

DISPOSALS OF LAND BY CHARITIES

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The Charity Commission has had a role in charities disposing of land since 1853². The current regime is set out in sections 36 to 40 of the Charities Act 1993 which enables charities to dispose of land without recourse to the Commission for the majority of disposals. The purpose of these provisions is to give charity trustees greater responsibility while providing a framework to ensure that they are properly exercising their discretion when disposing of charity land.

This article will consider the Commission's understanding of the law and practice of section 36 Charities Act 1993³. Further guidance is available in the Commission's publication CC28 "*Disposing of Charity Land*" and its operational guidance OG 54 "*Dispositions of charity land*"⁴.

Land

In section 36, "land" has its usual legal meaning⁵ which includes buildings and other structures, land covered by water, an estate, interest, easement, servitude or

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² Sections 21 and 24 Charitable Trusts Act 1853 authorised the Charity Commission to sanction certain disposals and mortgages of charity land. Section 29 Charitable Trusts Amendment Act 1855 imposed a statutory prohibition on any disposition of charity land that failed to comply with the restrictions imposed by the section. The background to and development of the current regime from these origins is examined by David Dennis in *Dispositions of charity land*, [2006] 70 Conv., May/June 2006, pp. 219-244.

³ All statutory references are to the Charities Act 1993 unless otherwise stated.

⁴ Available online at www.charity-commission.gov.uk.

⁵ s.5 and Schedule 1 Interpretation Act 1978

right in or over land⁶. Land within section 36 is limited to land in England or Wales.⁷

Section 36 applies to land held by or in trust exclusively for a charity or charities. Land held jointly by a charity and a non-charity would not be within section 36 nor would land held on trust for a charity and non-charity. However, if a charity which is a tenant in common with a non-charity sells its interest in the land, that sale will fall within section 36 as the interest being sold will be held exclusively for a charity.

Where the beneficiaries of a deceased testator's estate are all charities, any land sold in the administration of the estate by the personal representatives is not necessarily land held by or in trust for a charity. This is because the funds held by personal representatives can be properly used to defray the expenses of the administration and other proper claims on the estate. Accordingly, the land is not held exclusively on trust for charity.⁸

What is a disposal for the purposes of section 36?

Section 36 applies when land held by or in trust for a charity is "sold, leased or otherwise disposed of". This includes the surrender of a lease, transfer of an easement, release of an easement, and release of a covenant running with land - but not licences and pre-emption agreements⁹.

⁶ A rentcharge is an interest in land but under section 40 of the Charities Act 1993 section 36 will not apply to a release of a rentcharge if the release is given in consideration of the payment of an amount which is not less than ten times the annual amount of the rentcharge.

⁷ See s. 36 (11). It is proposed to introduce a similar regime for disposals of charity land in Northern Ireland (see clauses 59-64 of the draft Charities (Northern Ireland) Order 2006 issued for consultation by the Department for Social Development on 17 July 2006 www.dsdni.gov.uk).

⁸ For tax reasons, land is sometimes appropriated to a beneficiary charity or charities at an early stage in the administration of an estate. In these cases where the legal title remains with the personal representatives, the property will be held on trust for a charity and section 36 will apply to the trustees of that charity if the land is sold. Where land is appropriated for the benefit of two or more charities, the power of sale remains with the personal representatives or the trustees nominated to hold the land for the beneficiary charities; in this case they are considered to be the "charity trustees" for the purposes of section 36.

⁹ A pre-emption agreement gives a person the right to purchase the property, on the terms of the right of pre-emption, if and when the charity decides to sell. The grant of a right of pre-emption, is not, in itself an agreement to effect a disposition of land, and section 36(3) and (5) do not apply..

For many years, contracts or agreements for the sale of land were considered to be disposals of land¹⁰. However, the Court of Appeal rejected this view in November 2004 in *Bayoumi v Women’s Total Abstinence Educational Union Ltd*¹¹. This case has had significant impact on the use of section 36 (and is considered in more detail below). The grant of an option is a type of agreement for the sale of land. Accordingly, the ruling in *Bayoumi* means that the grant of an option is not a disposal. The implications of this are considered below.

A number of disposals are specifically excluded from the scope of section 36¹². These are dispositions of land held by or in trust for an exempt charity¹³, any disposition of land by way of mortgage or other security¹⁴ and any disposition of an advowson¹⁵.

