CASE NOTES[1]

Liverpool City Council v A-G (1992), *The Times* May 1

The Facts

In 1926 the executors of Thomas Clarke, with the consent of the residuary beneficiaries, had transferred Allerton Hall Gardens estate to Liverpool corporation, which had covenanted that the estate "shall be used and maintained as a public park or recreation ground and for no other purpose."

The council now wish to deal with the estate as a whole in a way which, though consistent with their statutory powers, would be inconsistent with any charitable trust or obligation which may exist.

The question for the determination of the High Court was whether the land was held by the council on exclusively charitable trusts, as the Attorney-General contended, or as part of its corporate property as the council claimed.

Held

The gift of land for use as a "recreation ground and for no other purpose" did not create a charitable trust requiring the council to maintain the land for recreational purposes in perpetuity in the absence of any of the formalities applicable to a transfer of land to be held on charitable trust.

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The Decision of Morritt J

Morritt J said that it was common ground that the provision of a recreation ground was a charitable purpose.[2] It was also common ground that it was necessary to show an intention that the corporation's legal ownership of the land was to be held beneficially for charitable purposes.[3]

An alternative test was whether there had been an imperative dedication of the land to purposes which were charitable. This test was referred to in *Richmond-upon-Thames v A-G*,[4] a similar case, where the court was faced with the question whether land given to a vestry was to be held on charitable trusts or for its statutory purposes.[5]

The council argued that the terms of the transfer showed that the land had been acquired by the corporation as part of its corporate property, subject only to personal covenants in favour of the donors, and that it was now entitled to use the land in accordance with its statutory powers.

The Attorney-General argued that the land was held on valid charitable trusts. He contended that the terms of the transfer construed in the light of the surrounding circumstances, created a valid charitable trust, because the corporation thereby accepted a fiduciary obligation to use and maintain the whole estate as a public park or recreation ground. He relied on the proposition set out in *The Shannon Ltd v Venner Ltd*[6] and *Prenn v Simmons*,[7] that if the meaning of the terms of the transfer was not plain, the court could consider the objective aim and genesis of the transaction.

The Attorney-General suggested that the aim of the transfer, that had been plainly manifested by the covenants and the corporation's acceptance of fiduciary obligations to that effect, had been that the estate should be kept as a recreation ground in perpetuity, as a memorial to the parents of the donors.

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2 See, for example, *Re Hadden* [1932] 1 Ch 133.

3 *Brisbane City Council v A-G for Queensland* [1979] AC 411, at p. 421G.

4 (1983) 81 LGR 156, at p.165.

5 See also, more recently, *R v Warwick District Council, ex p. Newby*, 4th March 1992, unreported (decided by Knox J sitting as an additional judge in the QBD in proceedings by way of judicial review of a council resolution to dispose by lease of land which it owned).

6 [1965] Ch 682, at p.690-692.

7 [1971] 3 All ER 237.

These propositions were disputed by counsel for the council, who contended that the desire for a permanent memorial was merely the motive for the gift and that the intention of the donors was that the estate should be put to the best use by the corporation and that the donors wished to tie the corporation as little as possible by placing restrictions on them.

Morritt J could not accept the Attorney-General's argument for three reasons.

First, several of the covenants envisaged that the estate would otherwise be available to the corporation to use for other statutory purposes. For example, a reference to the possibility of using the Hall as a public library, museum or art gallery, envisaged the exercise by the corporation of some statutory power because the gift did not include either the money or the books, objects or pictures to enable such a use.

Secondly, performance of some of the covenants would involve the corporation in some expenditure of ratepayers' money. In 1926 an admission charge would not have been thought to be consistent with the provision of a public park or recreation ground. It is unlikely that the donors would have been content that the memorial to their parents should be available only to those who paid to enter.

Thirdly, the Attorney-General's argument gave rise to an inescapable dilemma. Why should the court impose a charitable trust which the parties never considered at the time?

The Attorney-General had argued in the alternative that he was entitled to enforce the charitable purposes apparent from the covenants contained in the transfer, notwithstanding the absence of a trust and notwithstanding that he was not a covenantee and was not an assignee of the benefit of the covenants.

However, in *A-G v Poole Corporation*,[8] where the corporation had covenanted to preserve land conveyed to it as a recreation ground, the Court of Appeal had held that the conveyance was a document *inter partes*, in respect of which the covenantees would be the proper parties to sue. The Attorney-General had not been entitled to enforce the provisions of the deed against the corporation.[9]

The decision of the Court of Appeal could not be distinguished and it accordingly bound the judge in this case.

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8 [1938] Ch 23.

