The Charity Law & Practice Review

CHARITY LANDHOLDING: A NEW BEGINNING

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The repeal of section 29 of the Settled Land Act 1925 by the Trusts of Land and Appointment of Trustees Act 1996 ("the 1996 Act") has effected an unrecognised revolution in charity landholding. It is a good step, but more is needed.

Settlements and Trusts

The main object of the 1996 Act was to remove the dual system of holding land by limited owners as it had been confirmed and formalised by the 1925 legislation. That system distinguished between land in settlement, governed by the Settled Land Act 1925, ("SLA") and land held on trust for sale, governed by the Law of Property Act 1925. The Law Commission considered that the rules needed reform and, while few practitioners had complaints about a system that worked well in practice, Parliament accepted the proposal. There is no doubt that the new rules are an improvement.

The old rules depend on a distinction between a settlement and a trust that go back long before 1925. Since the Middle Ages the settlement, although not always under that name, has been used to control the devolution of land. The typical limitation to A for life, remainder to his first and other sons successively in tail male, with a remainder or reverter of the land in fee simple, created a succession of direct rights to the land itself. There was no need for trustees, and therefore no trusts in the modern sense. Indeed, the arrangement goes back centuries before trusts came into being.

What we would describe as charity land was limited in a similar way by granting the fee to a corporation, such as the Abbot and Chapter of a monastery. Under *Quia Emptores* (below) there could be no restriction on sale of a fee simple, (the Act did not apply to the life estate or entail), but a fee held as endowment of an

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ecclesiastical corporation could not be alienated under ecclesiastical law. It was in *mortmain*, the dead hand of the Church.

Feudal Incidents and *Quia Emptores*

Such land was originally held in Frankalmoign tenure from the original donor.[2] There were numerous freehold tenures, the most important being Knight Service and Socage. Both of those (and many others) were subject to feudal incidents which, because the King was the main feudal overlord, operated in some ways like a system of land taxation (and after the emergence of Parliament with its exclusive right to grant taxes was used, particularly in the seventeenth century, instead). If the Tenant in fee in possession died, his heir had to pay a Relief before entering. If the heir was an infant, the Crown could take the profits during the minority Wardship. Marriage of an heir was in the lord's gift and could be profitably sold. And there were other incidents.

So, many tenants tried to avoid them, principally by subinfeudating (granting a subsidiary freehold), so that on a sale or gift within the family, the vendor or donor became the freehold landlord of the freehold purchaser or donee, and so became entitled to the incidents. This deprived the Crown of revenue and in 1290 Edward I made a deal with his tenants in chief in Parliament, enacted in the Statute *Quia Emptores*, that in return for conceding the right of any holder of a fee simple to alienate it freely, subinfeudation was thenceforth prohibited, so saving the right of the Crown as lord to its feudal dues.

Alienation to the Church, which did not die, was never an infant, and could not marry, was formally prohibited under the Statute of Mortmain passed 11 years earlier in 1279 but at the time the Crown still had the power to dispense from statutes and did so by granting a licence in mortmain so that it could keep a watch on the loss of feudal rights.

That was not the first attempt to deal with the avoidance of Crown revenues using a similar method. The 1217 reissue of Magna Carta (which showed more of the influence of the King's advisers than the baronially inspired first edition of 1215) included c.43 which prevented the device of granting land in fee to a religious house and then taking back a subsidiary freehold to the grantor, the object being that the Crown lost its feudal incidents but the owner retained possession of the

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2 See *A-G v Dean and Canons of Windsor* (1860) 8 HLC 369 at 399: "this tenure, although consistent with a beneficial interest in the grantees, is likewise consistent with a charitable trust."

land. The Exchequer is still alert to counter modern equivalents of this scheme of gifts to charity with reservations.[3]

Alienation

Quia Emptores remains in force. In *Oldham BC v Attorney-General*[4] the Court of Appeal seemed to be in some doubt as to the source of the rule of free alienation and questioned if it was a general power of the Common Law. To the contrary, the Common Law does not prevent controls on the alienation of land. That is why a lease may to this day include an absolute prohibition on assignment. The rule is statutory under the Act of 1290. Section 36 of the Charities Act 1993 is no exception. Charity land may be freely sold like any other land in fee simple. Charity Commission consent is necessary,[5] just as consent of beneficiaries may be under section 10 of the 1996 Act, but that does not by itself make the land inalienable (any more than leasehold land subject to a qualified restriction on assignment). *Quia Emptores* never applied to lesser estates, which is why the rules against perpetuities became necessary to prevent settlors using life estates and entails and other shifting and springing interests arising after 1535 (below) to tie up land, but since 1925 virtually all freehold land (other than Crown Allodium and consecrated parish land) has been held in fee simple.