Other categories of disposal excluded from the operation of section 36 include any disposition for which general or special authority is given (without the authority being made subject to the sanction of an order of the court) by any statutory provision contained in or having effect under an Act of Parliament or by any scheme¹⁶. Examples include a forced sale under the compulsory purchase legislation and a sale by a liquidator.

The provisions of section 36 also do not apply to a sale by a charity to another charity at an undervalue¹⁷ which is authorised to be made by the trusts of the

10 *Milner v Staffordshire Congregational Union (Incorporated)* [1956] Ch 275

11 [2004] Ch 46; [2004] 2 WLR 181; [2003] EWCA Civ 1548. The House of Lords refused leave to appeal.

12 See s. 36(10).

13 Under current law dispositions of land by exempt charities that require registration must contain a statement that the land is held by or in trust for an exempt charity (Rule 180(1)(a) Land Registration Rules 2003 (S.I. 2003/1417). The Charities Act 2006 extends the Commission’s jurisdiction over certain charities that are currently exempt; when it enters into force future disposals of land by charities that cease to be exempt will also be subject to the requirements of section 36.

14 The provisions of section 38 and section 39 Charities Act 1993 have a similar regime as section 36 applicable to charities entering mortgages and charges.

15 An advowson is a right to appoint a clergy person to a particular church or benefice. It is an interest in land albeit one which is excluded from the operation of section 36.

16 s. 36(9)(a) Charities Act 1993 Where a general power of sale is conferred within a scheme, there is usually a provision that section 36 must be complied with on a disposal under the power. In the absence of such a provision, section 36 would not apply in such cases.

17 “otherwise than for the best price which can reasonably be obtained”.

disposing charity¹⁸. The disposition would essentially be a means of the disposing charity furthering its objects.

Similarly excluded are leases to beneficiaries at an undervalue where this is to enable property to be occupied for the purposes, or any particular purpose of the charity¹⁹. Thus a charity providing housing for the relief of the poor could grant a lease to a beneficiary at less than the market rent.

Power of sale

Section 36 does not confer a power to dispose. Before a charity can dispose of its land in accordance with section 36 the charity trustees must have a power to dispose. Such a power may be express and set out in the charity's governing document or it may be a statutory power. In the case of charitable trusts, the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) confers on trustees of land, for the purpose of carrying out their trusts, all the powers of an absolute owner. This clearly includes a power to sell or lease and to mortgage so long as this is in accordance with the trusts of the charity²⁰.

The TLATA also specifies that these powers shall not be exercised "in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity"²¹. This means, for example, that any disposal of land held on *specie* trusts²² where there is no express power of sale is not authorised by the statutory power except for the purpose of replacing the land with other suitable land to be held on identical trusts²³.

There will be some cases where land is held on *specie* trusts when it would not be appropriate for other land to be used to replace it. An example would be a trust to preserve a particular historical property associated with a particular eminent

18 s. 36(9)(b) *Ibid.*

19 s. 36(9)(c) *Ibid.*

20 s.6(1) Trusts of Land and Appointment of Trustees Act 1996

21 s.6(6) *Ibid.*

22 *Specie* trusts are trusts which stipulate that the land is to be used for the purposes, or any particular purpose, of the charity.

23 *Oldham Borough Council v Att.-Gen.* [1993] 2 WLR 224

figure. In such cases retention of the site is part of the trusts and even a sale for purposes of replacement would not be permitted.²⁴

The Trustee Act 2000 also confers on trustees who acquire land under the powers in the Act all the powers of an absolute owner²⁵. These powers are given subject to “any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation”²⁶ so similar restrictions apply to those imposed by the TLATA.

In the case of charitable companies, there is likely to be an express power of sale in the Memorandum of Association. If not, the company will usually have the power to amend its memorandum to confer such a power.

If a charity has no power to sell, the Charity Commission can, where appropriate, confer the necessary power under section 26 Charities Act 1993 or by scheme depending on the circumstances.

Requirements of section 36

Having established that a charity has the power to dispose of land, the starting point in section 36(1) is that all disposals will require an order of the Commission or the court. However section 36(2) provides that so long as the charity trustees can comply with the terms of section 36(3) or 36(5) and provided the disposal is not to a connected party, then the charity can proceed without such an order.

