

SHARED OWNERSHIP: A CHARITABLE OPTION? Sarah Hayes and Jennie Gubbins¹

Introduction

One of the key issues facing charitable housing associations today is whether or not they can respond to Government pressure to maximise the amount of housing which can be produced within the current grant regime. The Government, through the statutory grant making body the Housing Corporation, is promoting Shared Ownership Schemes and DIYSO (Do it Yourself Shared Ownership). This is leading many charitable associations into a detailed analysis of what is, and what is not, permitted within their charitable objects.

In addition, we also understand that the Charity Commissioners have been conducting their own internal review of the charitable nature, or otherwise, of Shared Ownership and with the Department of the Environment have consulted the Attorney-General. To date no formal advice has been forthcoming; however, previous communication with the Charity Commissioners has indicated their severe reservations as to the appropriateness of any charitable association's involvement in the provision of Shared Ownership housing. We intend in this article to justify the charitable nature of many Shared Ownership schemes, notwithstanding the relatively controversial nature of the task.

What is Shared Ownership?

In essence Shared Ownership is a means of sharing the available equity in a unit of accommodation between landlord and tenant. The housing association will own the freehold interest and will grant a long lease to the tenant who pays only a proportion of full market value as a premium. The tenant then "owns" a corresponding percentage of the property and has the right to acquire further shares of equity (commonly known as the right to "staircase") up to full one hundred percent "ownership". Whilst the housing association retains its equity interest in the property the tenant will pay rent for his occupation of that share.

¹ Sarah Hayes MA (Cantab)
Jennie Gubbins LLB (UCL) Member of the Advisory
Editorial Board of this Review.
Both solicitors and partners in Trowers & Hamlin, 6 New
Square, Lincoln's Inn, London WC2A 3RP
Tel: (071) 831 6292 Fax: (071) 831 8700.

What are Housing Associations?

There are approximately 2290 housing associations registered with the Housing Corporation pursuant to the Housing Associations Act 1985. Their primary role is to provide affordable housing for those in housing need. In the region of forty percent have charitable status. Registration with the Housing Corporation gives each association the potential of bidding for Housing Association Grant under a statutory regime.

The majority of charitable housing associations are incorporated not as companies under the Companies Acts, but as industrial and provident societies under the Industrial and Provident Societies Acts 1965 - 1978. There are a few charitable associations which have more unusual constitutions. For instance, Peabody Trust² is incorporated under its own private act of Parliament and the trustees of the Guinness Trust³ are incorporated under the Charitable Trustees Incorporation Act 1872. As corporate bodies all these charitable organisations must act in furtherance of the objects set out in their constitutions. For industrial and provident societies these are registered rules, which are the equivalent to a company's memorandum and articles of association.

Where an association fails to act in furtherance of its objects it will be acting ultra vires. Since the saving provisions of s.9 of the European Communities Act 1972 and s.35 of the Companies Act 1985 are inapplicable, the full weight of the law as expressed in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation and Others* [1986] 1 Ch 246 (CA) will have effect, with potentially catastrophic consequences for association, management committee and creditors.

Charitable Objects

The modern form of registered rules for a charitable housing association incorporated as an industrial and provident society sets forth its objects in the following manner:

"The objects of the Association shall be to carry on for the benefit of the community the business of:

² Peabody Trust is incorporated as "The Governors of the Peabody Donation Fund" under The Peabody Donation Fund Act 1948.

³ The Trustees of the Guinness Trust are incorporated as "The Guinness Trust (London Fund) Founded 1890 Registered 1902" under the Charitable Trustees Incorporation Act 1872.

- (a) providing houses or hostels and any associated amenities for persons in necessitous circumstances upon terms appropriate to their means;
- (b) providing for aged, disabled, handicapped (whether mentally or physically) or chronically sick persons in need thereof houses or hostels and any associated amenities specially designed or adapted to meet the disabilities and requirements of such persons;.."

Where charitable housing associations wish to become involved in Shared Ownership Schemes they must ensure that these schemes are charitable in nature, falling within either object (a) or (b) set out above. Both these objects are derived from the key heads of charity specified as "the relief of the aged, impotent and poor" in the Statute of Elizabeth.⁴ Case law does not abound on the specific topic of a charitable housing association's powers and as with many charitable issues must be deduced from much wider case law.

Shared Ownership for the Elderly or Infirm

Danckwerts J in *Re Glyn's Will Trusts*⁵ summarises the disjunctive nature of the key heads of charity by stating clearly that:

"there is no reason for holding that aged people must also be poor to come within the meaning of the preamble to the Statute."

