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CORPORATIONS AS TRUSTEES

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The idea of a corporate body as trustee is in one sense a rather artificial concept, since a corporation has no mind of its own and is dependent on people to run it. Section 97(1) of the Charities Act 1993 solves this problem by "lifting the veil of incorporation" and providing that "charity trustees" means the persons having the general control of the management and administration of a charity. This means that for the purposes of control by the Charity Commissioners the members of the governing body, however designated, will be the charity trustees and so responsible for the due administration of the charity. Frequently, the charity's governing document will contain a statement that the members of the governing body will remain as fully responsible for their own acts and defaults as if incorporation had not taken place. It is thought that this merely states the position under the general law and will apply equally to any trusts administered by the corporation. Similarly, the members of the governing body of a non-charitable corporation will be the charity trustees of any charities which it administers.

At the risk of stating what will be obvious for some, it might be helpful for those less familiar with the charity scene to give some examples of the type of corporate bodies which can find themselves trustees of charities.

There are bodies incorporated by Letters Patent or Royal Charter; there are a few incorporated by Act of Parliament; some are created under particular legislation, such as Parochial Church Councils, the Minister and Churchwardens - a quasi-corporation aggregate for the purposes of the School Sites Act,[2] Health Authorities and NHS Trusts; there are Local Authorities; there are trustees incorporated under the Charitable Trustees Incorporation Act 1872; and there are, of course, limited companies. There are, too, corporations sole, such as the incumbent of a benefice or the bishop of a diocese, but these will not figure in this article, except perhaps for the Official Custodian for Charities, of whom more later.

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2 S.7 School Sites Act 1841.

A fundamental concept which must be grasped when considering this topic is the distinction between a charity which is itself incorporated and a charity which is administered by a trustee which is a corporate body. The legal notion of charity is derived from the equitable concept of a trust. A charity is a trust for purposes not for people. Originally, therefore, the property of the vast majority of charities was held on trust. This gave the Court of Chancery jurisdiction to intervene in the event of a breach of trust or on a failure of the original purposes of the trust. It is stated in *Tudor on Charities*, 4th edition, that the property of a corporation established for eleemosynary purposes is held on trust, whereas the property of a corporation established for civil or ecclesiastical purposes is not. No very good reason can be seen for this distinction, except perhaps that the Court of Chancery was seeking to found a jurisdiction which would give it control over these undoubtedly charitable institutions. Presumably the actions of the other institutions could be controlled in other ways: ecclesiastical corporations[3] would be subject to their own system of law, whilst presumably other remedies were available to deal with civil corporations, such as the prerogative writs like certiorari and mandamus.

Whilst some charities (such as Christ's Hospital) were founded by Royal Charter, so that the charity itself was incorporated from the outset, most charters were granted to pre-existing institutions. The result was that the corporation so created did not hold the property of the charity as its own corporate property but continued to hold it on trust. This meant that an alteration of the Charter would not bite on the assets of the charity insofar as the amendment purported to alter the charitable purposes. This is the reason for s.15 Charities Act 1993, which makes it clear that the Court can establish a Scheme relating to a charter body under its jurisdiction with respect to charities notwithstanding that the Scheme cannot take effect until the Charter itself is amended.

Interestingly, charters were sometimes granted to existing corporations in respect of particular charities. An example is the charter granted to the Brewers' Company for the charity of Richard Platt. The effect was that the corporators of the new charter body were in fact the corporators of an existing corporation, but legally the two bodies were distinct. A purchaser or mortgagee dealing with the charity would therefore have to ensure when taking a transfer or charge that the documents were executed by the correct body.

Some charities are actually incorporated by statute. A modern example is the International Planned Parenthood Federation, which, because of its international federal structure, did not fit easily into the framework of English company law.

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[3] It is the *celebratio divinorum* which makes an ecclesiastical corporation: *Patrick's case* 1662 Raym. 108.

With this can be contrasted the Peabody Donation Fund, the subject of the Peabody Donation Fund Act 1948, where it is the Governors who are incorporated and not the charity itself.

Another case where one has to distinguish between the charity and its corporate trustee is that of trustees incorporated under the 1872 Act mentioned above.[4] The Certificate of Incorporation granted by the Charity Commissioners incorporates the charity trustees and, except for the matter of title, does not affect the property of the charity. This vests land, other than that vested in the Official Custodian, in the new corporation. The Act places a duty upon persons in whose names securities and funds are held to transfer them into the name of the new body corporate.