9 See dicta of Sir Wilfred Green MR at p. 28 and dicta of Romer LJ at p.36.

Comment

In charity proceedings, the Attorney-General represents the Crown as *parens patriae* and enforces charitable obligations on behalf of the public, who are the objects of the charity and are not normally entitled to enforce them personally.

But, the status of the Attorney-General in this respect does not enable him to create legal obligations in favour of the public where none exist.

Where property is effectively dedicated to charity, the law regards the charity as an abstract conception distinct from the institutional mechanism provided for holding and administering the funds of the charity.[10] But the ability of the Attorney-General to intervene depends upon such dedication.

In this case, Morritt J concluded that there was merely a gift to the corporation subject to the covenants in favour of the donees.

It is submitted that it was therefore correct to decide that the Attorney-General could not sue on the covenants or complain about the proposed application of the council's corporate property in accordance with the statutory provisions affecting it.

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10 See *Re Vernons Will Trust* [1972] Ch 300, at p.304.

Oldham Borough Council v A-G (1992), *The Times* August 5, CA[1]

The Facts

In 1962, by a deed of gift, Ina Clayton of Oldham, a metal merchant, had conveyed land[2] to the council on the trusts declared in clause 3, which read:

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

What lay behind the originating summons was a proposal, which had been the subject of much local debate and controversy, that the existing site of the Clayton Playing Fields[3] should be sold to commercial developers for a large price, and that with that price the council should acquire a new site in the same locality for playing fields which, because the price would be so high, would have much better facilities and be better endowed.

Paragraph 2 of the summons asked, if the answer to the question in paragraph 1 was "yes," that the council be authorised to sell or exchange the land on such terms as it might think fit.

The Attorney General, representing the interests of charity generally, supported the appeal but reserved his position in relation to paragraph 2.

The court was in no way concerned with the details of the proposal or with whether it was a good idea. It merely had to decide the first question in the summons as a question of law.

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1 **The first instance decision in this case was noted in this journal (CL & PR Vol 1, 1992/93, Issue 1 at 79).**

2 Some 23 acres of open space within the metropolitan borough of Oldham.

3 The land currently accommodates 6 football pitches, a building containing facilities for teams playing on those pitches, and some car parking spaces.

Held

Since the charitable purpose of a gift of land for use as playing fields for the benefit and enjoyment of the inhabitants of an area could be carried on on other land in the area, the court had power to authorise the donee and trustee to sell or exchange any part of the land.

The Court of Appeal therefore allowed an appeal by Oldham Borough Council from Chadwick J who, in answer to the question, whether the court had power to authorise the council to sell or exchange all or part of land in Oldham known as the Clayton Playing Fields, had declared that that question was to be answered in the negative.[4]

The proceedings were then remitted to the Chancery Division for consideration of paragraph 2 of the summons.

The Judgment of Dillon LJ

Dillon LJ commenced by stating that it was not in doubt that, as a general proposition, charitable trustees who held land as part of the permanent endowment of a charity (or land which had been occupied for the purposes of the charity) had power to sell that land with the consent of the court or of the Charity Commissioners. Whether that power was conferred by the common law, or by s.29 Settled Land Act 1925 or by s.29 Charities Act 1960 to the extent that the first question depended on that power, the answer had to be "yes."

The problem arose from s.13 of the Charities Act 1960, the broad effect of which was that an alteration of the "original purposes" of a charitable gift could only be authorised by a scheme for the *cy-près* application of the trust property and such a scheme could only be made in the circumstances set out in subheads (a) to (e) of s.13(1).

Since the circumstances of the present charity did not fall within any of those subheads, if on a true appreciation of the deed of gift and of s.13, the retention of the existing site was part of the original purposes of the charity, the court could not authorise any sale.

It therefore became necessary to look at the terms of the deed of gift. Having considered the wording of clause 3[5] and other provisions of the deed of gift, Dillon LJ took the view that there was no doubt that the donor intended that the land given should be used for ever for the purposes for the charity, as playing fields for the benefit and enjoyment of the specified inhabitants.[5] In this finding, Dillon LJ agreed

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4 *Oldham Borough Council v A-G* (1992) *The Times*, 13th April 1992.

5 supra.

5 In the lower court, Chadwick J had come to the same conclusion when he said, "it would be difficult to conceive of langauge which could indicate more clearly the intention of the Donor that the very land which was the subject of the gift should be preserved and managed as

with dicta of Lord Cranworth LC in *St Mary Magdalen, Oxford v A-G.*[6]

However, the crux of the case was the true construction of s.13 in the context of its legislative purpose. Did the "original purposes" include the intention and purpose of the donor that the land given should be used for ever for the purposes of the charity, or were they limited to the purposes of the charity?

