



*Charity Commission Scheme – appeal to First-tier Tribunal – whether error of law in approach of FTT - appeal allowed*

FTC/84/2014

UPPER TRIBUNAL  
(TAX AND CHANCERY CHAMBER)

BETWEEN:

STEPHEN BADDELEY  
ELIZABETH BLOOR  
DERWENT CAMPBELL  
DAVID DIXON  
DAVID DURDAN  
DON EARLEY  
SIMON EMERY  
GEOFFREY FAIRCLOUGH  
MICHAEL LAUGHTON  
(being trustees of the Bath Recreation Ground Trust)

Appellants

and

JACK SPARROW

First Respondent

ROSEMARY CARNE

Second Respondent

NIGEL WEBSPER

Third Respondent

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Fourth Respondent

**TRIBUNAL: Mr Justice Warren  
Judge Alison McKenna**

**Sitting in public in London on 18 May 2015**

**The Appellants were represented by Matthew Smith of counsel, instructed by  
Veale Wasbrough Vizards LLP**

**The first and second Respondents appeared in person.**

**The third Respondent was represented by Greville Healey of counsel, instructed  
by TLT LLP**

**The fourth Respondent was represented by Mr Kenneth Dibble of the Legal  
Department, Charity Commission for England and Wales**

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## **DECISION**

For the reasons given below, we allow the appeal by the Appellants. We will receive further submissions in writing from the parties about what relief follows from our decision to allow the appeal. We will issue separate directions for the receipt of such submissions

## REASONS

### *Background*

1. This is an appeal against the decision of the First-tier Tribunal (General Regulatory Chamber) (Charity) (“**the F-tT**”) released on 27 March 2014 (reference numbers CA/3013/0006, CA/2013/0007 and CA/2013/0008) (“**the Decision**”). The panel members were Judge Peter Hinchliffe, Ms Susan Elizabeth and Ms Carole Park (“**the Tribunal**”). Permission to appeal was granted by the F-tT on limited grounds. We will refer to paragraphs numbers of the Decision in the format “Decision [x]”.
2. The appeal to the F-tT concerned the Charity Commission’s Scheme of 12 June 2013 (“**the Scheme**”), made pursuant to section 69 of the Charities Act 2011, in respect of the charity previously known as The Recreation Ground Bath and now known as The Bath Recreation Ground Trust (registered charity number 1094519) (“**the Charity**”). The recreation ground land (“**the Recreation Ground**”) had been acquired by the Mayor and Aldermen of Bath in 1956. The conveyance, dated 1 February 1956, by which title transferred set out the trusts on which the land was to be held. In 2002, Mr Justice Hart sitting in the Chancery Division of the High Court, determined that the trusts on which the land was held (then by Bath and North East Somerset Council (“**BANES**”)) were charitable.
3. Prior to that decision, BANES (unaware that it held the land as a trustee for charity and not beneficially) had built a leisure centre and car park on part of the land, and leased another part of the land to the local rugby club. The Scheme was intended to regularise the unsatisfactory position in which the Charity had found itself, by amending its purposes, its administrative powers and its governance arrangements. This is dealt with in slightly more detail in Decision [4]:

“About 1974, an indoor sports and leisure centre and car park (the “Leisure Centre”) was built by BANES in its capacity as local authority on the Recreation Ground, amounting to around 11,120 sq. m. in total. This construction took place despite the terms of the trust created by the 1956 Conveyance requiring BANES to “*not use the Recreation Ground otherwise than as an open space*”.

A 75 year lease dated 23rd May 1995 was granted to The Trustees of the Bath Football Club of about 14,907 sq. m. of the Recreation Ground (the “1995 Lease”). The 1995 Lease replaced an earlier lease and permitted part of the Recreation Ground to be used and occupied by the Bath Football Club as a rugby stadium and pitch. The terms of the trust created by the 1956 Conveyance not only required the land to be used for recreation purposes and preserved as an open space but also required that one sport should not be preferred over another. As the 1995 Lease only granted Bath Football Club the right to provide seating accommodation on three sides of the rugby pitch included in the lease, the Charity has made additional land available each year for the temporary provision of seating on the fourth side of the stadium (the “East Stand”).”