A corporate body does not hold its corporate property on trust. In *Liverpool & District Hospital for Diseases of the Heart v AG* [1981] Ch 193 Slade J held that, whilst a limited company is not a trustee of its corporate property, it is nevertheless in a position which is analogous to that of a trustee. Generally speaking, it will not be necessary in the case of a limited company for the Court to intervene by way of Scheme because the company has a statutory power to alter its purposes in the Memorandum of Association and power to alter its administrative machinery in its Articles. The Court can, of course, make Schemes for property of a company which is held on trust.

Whilst the practice of incorporating the trustees of a charity dates back to early times, it has not always been without its critics. The author of the fourth edition of *Tudor* wrote in 1889:

> "corporations are, as has been seen, frequently trustees of charities. This has been regarded with disfavour. It has been found that the impersonal veil of incorporation conceals the decisions and acts of individual members, weakening the sense of responsibility and producing laxity of administration. Besides that, it is certain that, in point of law, the liability of the individual corporators for acts done by the corporate body is less and more difficult to bring home than where the acts are those of individual trustees. The current practice both on the part of the legislature and of the Court has been to substitute, as far as possible, individual trustees for corporations."

The author gives as examples the Municipal Corporations Act 1835, which removed municipal corporations throughout the kingdom and they were replaced

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[4] Charitable Trustees Incorporation Act 1872 as amended by Charities Act 1992 and consolidated in the Charities Act 1993.

by bodies of trustees, and the Endowed Schools Act 1869, under which the Charity Commission had power to dissolve corporations that had been brought into existence solely for the purpose of an educational endowment. The practice was to exercise that power.

The learned author goes on to comment that charities found most urgently in need of reform were what are described as "benefiting corporations" involved in the abuse of their powers on the sale or leasing of lands. No doubt what he had in mind were cases like that of the St Cross Hospital Winchester,[5] which gave Anthony Trollope the inspiration for his novel *The Warden*.

It is interesting to note that almshouse charities in particular were quite frequently incorporated as "The Master and Brethren of the Hospital of King James", or "The Priest and Poor of the Charity of...", or by some similar title. In other words, the beneficiaries were corporators of the charity, as was its chief administrator, who also frequently benefited substantially from the charity by way of stipend. Such a situation would not be tolerated in today's climate of regulation and accountability.

How does a corporation become a trustee? An existing unincorporated association may receive the grant of a Charter, or a Charter or Certificate of Incorporation may be granted to an existing body of trustees who already hold property for charitable purposes. A benefactor may donate property, either inter vivos or by Will, to a corporation to be held on trust. We have already mentioned the incorporation by Act of Parliament of a body of charity trustees. A corporation is not infrequently appointed trustee by a Scheme or Order of the Charity Commissioners, less frequently by a Scheme of the Court.

If a body corporate is to be appointed trustee, the first question to consider is whether it has power to act. No body corporate can be appointed a trustee unless the instrument which constitutes it and defines its powers gives it power to be a trustee. In the case of a body incorporated by Royal Charter the power to act as a trustee may readily be implied and need not be expressed. The text-book statement is that a charter body has all the powers of a natural person, which would include the power to act as a trustee. However, the general view is that any trust which it assumes must be consonant with the purposes set out in the Charter. Modern Charters will usually contain a catalogue of powers, including power to administer trusts, but many old Charters will have no powers at all.

In the case of a limited company the power to act ought, ideally, to be expressed in its Memorandum of Association since the ultra vires rule still applies to

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5 *A-G v St Cross Hospital* (1835) 17 B.435.

charitable companies and it is not thought that the general sweeping-up provision ("to do all such other lawful things as will further the objects") would be sufficient to confer the necessary power. Although the doctrine does not now apply to commercial companies it is not thought that the administration of a charitable trust would sit comfortably with ordinary commercial activities. There is, however, no technical reason why a commercial company should not administer a charitable trust, for instance a benevolent fund for the benefit of its employees.

In the case of statutory corporations one would have to look very carefully at the Act constituting them. Since they are creatures of statute they can only do what their Act authorises them to do, so that it is felt that the power to administer trusts other than the one for which they are incorporated would have to be clearly stated. Fortunately the question does not arise very often in practice.