The disposal must also comply with the requirements of section 37 Charities Act 1993. These include a certificate by the charity trustees in the instrument effecting the disposition that the trustees have power to dispose of land to a connected person or that the disposal has been sanctioned by the court or the Commission²⁷.

²⁴ In such cases, sale of the land would necessitate an alteration of the original charitable purpose and, therefore, a *cy-pres* scheme (per Dillon LJ *ibid* at 222).

²⁵ s.8(3) Trustee Act 2000. The statutory duty of care under section 1 of the Act applies to a trustee when exercising any power in relation to land.

²⁶ s.9(b) *Ibid*.

²⁷ s. 37(2) *ibid.*). In the case of a charitable company, the certificate will normally be given by the directors of the company. The directors, in their capacity as charity trustees, can delegate the giving of the certificate to two or more of their number (see OG 54 B7 at 4.3). The delegates should indicate in the certificate that they are acting as representatives of the trustees as a whole. These requirements are explained in more detail in “Charities”, Land Registry Practice Guide 14, August 2003, www.landregistry.gov.uk.

Disposals to a “connected person”

A disposal to a connected person must be authorised by an order of the Commission or the court.²⁸ “Connected person” is defined in Schedule 5 to the Charities Act 1993. It includes:

- a charity trustee or trustee for the charity;
- any person who is a donor of any land to the charity;
- a child²⁹, parent, grandchild, grandparent, brother or sister of any such trustee or donor;
- an officer, agent or employee of the charity;
- the spouse or civil partner of any person above
- an institution which is controlled –
 - (i) by any person falling within the sub paragraphs above, or
 - (ii) by two or more such persons taken together
- a body corporate in which –
 - (i) any connected person falling within the sub paragraphs above have a substantial interest, or
 - (ii) two or more such persons, taken together, have a substantial interest.

Schedule 5 contains further details of connected parties and includes “any person living with another as that person’s husband or wife shall be treated as that person’s spouse”. Although the Civil Partnership Act 2004 amended the schedule to include civil partners as well as spouses³⁰, it did not make provision for persons

²⁸ The Commission has produced form CSD-1345 “Application for an Order authorising a disposal of charity land to a connected person” for this purpose.

²⁹ The term “child” includes a stepchild and an illegitimate child (Schedule 5 paragraph 2(1))

³⁰ Paragraph 1(e) of Schedule 5 Charities Act 1993 as amended by section 261(1) and Schedule 27 of the Civil Partnership Act 2004

living together as if they were civil partners to be treated as if they were civil partners. The Charities Act 2006 introduces such a provision³¹.

Statutory requirements in section 36(3)

The statutory requirements in section 36(3) apply to all dispositions except those granting a lease for a term of less than seven years where the charity does not receive a fine³². The requirements detail the steps the charity trustees must take before entering into an agreement to dispose of land.

For section 36(3) these steps are:

- (a) the charity trustees must obtain and consider a written report on the proposed disposal from a qualified surveyor instructed by the charity trustees and acting exclusively for the charity;
- (b) they must advertise the proposed disposition for such period and in such manner as the surveyor has advised in his or her report (unless s/he has there advised that it would not be in the best interests of the charity to advertise the proposed disposition); and
- (c) they must decide they are satisfied, having considered the surveyor's report that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.

If the charity trustees comply with all these requirements, they can complete the disposal without obtaining an order from the Commission or the court.

³¹ Paragraph 178 of Schedule 8 of the Charities Act 2006.

³² For these disposals see section 36(5)

Report from a qualified surveyor

A qualified surveyor is defined in section 36(4)³³ and this definition relies both on professional qualifications and practical ability and experience. To satisfy the latter requirement the surveyor must:

- have considerable experience of the property market in the town or district where the charity's land is situated;
- be familiar with the factors which affect the value of the type of land in question (eg agricultural, freehold or leasehold residential, light industrial, etc) within the market; and
- know which methods of marketing and disposal are most likely to succeed in the market for that type of land.

It is also important that the surveyor is clear that s/he is acting on behalf of and advising the charity trustees. The matters which should be dealt with in his/her report are set out in the Charities (Qualified Surveyors' Reports) Regulations 1992³⁴. The information prescribed by these regulations must be contained in such a report to comply with section 36(3).³⁵

Statutory requirements in section 36(5)

The statutory requirements in section 36(5) apply to leases for a term ending not more than seven years after it is granted (other than one granted wholly or partly in consideration of a fine).

