CHARITY LAND: DO CHARITY TRUSTEES HAVE POWER TO SELL DESIGNATED LAND?

A view from the charities bar: the ninth instalment of a regular series by Matthew Smith, Maitland Chambers, counsel specialising in charity law and practice.

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Mark Twain once advised investors:

> "Buy land, they're not making it any more."

Whether charities consider real estate to be a good investment, disposing of charity land can be very complicated:

- First, there is the question of whether the charity trustees have the requisite powers.
- Then, there is the question of whether a proposed disposition is consistent with their duties.
- A statutory code governing disposal of land is laid on top for good measure.
- Then there are additional things to worry about, seemingly with a vocabulary of their own, if the land is "designated land" or "specie land".

POWER TO DISPOSE OF LAND

Let's start with the question of whether charity trustees have a power to dispose of land:

- In the case of a charitable incorporated organisation (CIO), the answer will usually be "yes" since section 216 of the Charities Act 2011 (ChA 2011) and the Charity Commission's model constitutions confer wide powers on a CIO's charity trustees (see *Practice note, Charitable incorporated organisation (CIO): governance: Powers of a CIO*, and clause 4 of *Standard documents, Charity Commission model constitution for a charitable incorporated organisation (CIO): foundation model* and *Charity Commission model constitution for a charitable incorporated organisation (CIO): association model*).
- Similarly, most modern charitable companies will have express powers in their articles of association to permit dealing with land or wide sweep-up powers (see, for example, article 3(f) and article 3(ff) of *Standard document, Articles of association for a charitable company (separate membership), with drafting notes*).
- A modern trust deed is likely to make similar provision but, even where it does not, section 6 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996) confers on trustees of land (including the trustees of a charitable trust or a charitable unincorporated association) all the powers of an absolute owner (see *Practice note, Trusts of Land and Appointment of Trustees Act 1996: general powers and duties of trustees: Sections 6 and 7: Absolute owner powers and power to partition*).

We return to this below in the context of designated land (see *Power to dispose of designated land*).

CHARITY TRUSTEES' DUTIES

Whether a disposal is consistent with the duties of charity trustees will often (in the case of investment property) simply be a question of getting the best terms on a sale. But land offers all sorts of opportunities, so advisors will

often recommend seeking planning permission or insisting on an overage clause as part of a disposition. The grant of a long lease might sometimes be better than a sale of the freehold.

Failure to consider these possibilities might not maximise the charity's financial return.

STATUTORY REGIME (PART 7, CHARITIES ACT 2011)

The charity trustees' duty to obtain the best terms on a sale is reinforced by the statutory regime in Part 7 (sections 117 to 129) of ChA 2011.

In short, this requires an order of the Court or the Commission to be obtained to approve a disposal of an interest in land in England or Wales held by, or in trust for, a non-exempt charity, unless a self-certification process is followed. This requires charity trustees to obtain and consider appropriate professional advice and specific statements to be made, and certificates to be given, in the conveyancing documents.

If the charity is selling designated land, additional restrictions apply (section 121, ChA 2011). In essence, charity trustees are required to give public notice of the proposed disposition and to take into consideration any representations made to them within the timescale specified in the notice (which must not be less than one month).

In practice, the self-certification process is the norm and orders are the exception unless the parties are connected (in which case the self-certification process is not available). Elaborate attempts are sometimes made to avoid seeking Commission consent even in the case of transactions between connected parties, especially in the context of convoluted tax planning, but they are rarely successful.

Until this month there was only one reported decision on these provisions; the not-at-all-straightforward decision of the Court of Appeal in *Bayoumi v Women's Total Abstinence Educational Union Ltd [2003] EWCA Civ 1548*. Subject to safeguards in favour of good faith purchasers, this decision established that a disposal entered into without following the statutory requirements was void (see *Legal update: case report , Selling charity land and protecting the buyer acting in good faith (Court of Appeal)*). This is often a great help to charities who have seen their assets transferred away in questionable circumstances since the effect is automatic and it is not necessary to prove any wrongdoing.

Some welcome clarification has recently been given by the High Court as to the consequences where there has been an attempt to follow the statutory provisions but there has been some small technical failure. In such a case, such as where a surveyor's report does not contain all of the prescribed detail, that will not in itself render the transaction void (*David Roberts Art Foundation Ltd v Riedweg [2019] EWHC 1358 (Ch),* see *Legal update, Transaction not void for technical failure to comply with charity land disposal rules (High Court)*).

WHAT IS IN A NAME?

It is not uncommon for charities to hold land that is required by the trusts on which the land is held to be used for the pursuit of the charity's purposes (or of any of its purposes). Such land is often called "designated land".

An example might be where a will or deed of gift makes a gift of a large house for a specific charitable purpose, such as for use as a nursing home or a school. Gifts of land for use as a recreation ground often give rise to similar questions, as do deeds declaring the trusts of buildings bought following an appeal for funds from within a membership charity.

The term "specie land" is sometimes used to mean the same thing as designated land. This approach is taken by the Commission in some of its guidance (for example, see *Charity Commission: Permanent endowment: rules for charities"*). However, "in specie" is defined as:

> "...anything in its own form, not any equivalent, substitute, or reparation" (*Jowitt's Dictionary of English Law 4th ed, 2015*).