However, it is equally clear that the simple provision of housing in itself is not a charitable pursuit. The court in *Joseph Rowntree Memorial Trust Housing Association Ltd v A-G*⁶ made clear, after a review of the existing case law, that it is essential to the charitable purpose that it should give relief. The aged or impotent being assisted must have a need attributable to their condition, which requires alleviating and which those persons could not alleviate, or would find difficulty in alleviating, from their own resources.

⁴ Preamble to the Charitable Uses Act of 1601.

⁵ [1950] 2 All ER 1150

⁶ [1983] 1 All ER 288.

Consequently, many charitable housing associations are seeking to fulfil their second object by providing Shared Ownership developments for the elderly which have warden and alarm services, are constructed to advanced mobility standards and with communal facilities, such as a common room or laundry. In our opinion, provided that the association analyses the special features, location or size of accommodation to evidence the appropriate adaptation and suitability for elderly and infirm occupation then we are of the view that Shared Ownership provision for the elderly and infirm is a proper activity for charitable housing associations.

Ancillary Shared Ownership

No one has doubted that the provision of rented accommodation for the poor is a proper charitable activity for charitable housing associations. Nowadays such lettings will be on assured tenancies and although these in theory permit a "market rent" it is the nature of registered housing associations that they restrict rental level to "affordability". In this they are assisted by the provision of Housing Association Grant, which meets a proportion of the total capital outlay for the acquisition of new housing stock.

However, the current trend is for grant rates to be reduced and this places the onus on the housing association to ensure the overall financial viability of the scheme in other ways. Normally this is achieved through borrowing private finance rather than use of the association's own capital resources. However, interest costs may be such that this would produce rental levels which the association reasonably believes exceed the level of "affordability" and which cannot be met by those in need.

In such circumstances it is our view that charitable housing associations have the power to assist the overall financial viability of a rented housing scheme by incorporating Shared Ownership units. In doing so the association would be exercising its power to act in a manner which is necessary or expedient for the fulfilment of its primary objects. Clearly this is an appropriate form of Shared Ownership only where the association takes the reasonable view that the rented scheme would not progress at all without the financial bolstering achieved by Shared Ownership sales, or where, if the scheme did progress, the resulting rents would need to be set at a level beyond the reach of those in need. The further advantage which this form of ancillary Shared Ownership gives is that it protects the association's overall charitable assets from excessive gearing.

Shared Ownership for the Poor

Shared Ownership provision for the poor is the most controversial category of Shared Ownership provision by charitable housing associations. The basic premise

for those who dispute that this form of housing can ever fall within the charitable head "relief of poverty" is that those who can afford to buy their home, or a share of their home, cannot by definition be poor.

As an aside, there has long been a concern expressed by the Charity Commissioners regarding the action which should be taken by a charitable housing association when a charitable beneficiary housed by that association ceases to be a proper beneficiary of charity. This is a concern which applies equally to the provision of rented accommodation and which may require the full review of a tenant's circumstances on an ongoing basis. We believe that this concern can be effectively dealt with in the terms of the Shared Ownership Lease itself and does not create any additional hurdle which would prevent Shared Ownership being a charitable pursuit.

The suggestion that those who can afford to buy their home cannot be poor is an assumption which we would strongly dispute and which we do not believe is justified by existing case law. It is common knowledge that there is no statutory definition of "poverty". The rules of charitable housing associations provide no clarification of who may be "in necessitous circumstances" and trying to flesh out the charitable purpose of relief of poverty has proved a recurring problem. Channell J in the *Mary Clark Home* case⁷ went so far as to say:

"I do not know any standard of poverty, nor how I can lay down any rules; the difficulty in any case is to determine from what point of view the question is to be looked at, for obviously very different views may be held as to what is poverty and what is riches."

However, it is clear that poverty is not limited to those in extremis. Evershed MR has stated in *Re Coulthurst*⁸:

"It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to "go short" in ordinary acceptation of that term, due regard being had to their status in life and so forth."

⁷ *Trustees of the Mary Clark Home v Anderson* [1904] 2 KB 645 at 655.

⁸ [1951] 1 Ch 661 (CA).

It follows that the possession of a small amount of capital or the necessary income to support a mortgage does not of itself remove a person from the class of potential charitable beneficiaries. A Court of Appeal decision that made this clear beyond doubt is *Re Gardom*⁹. Here the charitable bequest was to provide a temporary home for ladies of restricted means. It was quite clear to the Court that each of the potential beneficiaries had an income. Nevertheless the Court held that there was a good charitable trust, since the ladies would be too poor to provide themselves with a temporary home of this nature without outside assistance.

