power, among other things, to make *"statutes and ordinances in writing"* about the government of Harrow school and its property, but also other *"uses and intentions"* which the Royal Charter commanded were "*inviolably to be observed from time to time for ever*". After John Lyon's death, the Governors were given power to make statutes about the government of Harrow School and its income, but not so as to contradict the founder's inviolable statutes and ordinances.

9. John Lyon laid down such Statutes in 1591 (**"the 1591 Statutes"**) to take effect after the death of him and his wife. Statutes 12 and 13 included additional purposes (**"the Additional Purposes"**) if he and his wife died without an heir (as in the event they did). The Additional Purposes included payments to a preacher, payments for tolling a bell before sermons, payments to the poorest householders in the parish of Harrow, payments to scholars at Oxford and Cambridge, and payments for the maintenance of certain roads. They included in Statute 13, as to any "overplus" of the income from the endowed assets, *"for the help and relief of poor marriages and such other good and charitable purposes within the said parish of Harrow, at the discretion of the said Keepers and Governors."*

10. These Additional Purposes are objects of the charity. The Royal Charter has directed that they be inviolable for ever – they effectively have the same status as if they were in the Royal Charter. Some of the Additional Purposes were still being honoured as late as 1895 but they no longer are. The parties have agreed that when I consider the cy-près application I should assume, without finding, that the Additional Purposes are no longer binding on the Claimant.

11. In separate Rules appended to the 1591 Statutes, John Lyon provided for, among other things, the curriculum to be taught at Harrow School and the shape of the school day. John Lyon intended that the youth of the parish of Harrow should not be charged to attend the school. However, his Rules allowed that fee-paying "foreigners", i.e. youth who were not inhabitants of the parish, could be admitted to the School (**"the Foreigners Rule"**), but only "*so many Foreigners as the whole number may be well-taught and applied"*.

AG v Earl of Clarendon

12. In the early 19th century, a claim was brought by the Attorney General against the Governors and Headmaster of Harrow School alleging breaches of the 1591 Statutes. Among other things, it was alleged that pupils from the nobility and gentry outside the parish ("foreigners") had been admitted to such an extent, and their expensive habits and ill treatment of the parish pupils was such, that few or none of the children of the inhabitants of the parish were attending the School, contrary to the founder's intention:

A-G v Earl of Clarendon (1810) 17 Ves Jun 490 at 493-494. Sir William Grant MR rejected this complaint as unproven.

13. What emerges from that case is that the Master of the Rolls considered the object of the charity to be the "*perpetual sustentation*" of the school (and not benefitting the youth of the parish). Non-parish scholars were intended to benefit from the school in the same way as the local pupils, except as to gratuitous teaching, and subject only to the restriction that the numbers of non-parish scholars should be such that the whole body of students could still be well taught, and the place could conveniently contain them all. The propriety of expenditure of the charity funds was therefore to be judged by whether it was fairly referable to the purposes of the school (and not by the number of parish boys benefitted).

14. The Master of the Rolls directed a scheme in respect of some surplus income which was no longer being applied in accordance with the 1591 Statutes and Rules. However, for reasons which are not known, no scheme was implemented.

Public Schools Act 1868

15. The Public Schools Act 1868 ("**the Public Schools Act**") arose out of the report of the Clarendon Commission which was set up to examine the affairs of certain public schools including Harrow.

16. By the Public Schools Act, Special Commissioners were appointed and given the power to make statutes for determining and establishing the constitution of a new governing body of Harrow School ("**the New Governing Body**") to act in the place of the Original Corporation.

17. All powers previously vested in the Original Corporation were to be exercised by the New Governing Body on its establishment.

18. The constitution of the New Governing Body was determined and established by a statute made by the Special Commissioners on 28 July 1871 ("**the 1871 Statute**"). While this gave the New Governing Body control of the operation of the School, it did not dissolve the Original Corporation which continued to hold and administer the assets of the charity established under the Royal Charter.

19. This was corrected by the Public Schools (Shrewsbury and Harrow Schools Property) Act 1873 (**"the 1873 Act"**). The 1873 Act incorporated the New Governing Body and this incorporated body is the Claimant. The 1873 Act gave the Claimant the power to submit to the Special Commissioners a scheme providing for the transfer to the Claimant of all property vested in the Original Corporation.