Statute of Uses

Quia Emptores was not the end of the attempt to outwit feudal dues. The next attack was based on the feoffment to uses, which led to the Statute of Uses and the later Act of 1601. The use seems to have emerged to rectify conveyancing problems. A price was agreed for the land, the money paid, the buyer allowed into occupation but because of the complexities of title the freehold was not transferred. If later the seller tried to claim still to be the owner and evict the buyer, the Chancery gave the buyer an equitable remedy that the seller should hold the common law title "to the use" of the buyer.

This method was found to be a convenient way of creating a parallel structure to the settlement described above by something more akin to the trust, with the

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3 Section 23(4)(a) Inheritance Tax Act 1984 (gift of land to charity with reservation or creation of right to possession) has the same function as c.43 of Magna Carta 1217.

4 [1993] Ch 210.

5 Charities Act 1993 s.36(1) unless, the procedure in the section is followed.

feoffees 159to uses playing the part of trustees. The device could also be employed to get round the prohibition on leaving hereditaments by will, by conveying land to feoffees to the use of the testator's will.

These were in principle unobjectionable, but what the Crown did not like was the device of putting land in the names of feoffees, whose number of adult males would be replenished as often as necessary, and who, as a group, never died or were infants, so depriving the Crown of feudal dues.

Henry VIII dissolved the monasteries at least in part from financial motives, but his exchequer was always hungry and the decision was taken to curtail the avoidance device by abolishing the use. This was done by "executing" it so that where A, B and C were seised to the use of X, the Statute of Uses 1535 had the effect of transferring legal title to X so that on his death a relief would again be due. This was only put through Parliament as the result of another bargain, represented in the Statute of Wills 1540, allowing freehold land to be left by will.

Charitable Uses Act 1601

By the end of the century the effects of the dissolution of the monasteries were being shown up to sensitive Christian consciences by the lack of any satisfactory provision for the relief of poverty or other charitable purposes. It was not possible to leave land on charitable uses because the effect of the Statute was to execute the use and transfer title to the beneficiaries.[6] Suppose a parish contains ten ascertainable paupers. A pious and godly merchant leaves his property to the use of the benefit and relief of poor persons within the parish. The result is to divide the land between the ten former paupers.

Hence the Statute of 1601 which is familiar to all readers of this journal. It provided that where land or other property was given on charitable uses then, after an initial vetting by commissioners (not totally dissimilar to that by the modern Charity Commission):

> the Lands, Tenements, Rents, Annuities, Profits, Goods, Chattels, Money and Stocks of Money may be duly and faithfully employed to and for such of the charitable uses and interests before rehearsed respectively for which they were given, limited, assigned or appointed by the Donors and Founders thereof.

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6 In *Porter's Case* (1592) 1 Co Rep 22b at 25a it was considered that charitable uses were enforceable because they were made with a licence in mortmain. Charitable uses under the Act of 1601 did not need a licence so long as no corporation was involved.

This did not apply to certain of what we would now call exempted charities, including Oxford and Cambridge colleges, Eton, Westminster and Winchester which still have their own rules in the Universities and College Estates Act, specifically excluded from the effect of the 1996 Act.[7]

Tenures Abolition Act 1660

The continued existence of feudal dues led to continued resentment and was a major contributory factor to the Civil War. One of the lasting consequences was the Tenures Abolition Act 1660 which abolished them. The Statute of Uses remained on the books. Its original function had now gone but it played an essential part both in allowing more flexible settlements than had been possible before 1535 by the shifting and springing (legal) uses and also by the bargain and sale with lease and release in conveyancing practice. Even had the seventeenth century been inclined to repeal obsolete enactments, it was not practicable. So, beginning with the accidental creation of a use upon a use,[8] the Court of Chancery allowed the development of the law of trusts as we know it. This included charitable trusts.

With the passing of the power of the Crown the original function of mortmain to protect royal revenues had gone but in an age dominated by family rights the laws had a new purpose to protect heirs against disinheritance by gifts to corporations and the rules remained[9] in a modified form until repealed by s.38 of the Charities Act 1960.

A charity did not and does not need to be established by trust. A charitable company is not a trust nor is an unincorporated association, even though it has trustees. A charity could in principle be established by settlement and, if it was, it would be subject to the normal rules, including the perpetuity rules against remoteness of vesting. A settlement on A for life with remainder on charitable uses was valid. A special exemption from the perpetuity rules (which in origin applied to limited interests) was given to gifts over from one charity to another.[10] But an outright gift for charitable purposes, provided there were persons capable

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7 1996 Act s.1(3).