In our view the appropriate conclusion to reach from this case is that where a person can from their combined capital and income resources afford to buy or rent suitable accommodation in the open market in an area where they can reasonably be expected to live, they cannot be poor in the charitable sense. However, if they require some form of financial assistance before they are able to acquire suitable accommodation then they may well fall within the category of those who are poor. There are degrees of charity less acute than abject poverty or destitution¹⁰: those with moderate means can be charitable beneficiaries and it is well established that charitable provision need not be total but can be amalgamated with the beneficiary's own resources¹¹.

Analogous cases relating to charitable provision for the "working classes" show that regard must be had to whether or not potential beneficiaries could properly be described as falling within the lower income range, or in other words, for people whose circumstances are such that they are deserving of support from a charitable institution in their housing needs¹².

Charitable housing associations need to set themselves clear guidelines as to who may fall within the category of poor people but nevertheless be able to afford to acquire a Shared Ownership Lease. In our view it is quite clearly for the committee of management, who are equivalent to charitable trustees, to establish criteria reflecting their own view in this area.

The *Mary Clark Home* case reasserted that it is the trustees who are the judges of whether potential applicants are poor, subject only to their being judicially reviewed if they go outside anything which can reasonably be considered to be poverty. In this review the trustees must act reasonably and prudently as in all trust matters.

⁹ *Re Gardom* [1914] 1 Ch 662 at 668 (CA).

¹⁰ *Re Gardom* at p.656.

¹¹ See for instance *Mary Clark Home* and *Re Gardom*.

¹² Per Denning LJ *Guinness Trust (London Fund) v Green* [1955] 1 WLR 872 (CA).

In our view trustees would not be acting unreasonably in deciding that any person eligible for housing benefit under the state welfare system is poor. In addition the trustees need to establish who can properly be regarded as in the lower income range for their area of operation. They need to analyse the average income for the given area and the income which would be required to support suitable outright acquisition of housing or rented accommodation on the open market. The cost of acquisition or renting on the open market should be compared with outgoings for a Shared Ownership scheme, amalgamating for this purpose any mortgage and rental costs.

The level by which the potential shared owner exceeds the housing benefit capital and income levels will also be relevant, as will the number of dependents, and the individual's capital and income resources, which should be assessed together with those of any other potential occupant of the property for this purpose. The association, in our view, would not be acting unreasonably in taking into account other outgoings such as transport, electricity, gas, water and general living expenses, for even the Charity Commissioners accept that:

"whilst a poor person may have sufficient funds within which to provide some necessary elements of life such as food and clothing, he might have insufficient funds with which to provide others such as heating and accommodation."¹³

Shared Ownership to Release Rented Units

One final category of Shared Ownership provision which we regard as a proper pursuit of charitable objectives is for a charitable housing association to provide Shared Ownership units which are targeted at, and marketed to, existing tenants of the association's rented accommodation, with the primary purpose of obtaining vacant possession of those units in order that these can be re-let to new charitable beneficiaries. In essence this is an attempt to persuade those tenants who may no longer themselves fall within the class of charitable beneficiary, but who have security of tenure and cannot be evicted from rented accommodation, to utilise their income and capital resources to purchase on a Shared Ownership basis. Clearly a cautious approach is warranted here, since it will generally not be possible to identify the number of existing tenants willing to become Shared Owners in advance and project how many Shared Ownership units will be required and the equivalent number of rented units released.

¹³ Charity Commissioners Report 1990 - *Re Garfield Poverty Trust*.

Conclusion

It can be seen that we regard Shared Ownership as a proper charitable activity in many instances and we are strongly of the view that it is for the trustees of a charitable association to establish appropriate criteria for assessing whether or not a Shared Ownership scheme and its potential tenants fall within the class of people who are charitable beneficiaries. It is only for the court to override this assessment where the trustees' view is clearly unreasonable.

We believe that it is now time for all those involved to come to a sensible and pragmatic conclusion relating to Shared Ownership issues. There has never been any definition of poverty and in view of the fact that the opportunity was not taken to incorporate one within the Charities Act 1992 that innovation is unlikely to occur for the foreseeable future. Poverty and its relief must remain relative terms and we believe that even the cautious approach likely to be adopted by the Charity Commissioners should not go so far as to exclude any possibility of Shared Ownership Schemes being implemented for the "relief of the aged, impotent and poor".