³³ Section 36(4) – a person is a qualified surveyor if s/he is a fellow or professional associate of the Royal Institution of Chartered Surveyors or of the Incorporated Society of Valuers and Auctioneers who satisfies such other requirement or requirements as may be prescribed by regulations made by the Secretary of State; and is reasonably believed by the charity trustees to have ability in, and experience of, the valuation of land of the particular kind, and in the particular area, in question. Apparently the Royal Institution of Chartered Surveyors now has either fellows or members. Since 2002 the RICS has included the Incorporated Society of Valuers and Auctioneers. However, it is an accepted interpretation presumption that Parliament intends that the construction to be applied to an Act should continuously update its wording to allow for changes since the Act was initially framed. Accordingly, a member of the RICS is regarded as a qualified surveyor.

³⁴ SI 1992 No. 2980

³⁵ If the surveyor needs to provide more than one report, eg at different stages of the transaction, this is acceptable for the purposes of the regulations, provided that all the prescribed matters are eventually covered in the reports.

The provisions of this section are less onerous for charity trustees. The steps are that the charity trustees must:

- (a) obtain and consider the advice on the proposed disposition of a person who is reasonably believed by them to have the requisite ability and practical experience to provide them with competent advice on the proposed disposition; and
- (b) decide that they are satisfied, having considered that person's advice, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.

It is a matter for the charity trustees to judge whether the person they select to advise them is suitable, or possesses the appropriate credentials. They must assess his or her qualities according to the nature and complexity of the transaction and must be able to demonstrate that they have considered the matter if called upon to justify their choice of adviser.

As a matter of good practice, the Charity Commission suggests that the charity trustees retain a person who is a member of a professional body such as the:

- Royal Institution of Chartered Surveyors;
- Architects' and Surveyors' Institute; or
- Institute of Revenues, Rating and Valuation.

The charity trustees could use a suitably qualified employee of the charity. However if a charity trustee is to be employed and paid for this work then the governing document must contain a suitable professional trustee charging clause.

Again, if these steps are taken, the charity trustees can proceed without an order from the Commission or the court.

Requirements of the Commission for orders under section 36(1)

Where an order is required to authorise a disposal because the charity trustees cannot or do not want to comply with section 36(3) or (5) or the disposal is to a connected party, the Commission will need to be satisfied that the disposal is expedient in the interests of the charity. Accordingly, it will require evidence to demonstrate that the charity trustees' decision to dispose of the interest in land is reasonable. Such evidence may include a surveyor's report, copy of professional

advice, details of how any conflict of interests has been managed, and any other information which is relevant.

Section 36 must be complied with no matter how small the transaction may be. However the Commission may be prepared to authorise a small transaction without a surveyor's report if it is demonstrated that the cost of obtaining such a report would be disproportionate to the value of the transaction and there is other evidence that the disposal is expedient in the interests of the charity.

Specie³⁶ land

In the case of specie land there are further statutory requirements that need to be complied with before a valid disposal can be made. These are that prior to the disposition being made the charity trustees must have previously:

- (i) given public notice of the proposed disposition, inviting representations to be made to them within a time specified in the notice, being not less than one month from the date of the notice; and
- (ii) taken into consideration any representations made to them within that time about the proposed disposition³⁷.

This does not apply in the case of a sale of specie land in order to purchase replacement land which will be held on the same trusts³⁸. It also does not apply to the grant of a lease for a term ending not more than two years after it is granted provided it is not granted wholly or partly in consideration of a fine³⁹.

It is possible for the Commission to direct that these additional requirements shall not apply either to a particular disposition of land or to dispositions of land held by or in trust for a charity or class of charities if the Commission is satisfied that it would be in the interests of the charity or charities for the direction to be made⁴⁰.

³⁶ See note 22 above

³⁷ s. 36(6) Charities Act 1993

³⁸ s. 36(7)(a) *Ibid.*

³⁹ s. 36(7)(b) *Ibid.*

⁴⁰ s. 36(8) *Ibid.*

The Commission's website contains operational guidance⁴¹ which gives examples of the types of situation in which it might make such a direction including where:

- An urgent transaction which is not significant to the trusts of the charity e.g. an easement or lease which does not materially affect the trusts in specie and there is a good reason for not giving notice.
- There has already been public discussion of the proposed disposition.
- The trusts of the charity itself impose a more onerous duty on the trustees as in the case of a village hall where the trustees are required to call a public meeting.

