

CY-PRÈS APPLICATION OF THREE HOLLOWAY PICTURES

Lee Sheridan¹

Judicial precedent has had little to contribute to the development of the cy-près doctrine in England and Wales since the Charities Act 1960 came into operation. Most schemes are made by the Charity Commissioners.

In their report for 1992, the Charity Commissioners recorded a scheme they made for Royal Holloway and Bedford New College to sell pictures and devote the proceeds partly to building works. They described the legal issues as "not straightforward" but did not say what they were. The scheme also figures in volume 1 of *Decisions of the Charity Commissioners*, but the legal issues are not identified there either.

Facts

A fact which appears is that the people responsible for the finances of Royal Holloway and Bedford New College had got them into an undesirable condition. The college had what the Charity Commissioners described as "an accumulated deficit" of £1,400,000 on 31st July 1991 and it was predicted that the deficit would increase in amount. It is difficult to be sure exactly what an accumulated deficit is: it is not stated where the money for the expenditure not covered by income came from. If borrowing and paying interest was the financial mechanism, or included in it, that could be part of the explanation for the prediction of growth in the deficit. Another reason for expecting the accumulated deficit to increase was the estimate of seven million pounds as the cost of necessary or desirable building works over the following ten years. If the authorities responsible for administering the charity were (by whatever means) spending more on the charitable purposes than they received in funds applicable to the purposes of the charity and did not reasonably foresee means of making the charity solvent again, the first legal issue which is suggested is whether there had been a breach of trust. If there had not, consideration could be given without hesitation to the College's application for a scheme. If the applicant, or the people responsible for the application, had committed a breach of trust, the second legal issue appears to be whether discretion should be exercised by considering the application while the breach of trust stood unremedied or by putting the application aside on the principle that he who comes to equity must come with clean hands.

There is worse news about money. The college buildings were not being maintained and the Charity Commissioners were told that "unless drastic measures were taken

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the College's financial position would continue to deteriorate, putting its academic standards at risk". As the College is an exempt charity, the drastic measures could not include removal by the Charity Commissioners of any charity trustees unless the charity applied for their removal.

Representatives of the College had failed in their efforts to solicit gifts from English Heritage and other possible donors. In the circumstances, they turned to the *cy-près* jurisdiction of the Charity Commissioners with a view to selling valuable pictures held on trust (by the College, presumably) for the decoration of the college and using the proceeds partly for the purposes for which the deficit was being accumulated. In the words of the Charity Commissioners, "the College's Council was compelled to consider the sale of the three pictures" (a Constable, a Gainsborough and a Turner, part of a collection forming the trust property). One can only speculate what measures to continue the work of the College and to maintain its standards the College Council would have considered if there had been no endowment to turn to and what they had in mind when they started accumulating the deficit. If the College's income did not increase so as to wipe out the deficit, and (if a breach of trust was established) the private purses of the charity trustees would not run to doing so, the College would have had to try to reduce some reducible expenditure so as to bring the accounts back into balance. If that could have been done, there would have been no basis for a *cy-près* order relating to the picture trust.

Three legal issues affect the exercise of the jurisdiction to make a *cy-près* scheme in the circumstances:

- (1) whether there was an occasion listed in s.13 of the Charities Act;
- (2) if so, whether it was within the jurisdiction of the Charity Commissioners to make a scheme;
- (3) if so, what new purposes the trust property should be applied to.

Grounds for *Cy-près*

It is no ground for applying charity property *cy-près* that the trustees would rather do something else with the trust property than apply it in accordance with the original purposes of the trust. The only occasion listed in s.13 of the Charities Act which might be relevant to the College's predicament is: where the original purposes, in whole or in part, cannot be carried out, or not according to the directions given and to the spirit of the gift. The only evidence recorded by the Charity Commissioners that the purposes of the picture trust could not be carried out was: "there were no funds to provide for the care, maintenance and security of the pictures" and "their very high value meant that their insurance and storage were expensive and that in practice they were rarely seen by members of the public." Whether that was evidence of breach of trust seems a more obvious question than whether it was evidence that it was impossible to carry the trust out. A charity which has accepted a trust of pictures for the decoration of its premises accepts an obligation to provide for their care and security (and maintenance, if pictures require maintenance). It is not clear what the reference to the pictures being seen rarely by the public was meant to signify, but if the pictures were usually kept in storage, so that they were seldom seen

by students, officials and employees of the College, they were not decorating the College. There is no statutory obligation to insure trust property against theft, although it is prudent to do so. Ever since they accepted the trust of the pictures, the College should have been providing the funds required for performing it. In the financial terms of the College (as distinct from the joyous terms of the beholders), the pictures should have been recognised as a liability, not as a potential asset.