20. The Claimant submitted such a scheme which was approved by Her Majesty in Council on 12 May 1874. Under this scheme (**"the 1874 Scheme"**), from that date of approval, all of the Original Corporation's assets and:

> "2….all powers, rights, authorities, duties and privileges, by Charter, Act of Parliament, Statute, Instrument of Endowment, custom or otherwise, at the date of this Scheme vested in or exercisable by or incumbent on the [Original]

> Corporation…shall be absolutely transferred to and vested in the new Governing Body of Harrow School and their successors, in the same manner and to the same extent as the same were vested in the [Original] Corporation at the date of this Scheme.
>
> 3. Nothing herein contained shall affect any trust or liability whatsoever affecting the premises aforesaid at the date of this Scheme, but all such trusts and liabilities shall continue and may be enforced by or against the new Governing Body of Harrow School and their successors, in the same manner and to the same extent as the same could have been enforced by or against the [Original] Corporation if this Scheme had not been made."

21. The Claimant has therefore replaced the Original Corporation as the governing body of Harrow School and replaced it as the custodian of the property dedicated to the charitable purposes of the Royal Charter.

First Statutes under the Public Schools Act: the 1874 Statutes

22. Section 7 of the Public Schools Act gave the Claimant the power to consolidate or amend any existing statutes or regulations relating to Harrow School and to repeal any statute or regulation that had become obsolete or incapable of observance, subject always to the approval of Her Majesty in Council (I will return to consider the effect today of section 7 later in this judgment).

23. The Claimant exercised this power, and statutes were approved in Council on 7 July 1874 (**"the 1874 Statutes"**). Statute 1 of the 1874 Statutes provided for the allocation of "*the income of the property of the School"*, a defined term meaning "*the income available for the purposes of the School derived from the Foundation of John Lyon*". It is in respect of this income that I am asked to make a scheme.

24. The 1874 Statutes provided for the establishment and maintenance of a "*subordinate school"* called The John Lyon School. That school was built in 1876 in Harrow-on-the-Hill. The Claimant therefore owns, maintains and operates two schools; Harrow School and The John Lyon School (**"the Schools")**.

The 2016 Statutes

25. The 1871 Statute and 1874 Statutes were amended on 13 occasions between 1898 to 1998.

26. The Claimants' then made Statutes, which were approved in Council on 8th June 2016 (**"the 2016 Statutes"**), which repeal and replace the 1871 and 1874 Statutes subject to certain savings.

27. Under the 2016 Statutes:

    27.1 Statute 1.6 sets out that the income and capital of the "*Corporation Funds*" means "*all property of the Corporation except Restricted Funds*".

27.2 Statute 6.1 sets out how the Corporation funds would be utilised, which as stated in this Statute are to be "*applied towards the Objects in such manner as the Corporation shall think fit*".

27.3 Statute 1.16 defines "*The Objects*" as "*the objects of the Corporation as described in the Charter*".

27.4 The Claimant is given the power to do anything conducive or incidental to furthering the Objects, but not otherwise: Statute 5 and Schedule.

The Court's cy-près jurisdiction

28. The cy-près jurisdiction is the Court's inherent jurisdiction to make a scheme changing the purposes for which a charity's assets are to be applied. The jurisdiction is exercised to give effect to the charitable intention of the founder of the charity, usually the donor of the charity's original assets, in circumstances where the founder's directions as to how the charity's assets are to be applied have ceased to be appropriate. The jurisdiction requires a cy-près occasion to have arisen before it will be exercised. Originally the only cy-près occasion for an existing charity was where the original purpose had become impossible or impractical to carry out. That restrictive approach has in modern times been relaxed. Cy-près occasions are now specified in section 62 Charities Act 2011.

29. The contested issue in this case is whether a cy-près occasion has arisen. If it has, then the form of an appropriate scheme has been agreed by the parties subject to the Court's approval.

30. Section 62(1) of the Charities Act 2011 now specifies the different circumstances in which the cy-près jurisdiction arises.

31. The Claimant relies on the following statutory circumstances (cumulatively or in the alternative to one another) in section 62(1):

> *"(b) where the original purposes provide a use for part only of the property available by virtue of the gift;*
> *...*
> *(d) where the original purposes were laid down by reference to—*
> *...*
> *(ii) a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift*
>
> *(e) 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, regard being had to the appropriate considerations."*

32. The "*original purposes*" referred to are "*the purposes for which the property is for the time being applicable*": s.62(4), 2011 Act.