The next point to be considered after the power to act is that of suitability. The Commissioners can appoint a body corporate to be a trustee of a charity if it has power to act as a trustee and is suitable to be a trustee of that charity. Companies and other corporations incorporated with the intention of meeting the needs of the particular charity or similar charities are usually suitable bodies to be trustees for all purposes. For example, most Christian denominations have established trust corporations specifically for the purpose of holding and administering trust property, either alone or jointly with individuals.

On the other hand, a corporation set up for other purposes, such as a Local Authority, even though it may have power to act, may not always be suitable. In fact, Local Authorities are expressly precluded by s.139(3) Local Government Act 1972 from administering trusts for the relief of poverty or for ecclesiastical purposes.[6]

Even where the functions of the Local Authority coincide with the purposes of a charity there may still be a reluctance on the part of the Commissioners to appoint the authority. This is because history is littered with examples where the Local Authority has lost sight of the original trusts and treated the property as part of its general assets. This is particularly so in the case of land. Local Education Authorities have sold charity land occupied by a county school and mixed the sale proceeds with their general funds; Council houses have been built on land allotted under Enclosure Acts for the benefit of the inhabitants (for instance, for grazing); and in one case a whole housing estate was treated as part of the Council's general housing stock.

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6 LGA 1933 s.268(4) referred to "eleemosynary" charities.

A Scheme is not always necessary when the Commissioners are appointing an incorporated body to be a trustee of a charity; an Order may be sufficient. A scheme will be required if the existing trusts of the charity expressly or impliedly require that the trustees shall be individuals or shall have the qualifications which only individuals can have (for instance, profession of a particular religious faith), or require a particular number of trustees. A statutory exception to this general rule is provided by the Baptist and Congregational Trusts Act 1951, s.3 of which enables trustees of church lands to appoint the appropriate denominational trust corporation to act either alone or jointly with the individual trustees. So long as the trust corporation is a trustee any provisions in the Trust Deed regarding the number or qualifications of trustees are in abeyance.

Re Duxbury's Settlement Trusts is of interest.[7] Here the Public Trustee's valid appointment under s.5(1) Public Trustee Act 1906 entitled him to exercise powers and discretions, albeit that under the terms of the trust no discretion or discretionary power conferred on the trustees "shall be exercisable at any time where there are less than two trustees". The question occurs whether the Court would be prepared to take a similar view where other trust corporations have statutory authority to act as trustees.

If the Commissioners are asked to remove an incorporated trustee and appoint individuals in its place, and it is expedient to do so, the removal and appointment can usually be effected by Order without a Scheme, even though the original appointment was made by Scheme. In that case, any provisions in the Trust Deed regarding the number and qualifications of trustees will revive.

The expression "trust corporation" has been used, and something needs to be said about the status and functions of this particular creature. The expression is sometimes loosely used to refer to companies which undertake, for profit, the administration of private and other trusts. As a term of art it was first used in the Law of Property Act 1922, and now under the 1925 property legislation a trust corporation has certain powers and privileges in relation to land held upon trust.

The question whether or not a body is a trust corporation will not normally be relevant unless the trust property includes land.

The definition in the 1925 legislation[8] is as follows:

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7 [1995] 3 All ER 145.

8 S.117(1)(xxx) Settled Land Act 1925; s.68(18) Trustee Act 1925, s.205(1) (xxciii) Law of Property Act 1925; s.55(1)(xxvi) Administration of Estates Act 1925; s.175(1) Supreme Court of Judicature (Consolidation) Act 1925.

> "trust corporation" means the Public Trustee or a corporation either appointed by the Court in any particular case to be a trustee or entitled by rules made under sub-section (3) of section four of the Public Trustee Act 1906 to act as a custodian trustee."

This definition was extended by section 3 of the Law of Property Act (Amendment) Act 1926 to include the Treasury Solicitor, the Official Solicitor and any person holding any other official position prescribed by the Lord Chancellor. The provisions made in this section with regard to charitable trusts are set out later.

The role of the trust corporation is of particular significance in relation to the "overreaching" provisions of the 1925 legislation. The interests of the beneficiaries in land will not be overreached on a sale unless a purchaser can get a valid receipt for capital money arising on the sale. Section 14(2) Trustee Act 1925 provides:

> "(2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for:
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> (a) the proceeds of sale or other capital money arising under a disposition on trust for sale of land;"[9]

Similarly, the payment of capital money arising under the Settled Land Act to a sole trustee who is not a trust corporation is prohibited by s.18(1)(c) and s.94(1) of that Act.