Dillon LJ considered certain authorities cited to be irrelevant. These included cases such as *Re Laing Trust*[7] which concerned an administrative provision, and not purposes. In that case the provision, which was held to be administrative, was a provision that the capital was to be wholly distributed within the settlor's lifetime or within 10 years of his death. Other cases dismissed as irrelevant were those where the donor had imposed a condition as part of the terms of his gift, which limited the main purpose of the charity in a way which, with the passage of time, had come to militate against the achievement of that main purpose.[9] In each of these cases the condition was part of the purpose, but the court found itself able on the facts to cut out the condition by way of a *cy-près* scheme under the *cy-près* jurisdiction, on the ground that the subsistence of the condition made the main purpose impossible or impracticable of achievement.

Here, unlike those conditions, the intention or purpose that the actual land given should be used as playing fields was not a condition qualifying the use of that land as playing fields.

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playing fields for all times or (at the least) for so long as the law would permit."

6 (1857) 6 HL Cas 189 at p. 205

7 [1984] Ch 143.

9 See, for example, *Re Dominion Students' Hall Trust* [1947] Ch 183, where a condition of a trust for the maintenance of a hostel for male students of the overseas dominions of the British Empire restricted the benefits to dominion students of European origin. See also *Re Robinson* [1923] 2 Ch 322, where it was a condition of the gift of an endowment for an evangelical church that the preacher should wear a black gown in the pulpit.

The principles with which s.13 were concerned were the principles for applying property *cy-près* and nothing else, and there was nothing to suggest any legislative intention, in enacting the section, to extend the cases, where a *cy-près* scheme was necessary if anything was to be done, to cases where before the 1960 Act no scheme was required. Sales of charitable lands have, in so far as they have been dealt with by Parliament, always been dealt with by other sections not concerned with the *cy-près* doctrine.

Cases decided before the 1960 Act were consistent in indicating that mere sale of charitable property and reinvestment of the proceeds in the acquisition of other property to be held on precisely the same charitable trusts, or for precisely the same charitable purposes, did not require a scheme. So in *Re Ashton Charity*[10] Sir John Romilly MR held that the Court of Chancery had a general jurisdiction, as incidental to the administration of a charity estate, to sell charity property where the Court clearly sees that the alienation is for the charity's benefit and advantage.

Dillon LJ acknowledged that there were cases where the qualities of the property which was the subject matter of the gift were themselves the factors which made the purposes of the gift charitable. For example, where there was a trust to retain for the public benefit a particular house once owned by a particular historical figure, or a particular building for its architectural merit, or a particular area of land of outstanding natural beauty. In such cases, sale of the house, building or land would necessitate an alteration of the original charitable purposes and therefore a *cy-près* scheme, because after a sale the proceeds, or any property acquired with the proceeds, could not possibly be applied for the original charitable purpose.

But that was far away from cases such as the present, where the charitable purpose, playing fields for the benefit and enjoyment of the inhabitants of the donee's district, or it might equally be a museum, school or clinic in a particular town, could be carried on on other land.

Russell and Farquharson LJJ agreed.

Comment

It is submitted that the decision of the Court of Appeal is correct. Not all conditions attached to gifts should be treated as "original purposes" within section 13 of the Charities Act 1960. It is essentially a matter of construction in each case whether the provision, requirement, limitation or condition is so fundamental to the gift that it ought properly to be regarded as one of the purposes for which the property was given by the donor.

Here the trust to preserve and manage the land at all times hereafter was not within "the original purposes" of the gift made by the 1962 Deed. Rather, it was a direction as to the manner in which the original purposes - namely, the provision of playing fields for the benefit of the inhabitants of Oldham, Chadderton and Royton - were to be carried out. Accordingly, the court was correct in authorising a sale which was inconsistent with that direction.

As Dillon LJ acknowledged, with charitable gifts of land there will clearly be

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[10] (1856) 22 Beav 288.

circumstances in which the charitable purposes require the preservation of the land that has been given. An obvious example would be a trust for the preservation of an historic house to which the public were to have access. The public benefit lies in the access to that house for the purpose of enjoying the architecture, the setting and the appreciation of the contents in the setting for which they were acquired. This was not the case here, where an alternative site for the provision of playing fields within the area could be found.

The decision could have implications beyond the locality of Oldham. A spokesperson for the Open Spaces Society has commented that there could be many parks and recreational grounds given to councils by benefactors or acquired by public subscription where the wording in the deeds implies that there is a charitable trust.[11] Such councils will now be able, if the opportunity arises, to upgrade recreational facilities in their area by using money raised to provide and maintain new playing fields elsewhere.

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[11] The Times, 8th April 1992.