33. The "*appropriate considerations*" are defined in s.62(2), 2011 Act as follows:
"(a) (on the one hand) the spirit of the gift concerned, and
(b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration"

The objects, the supposed limitations and the proposed changed objects

34. The parties agreed, and I accept, that for the purposes of the scheme I am asked to consider, and on the assumption I am asked to make that the Additional Purposes have been extinguished, the objects are in these words of the Royal Charter:

> *"that for ever hereafter there shall be one Grammar School in the Village of Harrow-on-the-Hill ... which shall be called the Free Grammar School of John Lyon, for the bringing up, teaching and instruction of Children and Youth in Grammar, for all time hereafter coming*".

35. As the Master of the Rolls put it in *AG v Clarendon:*

> *"*the *founder has determined, that there shall be for ever kept up at Harrow a Grammar School; and he has provided funds for its perpetual sustentation*".

36. The Royal Charter objects can therefore be described as the establishment, maintenance, and improvement of a school to educate children, at Harrow, for ever. The 1874 Statutes have permitted the establishment and maintenance of a subordinate school also at Harrow.

37. The primary limitation on the use of "*the income of the property of the School"* is that it must be applied for the purposes of the Schools. Where the geographical limitation comes in is that the Schools are to be in Harrow. Expenditure and philanthropic activity outside Harrow are appropriate if it is nevertheless for the purposes of the Schools. It is not the case, as suggested in the Claimant's evidence, that the Claimant's activity must "*be shown to benefit young people in Harrow*". It must be shown to benefit the Schools. The Claimant's concern that there is uncertainty as to what is now the "village" or "parish" of Harrow might be relevant to the Additional Purposes but it is not relevant to the Royal Charter objects. The Schools are now firmly established on their sites. It is not the case, as the Attorney General contends, that educational benefit to children outside Harrow may only be conferred at the school buildings in Harrow. If educational benefit conferred on children outside Harrow is properly to be regarded as conducive for the purposes of the Schools, then, in principle, there is no geographical restriction on where it occurs.

38. Some of the things which the Claimant wishes to do are not prohibited by these objects if they are properly understood. The evidence filed on behalf of the Claimant identifies several projects which the Claimant would like to be involved with, but which it says are outside what the current objects permit. For example, the Claimant has been asked to provide technical and financial support for very disadvantaged children attending a primary school in Darwen, Lancashire. Similarly, it has been asked to form a

collaboration with Oasis Academy South Bank to form a sixth form centre in central London with a high proportion of students from a disadvantaged background. Provided these philanthropic projects are worthy and do not divert away resources needed for the Schools, I would regard such outreach projects as capable of being for the purposes of the Schools, for example by enhancing their reputation and inculcating by example appropriate values in the Schools' community. I accept, however, that it is an unhappy position for the Claimant to have to take the risk in respect of any particular project that another judge or the Charity Commission might take a different view.

39. One point which featured heavily in Mr Smith's oral submissions is that the Claimant perceives the geographical limitation as limiting its ability to found further schools outside Harrow, and in particular abroad, and is constraining it maximising the commercial exploitation of its international reputation. I agree that it is difficult to see how founding further schools abroad is within the Royal Charter objects. However, the Claimant is already able to commercially exploit its international reputation. There are twelve Harrow branded schools in eleven overseas locations pursuant to licensing arrangements with the Claimant. The additional public benefit from being able to found schools abroad as part of the pursuit of its charitable objects pursuant to a cy-près scheme, rather than through a commercial trading vehicle, was not fully addressed and was not obvious to me.

40. The Claimant seeks a scheme to change the objects. The proposed order reads as follows:

> *"By way of scheme, that "the Income of the property of the School" (as defined by the Statutes made by the Governors of the Claimant and approved by Her Majesty in Council on 12 May 1874) shall be applied for the advancement of education for the public benefit without geographical limitation in such ways as the [trustees/Governors] think fit, but primarily by maintaining directly or indirectly the schools known as Harrow School and The John Lyon School and for no other purpose"*

41. The proposed objects the Claimant seeks by way of a scheme will fundamentally change the Royal Charter objects. What is proposed is more than just sweeping away a perceived geographical restriction on where activity can take place. The object of the charity will no longer be the "perpetual sustentation" of the Schools. It will be the advancement of education more generally. Although the primary means of fulfilling that object is to be the maintenance of the Schools, it will no longer be necessary for any expenditure to be justified as being for the purposes of the Schools.