4. The first, second and third Respondents to this appeal are residents of Bath who live near to the recreation ground. They appealed to the F-tT against the Scheme as persons who are or may be affected by the Charity Commission's Order (column 2 of schedule 6 to the Charities Act 2011). The Appellants in this appeal ("the Trustees") are individuals who have been appointed as managing trustees for the Charity. Subject to one change in the trusteeship in the intervening period, they were the respondents to the appeal to the F-tT. The legal title to the land was until recently held by BANES but has now been vested in the Official Custodian for Charities.
5. The Tribunal allowed the appeals and amended the Scheme by Order dated 24 April 2014. The Trustees now appeal against the Tribunal's decision and seek to reinstate the Scheme as propounded by the Charity Commission with certain changes. Rather than remit the matter to the F-tT, they invite us to make the alterations sought.
6. At Decision [56] the Tribunal concluded

....It is the Tribunal's view that in this case the qualities of the property which is the subject matter of the gift i.e. the Recreation Ground, are themselves among the factors which make the purposes of the gift charitable. The original conveyance of the property was intended to benefit the public by requiring the local authority to hold the property on trust, not only so that games and sports and other recreational and entertainment facilities were made available to the public, but also so that the Recreation Ground itself should be maintained as an open space for the benefit of the public and that a range of games and sports should be carried out on that land. No evidence was provided and none may exist as to the original intention of the sellers of the Recreation Ground. However, it seems reasonable, given the location of the land and its status as an area of green space alongside the heart of the historically and culturally important centre of the city of Bath and the desire that the land be used for a range of entertainment as well as for games and sports, to interpret the terms of the trust on the basis that the reference to preserving the Recreation Ground as open space reflected the particular characteristics of this land and that these characteristics were relevant to the decision to create a charitable trust for the benefit of the public. With this view in mind, the Tribunal has suggested amendments to the Scheme that are intended to provide for the Charity to be operated on a basis that will enable it to pursue its full range of purposes and therefore, to the extent it is possible, to provide sporting and recreational facilities on open space on the Recreation Ground....

#### *The Issue for the Upper Tribunal*

7. Permission to appeal was given to the Trustees to appeal from the Decision on the basis of the following alleged errors of law:
  - (1)(a) The Tribunal did not have sufficient evidence of the original intention of the sellers of the land comprised in the conveyance dated 1 February 1956 that created the charitable trust over the Recreation Ground, Bath to justify an interpretation that the true charitable purpose was to preserve the land *in specie* as an open space.

(1)(b) The Tribunal were wrong to distinguish the trusts establishing The Recreation Ground, Bath from those considered in *Oldham Borough Council v Attorney General* [1993] Ch 210 (“*Oldham*”) and to treat them as within the type of case referred to near the end of the judgment of Dillon LJ as having a purpose rendered charitable ‘by reason of the particular qualities of the land in question’.

Or, in the alternative

(2) If the grounds for appeal set out in (1) above do not succeed and the land held on the trusts of the Charity is held on trust to be preserved *in specie* as an open space, the Tribunal should not have regarded the provisions relating to the 1995 lease in the Scheme and any modification of it as being ‘administrative’ rather than *cy-près* provisions.

8. The hearing before us on 18 May consisted, by direction of the Tribunal, of legal submissions only and we considered no evidence. We are grateful to all involved for their clear presentations and helpful skeleton arguments.

#### *The 1956 Conveyance*

9. The relevant trusts of the 1956 Conveyance were set out by the Tribunal, following Hart J in his decision reported as *Bath and North East Somerset Council v HM Attorney General*, [2002] EWHC 1623 (Ch) (“*BANES v HM A-G*”) at Decision [24]:

“TO HOLD the same unto the Corporation in fee simple upon trust that the Corporation for ever hereafter shall manage let or allow the use with or without charge of the whole or any part or parts thereof for the purpose of or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements entertainments or other activities of a like character and for no other purpose and shall maintain equip or lay out the same for or in connection with the purposes aforesaid as they shall think fit but so nevertheless that the Corporation shall not use the property hereby conveyed otherwise than as an open space and shall so manage let or allow the use of the property for the purposes aforesaid as shall secure its use principally for or in connection with the carrying on of games and sports of all kinds and will not show any undue preference to or in favour of any particular game or sport or any particular person, club body or organisation.”

10. The 1956 Conveyance was subject to two leases and to two agreements specified in the Schedule to it. These included a lease in 1933 of “Bath Football Ground”, an agreement in 1954 relating to “the erection of a recreational hut and clubroom” and a lease in 1954 of “land and pavilion”.
11. The 1956 Conveyance was preceded by an agreement for sale dated 2 January 1956. The Tribunal set out, also at Decision [24], certain provisions of that agreement which we do not need to repeat. We need only note that it contained a covenant on the part of the purchaser to observe and perform the restrictions covenants and stipulations specified in the Second Schedule which provided as follows:

“The Corporation will not use the Recreation Ground otherwise than as an open space and will so manage let or allow the use of the ground for the purposes herein before mentioned as shall secure its use principally for or in connection with the carrying on of games and sports of all kinds and will not show any undue preference to or in favour of any particular game or sport or any particular person, club body or organisation”

12. The Tribunal went on to record that Hart J had concluded from his review of the 1956 Conveyance that:

“it was for some reason decided that the covenant contained in the Second Schedule should not be included as a covenant in the subsequent conveyance but that instead its wording should be tagged onto the wording of the trust”.

adding that Hart J reasoned that, in order to arrive at his overall conclusion that the trusts were valid charitable trusts

“it is necessary to read words into the conveyance such as ‘to maintain the same as a recreational facility for the benefit of the public at large’”.