The protection required by the legislation is assured by s.37(2) Trustee Act, which provides:

> "(2) Nothing in this Act shall authorise the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust."

It is to be noted that s.37(2) would not operate to debar the Commissioners from appointing a sole trustee because the Commissioners' appointments are not made by virtue of any power in the Trustee Act 1925. Nevertheless, they would not be willing to appoint a body corporate as sole trustee unless that body when appointed could give receipts for the proceeds of any sale.

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[9] The position will not be altered by the Trusts of Land and Appointment of Trustees Bill before Parliament at the time of writing.

Other provisions which are of interest to some of the larger incorporated charities are ss.160 and 161 Supreme Court of Judicature (Consolidation) Act 1925 (replacing ss.12 and 14 Administration of Estates Act 1925), which deal, inter alia, with the grant of probate and letters of administration to a trust corporation. Many testators who do not have close kin will leave the bulk or the whole of their estate to a charity. Often the charity will be the only party interested in taking out a grant of representation, but unless it does so through its officers, will need trust corporation status. As the charity will not be able to comply with the minimum requirements for capitalisation specified in the Rules it will have to apply for the Lord Chancellor's Certificate under s.3 Law of Property Act (Amendment) Act 1926 to act as a trust corporation.

It follows from the original definition that if the Court appoints a body corporate to be the trustee of a charity, then with respect to that charity that body corporate becomes a trust corporation. By virtue of s.16 Charities Act 1993 the Commissioners may by Order exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for appointing a charity trustee or trustee for a charity. Although there was room for doubt on the position as far as Orders made under Charities Act 1960 was concerned, s.35 Charities Act 1993 includes in the meaning of "trust corporation" in the statutory provisions mentioned in the section, a reference to a corporate body appointed by the Court as including one appointed by the Commissioners under the 1993 Act to be a trustee, and s.35(2) deems the sections always to have had effect.

It is to be noted that the body corporate does not become a trust corporation for all purposes, and in particular the Commissioners' Order does not have the effect of making it a trust corporation for the purposes of some other charity for which it is appointed trustee by deed.

The phrase "custodian trustee" is a term of art appearing in the Public Trustee Act 1906. The particular powers and duties of a custodian trustee are set out in s.4 of that Act. Any corporation appointed to be a custodian trustee therefore has precisely those powers, not more nor less. The corresponding term of art for the trustees who actually manage the trust is "managing trustees".

No body corporate other than the Public Trustee can be a custodian trustee unless it is empowered to act as such under rule 30 (as amended) of the Public Trustee Rules. It will be observed that any company authorised by the Lord Chancellor to act in relation to charitable, ecclesiastical or public trusts as a trust corporation shall be entitled to act in relation to such business as a custodian trustee. It follows that the Lord Chancellor's Certificate, besides conferring status as a trust corporation on the corporate body, entitles it to act as a custodian trustee; and there may be occasions on which a body corporate will seek the Lord Chancellor's

Certificate merely because it needs to be empowered to act as a custodian trustee. No body corporate can be appointed either by the Court or by the Commissioners or by deed or in any other way to be a custodian trustee unless it has power to act as such within these rules.

It is to be observed that the corporations which are entitled to act as custodian trustees include all Local Authorities in relation to charitable or public trusts (but not ecclesiastical or relief of the poor trusts) for the benefit of the inhabitants of the area of the Local Authority concerned and its neighbourhood. Local Authorities are therefore trust corporations for such trusts.

Under the Public Trustee Rules 1912, substituted by the Public Trustee (Custodian Trustee) Rules 1971,[10] the Lord Chancellor can, under Rule 30(c), prescribe a body which is incorporated under the 1872 Act and which is empowered by its constitution to act as a trustee for any charitable purposes as a trust corporation, but only in relation to trusts in which its constitution empowers it to act.

This raises the question whether such a corporation which owns land should as a matter of course apply for the Lord Chancellor's Certificate. There appears to be nothing in ss.50-62 of the 1993 Act (replacing the 1872 Act) affecting s.14(2) Trustee Act 1925 or ss.18(1)(c) and 94(1) Settled Land Act 1925 so as to enable such a body to give a valid receipt for capital money. It would therefore seem that trustees so incorporated should apply for trust corporation status in order to be able to deal with the charity's land.