If the College could not reduce expenditure or acquire additional income to eliminate the deficit, so that it was trading fraudulently and would eventually have to be wound up if financial salvation did not turn up from any quarter, the decoration of the College would undoubtedly become impossible. If that was the situation staring the charity trustees in the face when they applied to sell the pictures, a *cy-près* occasion had indeed come to pass.

Destination of Funds under *Cy-près*

A *cy-près* scheme should apply the trust property affected by it to charitable purposes as close as possible to the purpose which has ceased to be achievable. The Charity Commissioners considered those purposes to be, first, the maintenance, security and upkeep of the unsold pictures and the picture gallery of the College; secondly, the maintenance and improvement of the original buildings and grounds of the college; and finally, any other way of furthering the general charitable purposes of the College not provided for out of government funds or other usual university funding sources. As it happens, the donor of the pictures was also the founder of the College (or rather, its predecessor, Royal Holloway College), which may suggest that, had he been faced with the situation, he would have preferred a partially decorated college to no college at all. There are other possibilities which might be favoured in a future case where the charity was not founded by the donor of the endowment which it is proposed to apply *cy-près*. The College could have been relieved of the burden of the care, maintenance and security of the pictures by applying them, or some of them, *cy-près* for the decoration of some other institution, such as another college of London University, which was willing and able to shoulder the concomitant financial obligations. In a suitable case, that kind of scheme might be considered closer to the intention of the founder of the trust than selling pictures with the result that they would no longer decorate a place used by university students and employees of a body engaged in university education.

Comment

It is unusual for a *cy-près* scheme to convert the capital of a trust into money available for expenditure on purposes of the trustee which are not closely related to the purposes of the trust which is being altered. There were objectors to the proposed scheme. It appears from the report of the Charity Commissioners that the expressed objections were on irrelevant grounds, but the College's application was controversial. The legal position was complicated. The Charity Commissioners must have come close to considering that they should abstain from the application of Royal Holloway and Bedford New College under what is now s.16(10) of the Charities Act 1993, which applies to the power to make a scheme:

"The Commissioners shall not exercise their jurisdiction under this section in any case (not referred to them by order of the court) which, by reason of its contentious character, or of any special

question of law or of fact which it may involve, or for other reasons, the Commissioners may consider more fit to be adjudicated on by the court."

Frequent reorganisation in education, the National Health Service and local government perturbs donors when institutions they intend to benefit cease to exist in the form in which they intended to benefit them. It is not a statutory consideration, but it is a matter of public concern, that potential benefactors may be deterred from generosity by that type of consideration or by foreseeing the authorised use, by trustees short of cash, of property meant as a permanent endowment, for purposes other than those for which the gift of the property was intended.

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EXPORTING CIVIL SOCIETY: CONFESSIONS OF A "FOREIGN LEGAL EXPERT"¹

E Blake Bromley²

Introduction

My first direct involvement in the work to create a legal infrastructure for the third sector³ in Eastern Europe was in the summer of 1989 in Moscow. I participated as part of an international delegation of foundation experts in a symposium sponsored jointly by the Rockefeller Brothers Fund of New York and the Foundation for Social Innovations of Moscow. In the next two years I made five trips to Hungary, Poland and Czechoslovakia, participating in various seminars and conferences on the third sector and meeting with national organisations interested in law reform which would create a more enabling environment for the third sector. I became directly involved

¹ This was presented at NCVO International Charity Law Conference, London, 16th-17th September 1994.

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³ The debate as to whether the sector should be called the charitable, non-profit, independent, non-governmental or voluntary sector is interminable. I have arbitrarily decided to use the term "third sector".