It might therefore be more accurate to use "specie land" to refer to land held by a charity, the retention of which is so fundamental to the purposes of the gift that it should be regarded as one of the original purposes. In other words, the purpose of the charitable gift is to retain that particular piece of land "in specie" for the public benefit.

Land will be essential to a charity's purposes where the qualities of the property which is the subject of the gift:

> "... are themselves the factors which make the purposes of the gift charitable, eg., where there is 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 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 is far away from cases.....where the charitable purpose - playing fields for the benefit and enjoyment of the inhabitants of the districts of the original donees, or it might equally be a museum, school or clinic in a particular town - can be carried on on other land." (*Oldham Borough Council v Attorney-General [1993] Ch 210*, Dillon LJ at page 222.)

If this approach is taken to clarify the jargon, specie land becomes a sub-set of designated land.

POWER TO DISPOSE OF DESIGNATED LAND

A question which commonly arises is whether the general power conferred on charity trustees by section 6 of TOLATA 1996 is sufficient to enable charity trustees to sell designated land.

My view is that generally section 6 of TOLATA will confer the necessary power, unless the land or building in question is specie land (as defined above, see *What is in a name?*). In those (rare) cases, a cy-près scheme would be required to dispose of the land or building since it would constitute a change in the charity's purpose (see *Practice note, How to amend the governing document of an unincorporated charity: Cy-près schemes*).

However, the Commission's guidance takes a more cautious view:

When will you need a scheme?

Short answer

If you are selling designated land and you do not intend to, or cannot, replace it, authority will be needed. This will usually mean the commission needs to make a scheme for the charity.

In more detail

Where a charity's governing document includes provision that specific property must be used for the purposes of the charity, this is known as designated land. This might be a recreation ground, almshouse, church or school. Charity trustees can sell designated land if there is a power of sale, or where the land is being replaced (as long as replacing the land furthers the purposes of the charity and will be beneficial to the charity). However, if there is no power of sale, and/or the land will not be replaced, the trustees must apply to the commission for a scheme to provide a power of sale and/or give new purposes for the charity..."

(*Charity Commission: Sales, leases, transfers or mortgages: What trustees need to know about disposing of charity land (CC28), at section 5.2.*)

There has been some debate as to whether section 6(1) of TOLATA 1996 only takes effect subject to section 6(6) of that Act. This provides that:

> "The powers conferred by this section 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".

It has been argued that section 6(6) of TOLATA 1996 brings into play a more general principle of charity law to the effect that charity trustees cannot dispose of designated land without an express power of sale.

That argument was articulated by Stephen Roberts (formerly Head of Policy at the Commission and a member of its legal division) and Elise Millington (also a lawyer at the Commission) in an article in the Charity Law and Practice Review (*C.L.& P.R 2006, 9(2), 1-18*). They suggest that:

> "...any disposal of land held on specie trusts, where there is no express power of sale is not authorised by the statutory power [i.e. section 6 of the 1996 Act] except for the purpose of replacing the land with other suitable land to be held on identical trusts."

They explain that:

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

They seek to vouch the general proposition by reference to Oldham.

I think that there are several objections to this analysis:

- It conflates specie land with designated land (see *What is in a name?*).
- It seems to me to seek to subvert the express provision of section 8(3) of TOLATA 1996 to the effect that a charitable trust cannot exclude the power conferred by section 6(1) (since one can only discern whether land is held on trusts to be used for the charity's purposes by reference to the provisions of the trust deed).
- I do not think that one can necessarily say that land held for the purposes of a charity can never be sold without an express power of sale since a number of the cases cited in argument in Oldham were to the contrary effect (many of these are cited with approval in Tudor on Charities (Sweet & Maxwell, 10th ed, 2015) at *paragraph 17-025*).
- The Court of Appeal in Oldham was concerned simply with the question whether the sale of designated land (in that case, a recreation ground) required a cy-près occasion (holding that it did not, because it was not specie land (see *What is in a name?*)). The Court of Appeal noted (at page 218c-d) that there was no doubt that trustees of designated land could sell with the consent of the Court or of the Commission, although the basis of that power was unclear. On any view, the decision in Oldham says nothing about the effect of TOLATA 1996 since it pre-dated it.
- Section 6(1) of TOLATA 1996 is plainly more wide-reaching than the provisions in force at the time of the decision in Oldham.
- It seems to me that the view that trustees of designated land must use the proceeds of sale of any of that land to purchase replacement land goes not to the powers of the trustees, but to their duties. It may be that a trustee has a power of sale but a duty as to how to apply the proceeds (failure to comply constituting a breach of trust). But I find it difficult to see how the existence of a power of sale can depend on the trustees' intention as to the subsequent application of the proceeds. Either one has a power or one does not.
- Finally, the analysis that section 6 of TOLATA 1996 confers a power to dispose of designated land appears to be confirmed (at least in an obiter statement) by the recent decision in *Dewar v Sheffield City Council [2019] 2 WLUK 277* (see *Legal update, Local Authority entitled to rely on Charity Commission advice to sell part of designated land (High Court)*).

FURTHER GUIDANCE

For further guidance on charity land transactions, see:

- *Practice note, Formalities for land transactions involving charities.*
- *Paragraphs 17-014-17-064, Tudor on Charities (Sweet & Maxwell, 10th ed, 2015).*