The crucial factors here are that there is no detriment to the charity in such a direction being made and that the transaction should be as transparent as possible.

Agreements to dispose and section 36(3) or (5)

The Bayoumi Decision

As previously mentioned, prior to the *Bayoumi* decision⁴² an agreement to dispose was regarded as a disposal. This meant that the Commission could authorise the charity trustees to enter into the agreement to dispose under section 36(1) if the charity was not able to meet the statutory requirements.

This is no longer possible. In *Bayoumi* the charity trustees entered into an agreement to sell land which stated that they had complied with section 36(3). In fact, although they had obtained a surveyor's report, it did not include all the required information and there was doubt as to whether the trustee body had decided it was satisfied that the sale was on the best terms available.

Because the charity trustees had not complied with the statutory requirements, the High Court held that the contract was void and unenforceable. This decision of the High Court raised concerns as to how a purchaser dealing with a charity could ever be sure that the agreement to dispose would be enforceable.

⁴¹ See OG 54. Special considerations apply when selling or leasing recreational land (see Information Sheet SCU 10).

⁴² See note 11 above.

The High Court decision considered that an agreement to dispose was itself a disposal⁴³. Therefore the Commission could authorise entry into an agreement to dispose where there was doubt as to whether the statutory requirements had been complied with. A purchaser who was not satisfied with the assertion of the charity that it had complied with the statutory requirements could insist that the trustees obtain an order from the Commission as this would ensure that the agreement to dispose would be enforceable.

If this had happened on a significant scale it would have undermined the purpose of section 36 which enables the majority of charity disposals to be completed without the court or the Commission. This did not in fact happen as in most cases there was no wish to test whether or not a contract to dispose was valid and once the sale was completed, a purchaser for value acting in good faith was protected by the provisions in section 37(4)⁴⁴.

In any event the Court of Appeal decision in the *Bayoumi* case in November 2003 upheld the decision that a contract where the statutory requirements were not satisfied was invalid and further decided that an agreement to dispose of land was not itself a disposal of land. This means that if an agreement to sell is not a disposal of land, it does not fall within section 36(1) and there is no power for the Commission to authorise the agreement under section 36(1) even if the statutory requirements have not been met.

Consequences of Bayoumi

In principle the Commission could still make an order under section 26 of the Charities Act 1993 authorising the charity trustees to enter into an agreement to dispose. However, this would not prevent such an agreement being void if the statutory requirements for a valid disposal were not met.

The Commission could authorise the actual disposal and would have to do so for such a disposal to be valid in these circumstances. However, this would still mean that no valid agreement to dispose could be entered into prior to the disposal being completed. These difficulties resulting from the *Bayoumi* case often apply to option agreements where it can be difficult for the surveyor to provide the information necessary for the report.

Section 36(3) and (5) do apply to all agreements to dispose and this presumably means that an agreement to sell to a connected person which complies with the

⁴³ [2003] Ch 283

⁴⁴ s.37(4) Charities Act 1993

requirements of section 36(3) or (5) is valid even though it can only be completed upon obtaining an order of the court or of the Commission.⁴⁵

Also, if charity trustees enter into an agreement to sell *specie* land prior to them giving public notice in accordance with the additional requirements for *specie* land, that agreement will be valid even though it cannot be completed until the additional requirements are observed⁴⁶.

The Court of Appeal in *Bayoumi* took the view that sections 35 and 35A of the Companies Act 1985 considered with section 65 of the Charities Act 1993 meant that a contract to dispose entered into by a charitable company which did not comply with section 36(3) or (5) might be saved from being void. This is based on the fact that the validity of an act done by a company shall not be called in question on the ground of lack of capacity by reason of anything in the company's memorandum. However, it is section 36 that makes the contract invalid not the company's memorandum. Accordingly, it is the view of the Charity Commission that charity trustees of charitable companies are in no better position than other charity trustees.

Alternative arguments for validity of agreements to sell where statutory requirements not met

There is an alternative argument which was not considered in *Bayoumi* which is that the statutory requirements in section 36(3) and (5) are there for the purpose of establishing whether section 36(2) applies. On this interpretation, section 36(3) and (5) are not freestanding obligations and a failure to comply with them will not automatically render an agreement to dispose invalid.