8 The law developed after *Ash v Gallen* (1668) 1 Ch Cas 114.

9 Reformed by the Mortmain and Charitable Uses Acts 1888 to 1892.

10 *Christ's Hospital v Grainger* (1849) 1 Mac & G 460.

of being seised of any land involved, was good, irrespective of any intention to retain land in perpetuity.

1925 Legislation

The settlement was still the dominant form in 1925 to the extent that unless there was either an express immediate binding trust for sale, or one implied by the legislation (as for tenants in common), a settlement rather than a trust was the default form provided for limited owners. This gave rise to the "accidental" settlements created by inappropriate wording. Trustees had to be found even for settlements, to hold capital money on sales, but trustees had been involved in settlements without affecting their nature since the eighteenth century.[11]

Just as a dual system existed for private settlements and trusts and with the passing of time the justification became obscure, so also in the case of charities there was a dual system. The presumption of the 1925 draftsmen was that charity land would be held, along with other land held on ecclesiastical or public trusts under section 29 of the Settled Land Act. There was of course the ability to sell, but land subject to the SLA was expected in the ordinary course to be retained and this was suitable for (though not limited to) functional land and permanent endowment. On the other hand where a charity held land simply as an investment it would be better held on trust for sale, the "trust" here being not an expression of any equitable interests but a conveyancing device.

With the passing of time, where any land was acquired the professional advisers of charities tended to recommend a trust for sale, partly to avoid any risk of the restrictions associated with permanent endowment, and partly because they were more familiar with that method as skills in operating the SLA became less widespread. Unskilful conveyancing, by home-made wills or will draftsmen unfamiliar with conveyancing language, could still lead to a s.29 holding, and of course there were occasions when it was intended.

Reform in the 1990s

The position was radically changed by s.32 of the Charities Act 1992 (now s.36 of the Charities Act 1993). That removed for most purposes the distinction between permanent endowment and investment land (save for land held on special trusts). From then on there were no practical distinctions and there was no need for charity trustees to distinguish. Whether the land was held under s.29 or on

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[11] For example, trustees to preserve contingent remainders.

trust for sale it was in the names of the trustees (or the Official Custodian), and although the procedure on change of trustees was different'[12] that was an issue for their lawyers.

This situation was threatened by the Trusts of Land and Appointment of Trustees Bill in 1996. That did indeed intend to remove the distinction for the future by providing that all future limited interests would be subject to a trust of land. This was not to apply to existing settlements subject to the SLA. The consequence would have been that although private SLA settlements would eventually disappear by reason of the perpetuity rules, existing charitable settlements would not, and therefore if they acquired more land it would be subject to section 29 (and the other relevant provisions of the SLA) for centuries to come.

Furthermore, trustees of land were to have all the management powers of an absolute owner but SLA trustees only had the powers conferred by the SLA (unless they had been widened by the governing Deed, which was unusual in the case of older charities or those under home-made wills, or by a Scheme). The limited powers can still be justified for private SLA settlements where they are exercised by the tenant for life (who may not always be sufficiently responsible) on his own, but that restriction is hardly appropriate for charity trustees, especially where their counterparts, formerly holding on trust for sale, were being given wider powers.

The Charities' Property Association took up the issue. There followed discussions with the Home Office and the Charity Commission. The main delay was caused by the Foreign Office which needed to check that the proposal to repeal s.29 would not breach the European Convention on Human Rights. Once they were satisfied that the United Kingdom would not be in breach of its treaty obligations the way was clear and the Government introduced amendments to the Bill to convert existing charitable settlements to trusts of land.

The New Law

On the face of it the new law assimilates the rules governing land held by charity trustees to those affecting private trustees, but that is not the whole story. The procedural differences are immediately apparent. First, sections 36 to 40 of the Charities Act 1993 lay down rules for the disposal or charging of charity land (whether trust or corporate) and they, and the Land Registration Rules under their

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12 A conveyance between statutory owners as distinct from an appointment of new trustees of the conveyance.

authority,[13] require certain formal words to be included in deeds and on the Register. Secondly, the Act of 1996, while conferring wide powers on trustees of land by section 6, permits the powers to be modified by the trust deed under section 8, but section 8(3) does not allow this for charitable, ecclesiastical or public trusts. Of course, the power of sale of freeholds cannot be excluded under *Quia Emptores* but a private trust can limit powers of, for example, leasing and mortgaging. Charitable trustees now have full statutory management powers (and not just the limited powers under the SLA) and they cannot be limited.