Another difficulty about these corporations is that they are incorporated in respect only of the charity to which the Certificate relates. If property is donated to such trustees for special, as distinct from general, purposes, it will constitute property of a separate, albeit subsidiary, charity. The result is that the trustees will not be a corporate body for the purposes of that separate charity.[11]

Perhaps a word should be said about the special position of the Official Custodian for Charities. By s.2(1) of the 1993 Act he is rather quaintly stated to be a corporation sole, and in practice the post is filled by an officer of the Charity Commission. His function is stated to be "to act as trustee for charities in the cases provided for by this Act". This is somewhat misleading because s.22(1) goes on to provide:

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10 SI 1971 No 1894.

11 Claricoat Phillips, *Charity Law A to Z: Key Questions Answered*, pp 24-25.

> "...where property is vested in the Official Custodian in trust for a charity, he shall not exercise any powers of management, but he shall as trustee of any property have all the same powers, duties and liabilities, and be entitled to the same rights and immunities, and be subject to the control and Orders of the Court, as a corporation appointed custodian trustee under s.4 of the Public Trustee Act 1906 except that he shall have no power to charge fees."

Note that he is not a custodian trustee. This is presumably because he is a special creature of the Charities Acts and does not fall into any of the categories specified in Rule 30 of the Public Trustee Rules. Whilst he is not a trust corporation, in practice he is not required to give receipts to purchasers because s.22(2) provides that "the charity trustees shall have power in his name and on his behalf to do and execute all assurances and things which they could properly execute or do in their own name and on their own behalf if the land were vested in them".

Where land is vested in the Official Custodian and the charity trustees wish to acquire the benefit of an easement this cannot be granted to the trustees themselves because they do not hold the legal estate. The grant will therefore have to be made to the Official Custodian direct and, because an easement falls within the definition of "land" in Law of Property Act 1925 s.205(1)(ix), the Commissioners have made Orders under the powers now in s.26 of the 1993 Act for this purpose.

Whilst the Official Custodian still has power to hold property of any kind, both real and personal, in the vast majority of cases he will only hold land on behalf of charities, his service to charities in respect of investments having been discontinued. He will only hold personal property in future where this is transferred to him under an Order under s.18(1)(iii) of the 1993 Act in order to protect the charity's property where there has been misconduct or mismanagement.

Some deeds or constitutions contain a power to appoint custodian or holding trustees, and may go on to say that these trustees can be removed. In the case of custodian trustees this can be misleading because they can only be removed by an Order of the Court or the Commissioners.[12]

Care has to be taken sometimes to distinguish between property of a corporate trustee and property of the charity which it administers. This is particularly so in the case of limited companies. The powers in the Memorandum of Association will not extend to any trust which it administers unless the powers have been imported by reference or in some other way into the trust instrument. This will

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[12] S.4(2)(i) Public Trustee Act 1906.

hardly ever happen in practice. This may be particularly significant in the case of investment. The company may have a very wide investment provision, but unless the trust instrument otherwise provides the trust will be restricted to the Trustee Investments Act 1961.

Confusion also sometimes arises in the case of directors' and officers' insurance. The company may have power in its Memorandum to insure its directors, but it cannot use trust funds to pay insurance premiums unless the trust instrument contains the necessary power or it has, as trustee, obtained an Order of the Charity Commission permitting the payments.

Finally, it is a moot point whether charitable trust funds of a company which is struck off as defunct will pass to the Crown as bona vacantia. Section 654(1) Companies Act 1985 saves property which is held "on trust for any other person". It is not certain whether a trust for persons would include a trust for purposes. It has been argued though, that such property is not legally property of the company at all (it certainly has no beneficial interest in it), and that if the company ceases to exist it is simply a case of a charity without a trustee. If the Commissioners accept this argument they could appoint new trustees, if only for the purpose of applying for a regulating Scheme. By s.63(3) of the 1993 Act the Commissioners may apply to the Court, in the same way as the liquidator, for an Order under s.651 Companies Act 1985, and in that case the dissolution of the charity can be declared void. In that way the company's corporate property can be saved for charity.