Any agreement to dispose, in this view, is only capable of completion if the contemplated disposal is authorised by an order from the Commission. Where the final disposal is authorised by an order before the agreement to dispose is entered into, the subsequent agreement to dispose will be valid.

If the final disposal is not authorised by an order before the agreement to dispose is entered into, the agreement to dispose will take effect subject to an order of the

⁴⁵ If the connected person ceases to be a connected person after the date of the contract but before the date of the disposition, it would be possible to complete the sale without an order under section 36(1). This anomaly has been corrected by the Charities Act 2006. See below.

⁴⁶ This was also considered to be a matter requiring adjustment in the Charities Act 2006. See below.

Commission being obtained. If it is not possible to obtain that order, the agreement will be frustrated.

This interpretation appears to be preferable to the view taken by the Court of Appeal in *Bayoumi* where sections 36(3) or (5) are regarded as freestanding obligations. However, proceeding on the basis that non-compliance with subsections (3) or (5) does not render an agreement to dispose invalid would not be without risk.

The Charities Act 2006 makes clear that subsections (3) and (5) are there to establish whether section 36(2) applies and do not create freestanding obligations⁴⁷. It also contains amendments to ensure that, where someone is a connected person at the date of an agreement to sell, a section 36(1) order will be required to complete the disposal⁴⁸. There is a further amendment to ensure that an agreement by charity trustees to sell *specie* land cannot be entered into before they have considered representations submitted during the public notice period⁴⁹.

Options

As indicated above, an option is a type of agreement for the sale of land. Accordingly, where section 36 applies to the grant of such an option, on the reasoning in *Bayoumi* the charity trustees will need to have complied with the requirements of section 36(3) in order for the option to be valid and enforceable. If at the time the option is granted it is not possible to comply with section 36(3), the option may be void and unenforceable.

However, the Charity Commission considers that there are circumstances in which it is possible for charity trustees to grant an option without section 36 applying. Agreements by a charity to *purchase* land, may include an undertaking, or conditional undertaking, to make a subsequent disposition of the land or part of it. This would, for example, include, as well as the sort of option which is a feature of the assignment in this case, an undertaking to grant an easement of way over the land acquired, for the accommodation of land retained by the vendor, or an undertaking to leaseback the acquired land or some of it.

The language of section 36(3) is quite inappropriate to embrace an agreement which is essentially for the *purchase* of land, but which incidentally contemplates a

⁴⁷ Paragraph 128 of Schedule 8 of the Charities Act 2006.

⁴⁸ Paragraph 178 of Schedule 8 of the Charities Act 2006.

⁴⁹ Paragraph 128(6) of Schedule 8 of the Charities Act 2006.

disposition or possible disposition of the land which is to be purchased, or some of it.

Accordingly, an option granted in these circumstances will usually be valid whether or not the requirements of section 36(3) are met. Of course, it may be the case that the disposal by the charity required as a result of the grant of the option will require authorisation by an order of the Charity Commission under section 36(1). If this is the case, the Charity Commission considers it should make the order once it is satisfied that there is a valid option without having to satisfy itself that the disposal is expedient in the interests of the charity at the date of the disposal. This approach is based on *Moore v Clench* (1875) 1 Ch Div 447 in which the court was of the view that if the trustees of a charity entered into an agreement to dispose of land, which agreement did not require the consent of the Commission, and which agreement was valid without such consent, then any legal requirement that the actual disposition contemplated by the agreement should be authorised by the Commission -

- either did not apply, or, if it did apply,
- it would be an abuse of power on the part of the Commission to withhold the authority.

If the person to whom the option is granted is a connected person, then in the context of the present regulatory controls over charity land dispositions, this approach clearly needs some qualification. For it is clearly intended by the current legislation that the Commission *should* be in a position to prevent a disposition to a connected person, even if the trustees *have* made a fully enforceable agreement to make the disposition to such a person. And one might say that this should also apply in the unlikely event of an agreement being both enforceable against the charity and manifestly unfair to the charity. But, subject to those points, the *Moore v Clench* approach remains, in the view of the Commission, the right one.