Are the objects amenable to the Court's cy-près jurisdiction?

42. The Court's cy-près jurisdiction was developed in the context of trusts in the strict sense. S..75ZA, 2011 Act (inserted by s.8, Charities 2022) puts beyond doubt the jurisdiction of the court and the Charity Commission to make a scheme in relation to a charity which is a corporation rather than a trust. It provides that:

> "(*1) Any power of the court or the Commission to make a scheme in relation to a charity that is a charitable trust is also exercisable in relation to any other institution which is a charity*."

By s.9(3), 2011 Act, an "*institution*" is defined as "*an institution whether incorporated or not, and includes a trust or undertaking*."

43. The mere fact that the Claimant is a corporation does not, therefore, present an obstacle to the exercise of the Court's scheme making jurisdiction.

44. There is, however, a well-established principle that the Court's scheme making jurisdiction will not be exercised in any way which conflicts with the provisions of an Act of Parliament or Royal Charter but only in aid of the statute or charter or to supplement it; see in relation to statutes *Construction Industry Training Board v Attorney General* [1973] Ch 173 at 187 C-E, and in respect of Royal Charters see *In re Whitworth Art Gallery Trusts* [1958] 1 Ch 461. Both Acts of Parliament and Royal Charters are treated as matters specified by a higher authority and not to be interfered with by the Courts without such interference being itself authorised by an Act of Parliament or Royal Charter.

45. The Claimant and the Attorney General have agreed that the principle is not engaged here, apparently on the basis that "*the relevant objects are not set out in an Act of Parliament or Charter but are corporate obligations arising out of the operation of the 1873 Scheme*". No substantive argument was heard on this issue as a consequence.

46. In considering this judgment, I have come to have real doubt as to whether the position agreed between the parties is correct. This is because it seems to me that the objects <u>are</u> set out in the Royal Charter as I have described above.

47. The Original Corporation owned its property subject to a binding obligation to apply it only for the charitable objects in the Royal Charter; see *Liverpool and District Hospital for Diseases of the Heart v Attorney General* [1981] Ch 193 cited with approval by Lord Walker in *Chinachem Charitable Foundation Ltd v The Secretary for Justice* [2015] HKCFA 35 at [38] and by Lady Arden in *Lehtimaki v Cooper* [2022] AC 155 at [67] to [73]. When its property was passed to the Claimant, the Claimant received it on terms that this would not affect "*any trust or liability*" affecting that property which "*shall continue and may be enforced by or against* [the Claimant] *in the same manner and to the same extent as the same could have been enforced by or against the* [Original] *Corporation*". While the Original Corporation did not hold its property on trust, the words "trust or liability" are clearly wide enough to catch the binding obligation affecting the Original Corporation's property (a point on which the Claimant and the Attorney General agreed). The Claimant therefore received the property subject to that binding obligation. At no point has the property ceased to be held for the charitable object set out in the Charter. All that has happened is that the Claimant has replaced the original Corporation as the custodian of that property.

48. If that analysis is wrong, and it is the case that the 1873 Scheme reestablished the charity such that the Claimant's corporate obligations are properly said to arise from the 1873 Scheme albeit incorporating by reference the objects in the Royal Charter, I still question whether it can really be said that the principle that the Court will not interfere with matters specified by a higher authority is not engaged. Apart from a technical restructuring nothing has changed. The objects of the charity are still contained in the Royal Charter.

49. However, I have formed these views without hearing argument, including argument as to whether section 75ZA has swept away the requirement for judicial restraint when dealing with charitable corporations established by Act of Parliament or Royal Charter. As appears below, a cy-près occasion has not occurred, and so the Court cannot exercise its scheme making powers in any event. It is therefore not necessary to delve further into this issue.

s.62(1)(b) cy-près occasion - where the original purposes provide a use for part only of the property available by virtue of the gift

50. The Claimant is very clear that it does not have surplus cash. The property which the Claimant identifies for the purposes of establishing this cy-près occasion is "*its valuable brand and the international recognition of it as a first-class educational institution, the staff and other educational resources which are not exhausted by the current objects*".