On the other hand, section 10 provides that where the consent of more than two persons is required under the trust deed for the exercise of any function relating to land then a purchaser from a private trust need only be satisfied that two have consented, but section 10(2) excludes that in the case of charitable and similar trusts, so that the exercise of most powers could be frustrated by requiring the consent of a sufficiently large number of people, such as all the trustees, or even all supporters so long as they are clearly identified and defined, for example as those with current covenants. This can of course be overridden by the Court or the Charity Commission.

More Problems to Solve

The effect of the 1996 Act is to improve the law relating to the structure of charitable landholding but there are still many features that are illogical and inhibit good management.

First is the legal form. The new law, by removing the seventeenth century distinction between charitable trusts and settlements is a good step forward, but there is more to do. The older contrast with corporations remains. Charity trustees now tend to act as a body. To an observer there is little apparent difference between a meeting of charity trustees and of the board of a charitable company. The Charity Commission sees them as much the same and many trustees themselves would hardly recognise the difference. The main modern distinction is limited liability.

Corporations sole still exist in large numbers - in every parish where the rector has been inducted with the temporalities.[14] There are still many ancient corporations aggregate which are not companies. Modern ones tend to be created as

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13 Most recently the Land Registration Rules 1996.

14 He or she no longer holds in frankalmoign: Administration of Estates Act 1925 Sched 2, which applied on the first vacancy after 31st December 1925.

companies, usually limited by guarantee, but there are still charitable unincorporated associations (with trustees) and Industrial and Provident Societies. There are also some unclassifiable charities, sometimes governed by their own statutes.

The Deakin Commission Report has proposed, in a recommendation[15] that has been widely welcomed, that:

A new legal form should be established for charities should they wish to adopt it, which would provide a legal personality, limited liability for trustees and, where appropriate, the ability to trade.

Land Holding and Powers

Secondly, the land itself may be held in various ways. Trustees may have the land in their own names (with the associated complications on a change of trustee, and no confining the number of estate owners to the limit of four which applies to private trusts) or in the name of the Official Custodian. Local Authority charities are in the name of the council. Many charitable trusts now put their land into the name of a nominee company, which is owned by the trust and is not a trust corporation so cannot give a receipt for capital money without joining an additional trustee. Charitable companies which own the land as part of the company assets are free from that restriction, which can be confusing. The requirements of the 1992 Act to refer to the charity on the title goes some way to help but it does not overcome all problems, especially where the deeds have not been amended since before 1992.

Thirdly, there is still confusion over powers. Trustees now have all the management powers of an absolute owner under s.6(1) of the 1996 Act but it is unclear if the powers of gift in s.55 of SLA has survived the reform. Most of the dispositive powers will be governed by the terms of the trust. Commercial companies have power to do anything permitted by law, but that rule is modified for charitable companies.[16] There may still be special trusts as indicated by s.36(6) of the Charities Act 1993 and contemplated by the Court in the *Oldham* case.[17] Charities governed by statute may have their own restrictions, as do those

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15 Rec 17.3.

16 Companies Act 1989 s.108, substituting a new Companies Act 1985 s.35. Section 35(4) applies to charities.

17 Supra.

subject to the Universities and College Estates Act. Many of these problems can be overcome by schemes or other consents, but it would be better if the law was rationalised.

The Future

There are proposals for a European Association to provide a continent-wide vehicle for the whole voluntary sector.[18] Even though European law does not normally touch directly on domestic property structures, perhaps implementing the regulation when it is made will provide an opportunity for reform. But that must be some years off.

What is needed is a new type of corporation (perhaps along the lines of an incorporated charity under Part VII of the Charities Act but, as Deakin suggests, with limited liability) with full capacity to hold and manage land and with continuing legal personality. It need not be limited to charities but could be available for the whole voluntary sector, those organisations which do not distribute profit for personal gain. Any person dealing with such a body would automatically be on notice that there were restrictions on dealings to protect its purposes. It would not need to submit returns to the Registrar of Companies. There should be transitional arrangements to enable land to be put into such an entity, notwithstanding any restrictions in a lease or other document, so long as there was no change in the charitable (or voluntary) objects. There would be a standard constitution laid down by Parliament and in Regulations[19] but this could be varied to suit the circumstances so long as the objects were protected. Such a body might be called an Association and would provide a flexible structure to hold land and other property.

The new law is an undoubted improvement but there is more to be done to meet the needs of the next millennium.

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18 Proposal for Council Regulation (EEC) on the Statute for a European Association: COM (91) 273 in OJ(C) 99 of 21st April 1992, as amended by COM (93) 252 in OJ(C) of 21st August 1993.

19 Compare Companies (Tables A to F) Regulations 1985.