A similar approach is taken by the Commission with regard to options granted under an equity sharing agreement entered into on the purchase of a property for a key employee of the charity. In these cases the property is purchased in the joint names of the charity and the employee, subject to the charity having the power to enter into such an arrangement. A feature of these agreements is often the granting of an option to the employee to purchase the share of the property held by the charity. The Commission considers that section 36 is not intended to apply to such an option. It is granted as part of the arrangements for the purchase of a property and section 36 does not apply to the purchase of a property by a charity.

Consequences for completed dispositions of a failure to meet the requirements of section 36

The consequences of failing to comply with section 36 on a completed transaction will depend on a number of factors. Firstly, it will be affected by whether or not the disposition contained the certificate required by section 37(2). This certificate is required to state either:

- (i) that the disposition has been sanctioned by an order of the court or of the Commission, or
- (ii) that the charity trustees have power under the trusts of the charity to effect the disposition and that they complied with the statutory requirements for disposing of land without an order of the court or of the Commission.

If the charity trustees either believe they have complied with section 36(3) or (5) or recognise that they should have obtained an order from the Commission under section 36(1), it may well be that a suitable certificate has been included even though in fact the charity trustees have neither complied with the statutory requirements nor obtained an order from the Commission or the court authorising the sale.

Where there is such a certificate, then in favour of any person who (whether under the disposition or afterwards) in good faith acquires an interest in the land for money or money's worth it shall be conclusively presumed that the facts were as stated in the certificate.

If the final disposition does not contain the certificate required by section 37(2) even though it should have done, then in favour of any person who (whether under the disposition or afterwards) in good faith acquires an interest in the land for money or money's worth the disposition shall be valid notwithstanding the charity trustees' failure to comply with section 36.

Accordingly, the following types of transaction will not be validated by these provisions:

1. There is no order of the court or of the Commission on a disposition to a connected person and the purchaser has not acted in good faith;
2. There is no order of the court or of the Commission, the charity trustees have not complied with statutory requirements for disposal without an order, and purchaser has not acted in good faith;

3. There is no order of the court or of the Commission on a disposition to a connected person and the person acquiring the interest has not done so for money or money's worth;
4. There is no order of the court or of the Commission, the charity trustees have not complied with statutory requirements for disposal without an order, and the person acquiring title has not done so for money or money's worth.
5. There is no order of the court or of the Commission on a disposition to a connected person, and the purchaser does not wish the disposition to be valid.
6. There is no order of the court or of the Commission, the charity trustees have not complied with statutory requirements for disposal without an order, and purchaser does not wish the disposition to be valid.

In these cases the disposition will be void, or at the very least voidable. In *Bishop of Bangor v Parry* (1891) 2 QB 277 a disposition in breach of the requirements was held to be void. However, the case would have been decided the same way whether the disposition was subject to a defect which might be cured or was a nullity. The point whether such a disposition is subject to a defect which may subsequently be cured, or is a nullity, does not appear to have even been before a court (although the point has come before the court in other contexts).

If a disposition is a nullity it cannot of course be subsequently ratified. A purchaser who, after completion of a disposition which should have been sanctioned by a section 36(1) order but was not, comes to see it as a bad bargain, would be able to walk away from the transaction. This may be a conclusion a court would strive to avoid in appropriate circumstances.

Validating a void or voidable disposition

There are three possible courses of action:

1. The trustees go through the whole disposition again and comply with section 36.
2. The Commission could provide authority to the execution of confirmatory disposal documentation which will record the fact that the original transaction was considered to be void or voidable because of non-compliance with section 36; or

3. If the transaction is not appropriate and should not be replicated then the Commission or the charity trustees take steps to re-vest the title in the charity or its trustees.

The first course of action is self evident. If the charity trustees go through the whole process again complying with section 36, the new disposition will be valid.

For the second course of action, the approach with the least risk is for the parties to the questionable disposition to enter into a document confirming the original disposition and for the Commission to authorise entry into the documentation by an order made under section 26⁵⁰ and 36 of the Charities Act 1993.

Conclusion

Section 36 still provides an effective framework in the majority of cases to enable charity trustees to dispose of land for the best terms reasonable available without requiring the Commission or the court's interference. The Charities Act 2006 will build on this to enable the difficulties in interpretation of section 36 arising from the *Bayoumi* decision to be resolved.

⁵⁰ Section 26 cannot be used to sanction any action which is expressly prohibited in the charity's governing document.