51. The Claimant says that its educational brand can be deployed around the world without detracting from its commitment to the Schools in Harrow. In fact, its brand is already deployed around the world on a commercial trading basis. There are twelve Harrow branded schools in eleven overseas locations pursuant to licensing arrangements with the Claimant. The Claimant nevertheless says that the need to use this franchise type arrangement is constraining and it is missing international opportunities.

52. The Claimant also says that there is presently some surplus capacity in teacher time which could be deployed, for example, on the projects in Lancashire and central London or in establishing an online school.

53. These submissions raise the question as to what is property for the purpose of this cy-près occasion.

54. I take "*the property available by virtue of the gift*" to be the property now dedicated to the original charitable purpose which it is sought to change. The property now available is derived from the original gifts by John Lyon or subsequent gifts from other donors. Some of this property may have been invested or employed in trade to generate profit but all the school's assets are ultimately derived from those gifts and are therefore available to the charity by virtue of those gifts.

55. Section 62(1)(b) is a cy-près occasion which restates the Court's original jurisdiction to apply surplus property cy-près. such as, for example, directing that the unused property be transferred to another charity. While there is no need to limit s62(1)(b) to the original jurisdiction, it does seem to me that "*property*" in s 62(1)(b) must mean property in the sense of a property interest recognised by the law which is capable of ownership. The part of the property which is not used must, self-evidently, be capable of being used. And it must be capable of identification with precision so that it can be applied cy-près.

56. Fluctuating surplus capacity in staff is not a property interest which is capable of being owned. Mr Smith submitted that the Claimant's brand, reputation and know how (as to how to run a boarding school) was intellectual property and that it was not being exhausted in Harrow. However, it is not possible to identify what property is surplus to the charity's requirements. Further, a brand cannot be separated into parts. The reality is

that the charity is using the whole brand. The fact that others could use it too does not mean that there is a part of the brand which is unused. The same points apply to reputation and know how.

57. This cy-près occasion has not occurred.

S.62(1)(d) and s62(1)(e)(iii)- "appropriate considerations"

58. Both these provisions require regard to be had to the "appropriate considerations" as defined in s.62(2), being the spirit of the gift on the one hand and the prevailing social and economic circumstances on the other. The subsection envisages that these will be competing considerations which the Court will have regard to.

59. The "*spirit of the gift*" is "*the basic intention underlying the gift or the substance of the gift as opposed to the form of words used to express it or conditions imposed to effect it*"; *Varsani v Jesani* [1999] Ch 219 at 234A per Morritt LJ. In this case, the spirit of John Lyon's gift is the advancement of education of children, including local children, through the establishment and operation of a school at Harrow. Free education for local students was swept away by the Public Schools Act reorganisation on the recommendation of the Clarendon report, and having been enacted by statute, the objects must now be read as intending to confer more limited benefit on local children.

60. The meaning of "*social and economic circumstances*" is self-explanatory; *White v Williams* [2010] PTSR 1575 at 1581F per Briggs J. The points highlighted by the Claimant included that Harrow is no longer a rural village but is now part of greater London. There is now free education across the nation and other schools in Harrow. The need for a school at Harrow to benefit the local children has passed. At the same time there are now many private schools with which the Schools must compete and I am told that there are financial pressures on the sector, making the exploitation of the international reach of Harrow School desirable.

s. 62(1)(d)(ii) cy-près occasion- original objects for a class of persons or an area which has for any reason since ceased to be suitable

61. The vestiges of the Founder's intentions in relation to the youth of Harrow after the Public Schools Act reforms are mainly that local students have the benefit of the convenience of the school on their doorstep and the ability to be day students rather than boarders. Online education has diminished the importance of physical attendance at a school building, and therefore diminished the importance of where the school is located. None of this, however, is sufficient to constitute a cy-près occasion. Harrow has not ceased to be a suitable area for the Schools. The Claimant is not proposing to move the Schools to a more suitable area. The local students have not ceased to be suitable for the limited benefit they receive from being local.

s. 62(1)(e)(iii) cy-près occasion - original purposes have ceased to provide a suitable and effective method of using the charity's property

62. The essence of the Claimant's submissions on this issue is that it could do more if it was not constrained by the current objects to applying its assets only for the Schools in Harrow. That, however, is not sufficient to constitute a cy-près occasion. It is not

enough to show that there is a more suitable or more effective way the charity could use its property. What needs to be established is that the use of the property required by the objects is no longer suitable or no longer effective. The Claimant does not contend that maintaining the Schools is no longer suitable or no longer effective, and even under the proposed scheme maintaining the Schools will remain the charity's primary object. Maintaining the Schools remains a suitable and effective use of the charity's assets.

Do sections 7 and 11 of the Public Schools Act 1868 permit the amendment of the Claimant's objects and, if so, subject to what constraints?

63. The Public Schools Act was intended to permit the recommendations in the Clarendon report to be given effect. It made provision for new governing bodies of seven Public Schools to be established by the then existing governing bodies to take over the management of the schools, and for the reform of the constitutional statutes of each school. It appointed temporary Special Commissioners to oversee the transition. Much of it has been repealed or amended. References to the Special Commissioners, for example, have gone.

64. It is the statute as amended that must be construed. As Hobhouse LJ put it in *Inco Europe Ltd v First Choice distribution (a firm)* [1999] 1 WLR 270 at 272:

> *"In general terms, it is undoubtedly correct that the effect of an amendment to a statute should be ascertained by construing the amended statute. Thus, what is to be looked at is the amended statute itself as if it were a free-standing piece of legislation and its meaning and effect ascertained by an examination of the language of that statute*."

65. An allied point is that the search is for the current meaning of the statute. Acts are usually regarded as "always speaking" and to be construed for their meaning at the current time, taking into account developments which have occurred since they were enacted (an 'updating construction'); Benion, Bailey and Norbury on Statutory Interpretation 8th ed (2020), section 14.1. When the Public Schools Act was enacted, it had a specific purpose as recited in the preamble, namely the implementation of the Clarendon report. This initial purpose was fulfilled, so far as Harrow School was concerned, by 1874. In 1893, one can infer that the Act had served its original purpose in respect of all seven schools because the preamble, and its reference to the Clarendon report, was repealed, so that the Act is now simply stated in the preamble to be intended to "*make further provision for the good Government and Extension of certain Public Schools in England*". The most relevant provisions for the purposes of construction of section 7 and 11 are sections 5 to 11. These were overhauled by the Statute Law (Repeals) Act 1973. Sections 5 and 6, which conferred specific statute making powers to give effect to the constitutional reorganisation envisaged by the Clarendon report, were repealed so far as they concerned Harrow School and sections 8 to 11 were amended. The effect of those amendments was to change the context of section 7 and section 11 in the free-standing amended Act. The Act as amended is clearly intended to be 'always speaking'.

66. Looking then, at the Public School Act now as a free-standing piece of legislation, the relevant provisions are these.

66.1 By section 7:

"*the new Governing Body of any School to which this Act applies may, by Statute made in manner herein provided, consolidate and amend any existing Statutes or Regulations relating to such School, whether in force by Act of Parliament, Charter, Judicial Decree, Instrument of Endowment, or otherwise, with Power to repeal any Statute or Regulation that has in the Opinion of that Body become obsolete, or has become incapable of Observance by reason of Changes authorised to be made under this Act*."

66.2 Section 8 imposes restrictions on the powers of any Governing Body to make Statutes under the Public Schools Act. These included in section 8(4):

"*No Statute made by any Governing Body of any School under this Act shall be of any Validity until the same has been approved by Her Majesty In Council as herein-after mentioned, but when so approved all the Requisitions of this Act in respect thereto shall be deemed to have been duly complied with, and the Statute shall be of the same force as if it had been contained in this Act, subject nevertheless to the Power of Alteration or Repeal herein-after contained*."

66.3 Sections 9 and 10 make provision for laying any Statute made pursuant to the Act before His Majesty in Council for approval or disapproval.

66.4 Section11 then provides:

"*Any Statute made in exercise of the Powers of this Act may, at any Time or Times be repealed or altered by the Governing Body for the Time being in the same Manner and subject to the same Provisions in and subject to which Statutes may be made by the Governing Body*."

67. The starting point is that "statutes" are conventionally understood to be subordinate to a Charter (see 14-010, *Tudor on Charities*, 11th ed) and therefore a power to consolidate, amend, repeal or alter "statutes" does not confer a power to consolidate, amend, repeal or alter a Royal Charter. The Charter itself may provide otherwise (as the Royal Charter did by authorising John Lyon to make statutes declaring further objects and declaring that they would be inviolable for ever). Or an Act of Parliament may provide otherwise.

68. In respect of statutes made by John Lyon or the Original Corporation pursuant to the Royal Charter, apart from authorising John Lyon to add to the Additional Purposes to the objects of the Original Corporation, it is clear from the terms of the Royal Charter itself that the statutes were intended to be made only for the implementation of the objects in the Royal Charter. John Lyon was given the power of making statutes relating to the government of the School and other things touching and concerning the School, as well as "other uses". He was not given the power to make statutes changing the objects as to the establishment and maintenance of a School or substituting different uses. After his death, the Original Corporation was given the power to make statutes relating to the government of the School and other things touching and concerning the School, but not whether there should be a school "forever" as the Royal Charter declared or that the property of the Original Corporation should be held for the purposes

of the School and the "other uses" specified by John Lyon "*and not otherwise, nor to any other uses or intentions*" as the Royal Charter also declared.

69. The question is therefore whether section 7 or section 11 of the Public Schools Act as amended permits an amendment of the objects set out in the Royal Charter.

70. The relationship between section 7 and section 11 has been changed by the historical amendments. In 1868, section 7 referred to the statutes which were in existence when the Public Schools Act took effect and section 11 to the statutes to be made pursuant to the Act. Section 7 clearly meant statutes and regulations in existence at the time of the Public Schools Act, but it has been deliberately retained when much of the Public Schools Act has been repealed. It should therefore be given an updating construction so that it applies to statutes and regulations now in existence. The 2016 Statutes, for example, are "existing statutes…in force by Act of Parliament".

71. Section 7 confers a power to consolidate, amend and (if obsolete) repeal, and implicitly to make and replace, existing statutes. Section 11 confers a wider, unrestricted, power to repeal, but only in respect of statutes made pursuant to the Public School Act and a power to alter such statutes. Neither section purports to confer a power to amend the instrument which authorised the making of those statutes, whether it be a Royal Charter, Act of Parliament or otherwise. Sections 7 and 11 are entirely consistent with the conventional position that statutes are subordinate to a Royal Charter or Act of Parliament and are intended to give effect to and implement the intention of the higher body.

72. If the objects of a charity to which the Public Schools Act applies are contained in statutes which fall within section 7 or 11, it seems to me that those provisions permit the objects to be amended (subject to the safeguard of Privy Council approval). If the objects of a school are not in existing statutes, then there is nothing in section 7 or section 11 which allows new statutes to be created which change the objects. If, as here, the objects of the charity are set out in a Royal Charter, there is nothing in section 7 or section 11 which authorises the alteration of the Royal Charter or those objects.

73. One point which gave me pause is that section 8(4) makes it clear that amended statutes will have the effect of an Act of Parliament. It might be said that this is an indication that statutes made pursuant to section 7 or 11 are intended to be able to do things which can only be done by an Act of Parliament, such as amending objects which are contained in a Royal Charter. In the end, however, this is too nebulous a footing for a far reaching construction to that effect. If Parliament intended the Public Schools Act to have that effect after its overhaul in 1973, it would simply have said so by inserting appropriate words.

74. The 2016 Statutes state that the Claimant's objects are "*the objects of the Corporation as described in the Charter*". This is simply a reference to where the objects are to be found. The 2016 Statutes were themselves made pursuant to sections 7 and 11 of the Public Schools Act, in its current form, and were not able to alter or change the objects set out in the Royal Charter. The 2016 Statutes do not themselves contain the current objects of the Claimant as described in the Charter, and an amendment of the 2016 Statutes cannot change them.

75. In conclusion, sections 7 and 11 of the Public Schools Act 1868 do not permit the amendment of the Claimant's objects as set out in the Royal Charter.

Conclusion

76. The Claimant's application for a scheme fails. I will hear the parties on paper as to the form of the order to be made, including the form of any declarations to be made and whether a further hearing is required.