13. And so the Tribunal concluded at Decision [26] that the objects of the Charity prior to the making of the Scheme were as set out in the 1956 Conveyance with the addition of the wording; “to maintain the same as a recreational facility available for the benefit of the public at large”.

14. Having thus identified the objects of the Charity prior to the making of the Scheme, they went on at Decision [28] to examine the proper interpretation of those objects. The Tribunal concluded that the reference in the 1956 Conveyance to the Recreation Ground not being used “otherwise than as an open space” was a separate requirement from the property being used for the playing of games and sports and other recreational activities. They concluded that:

“The Tribunal considers that this [not to use otherwise than as an open space] is a separate requirement from the requirement that the playing of games and sports and other recreational facilities. It seems reasonable to conclude that this was intended to achieve a specific and particular purpose and that the objects require that the activities.....must be carried out in such a way as to preserve the Recreation Ground as open space. The Tribunal concluded from this that the intention in the creation of the trust was not only to provide an area of land on which games and sports could be played and other recreational purposes pursued, but was also to provide that this specific piece of land, the Recreational Ground, should be preserved as an open space and used for the purposes of the trust. The Tribunal accepts that the trust was intended to preserve an area of open space for recreation purposes immediately adjacent to some of the most attractive and historic parts of Bath.

.....

In construing the terms of the 1956 Conveyance that created the trust, Mr Justice Hart referred to the conveyance adopting “an elaborate formula” with three limbs

“namely (a) used as an open space (b) principal use for games and sports and (c) the obligation not to show undue preference to particular sport or persons”.

The Tribunal took this analysis into account in interpreting the objects of the Charity prior to the making of the Scheme.”

15. Although the Tribunal did, in that passage, mention the attractive and historic character of the relevant part of Bath, the purpose which they perceived was clearly identified: it was to preserve this particular area of land as open space for use for the purposes of the trust (*ie* recreational purposes). What the Tribunal did not say – and nor did they say it anywhere else in the Decision – was that the purpose of the provisions for preserving the area as an open space was to maintain the attractiveness of this area of Bath so that the area would not be adversely affected by detrimental uses or development of the Recreation Ground itself. Nor did they say, here or anywhere else, that one purpose of preserving it as an open space was so that members of the public could use it the better to enjoy the attractive and historical city that surrounded it.

#### *The Scheme*

16. Clauses 3 and 4 of the Scheme contain the provisions relating, respectively, to that part of the land on which the sports and leisure centre has been built and to that part which is subject to the 1995 lease and certain adjoining land specified in Part 4 of the Schedule to the Scheme. We set out these out in the Annex to this Decision. These provisions are self-explanatory. We also set out Clause 2 since that clause was substantially amended by the order of the Tribunal. We need only record here the following:
- a. So far as the sports and leisure centre is concerned, the provision in the existing trusts that the site of the centre may only be used as an open space is suspended until the date on which the existing sports and leisure centre can no longer be used for indoor recreation for the benefit of the public at large.
  - b. So far as concerns the remainder of the Recreation Ground, the Trustees were given certain powers to resolve the problems arising from the grant of the 1995 Lease. Those powers relate to the land subject to the 1995 Lease and an area adjoining it of some 7548 square metres (this is the figure which actually appears in Part 4 of the Scheme) which is, in practice, used by the Bath Rugby plc (“**Bath Rugby**”) in connection with the stands which it erects on the land demised. So far as each of those areas is concerned, the Trustees may grant a lease or leases, receiving by way of consideration a capital sum and/or replacement land. This power was included in order to clarify that the Trustees had (in the Charity Commission’s view) the statutory power to effect a land swap. It is envisaged that such a swap might be made with the Bath Rugby which owns land, said to be suitable amenity land, outside the City centre. The power is circumscribed by the various requirements set out in clause 4.

*The Decision and the Tribunal's amendments to the Scheme*

17. Having held that one purpose of the trusts of the 1956 Conveyance was to retain the Recreation Ground as an open space for recreational purposes, the Tribunal made certain amendments to the Scheme. In Decision [41], the Tribunal expressed their view that “the proposals in the Scheme that relate to the governance and the powers of the Charity are expedient in assisting in resolving the issues surrounding the occupation of part of the Recreation Ground by Bath Rugby under the 1995 Lease”. However, they did not regard the specific powers set out in Clause 4 of the Scheme as necessary to protect the interests of the Charity. They accepted that the power to effect a swap could be expedient and in the interests of the Charity. But they did not, on the evidence before them, conclude that the proposal was the only, or the best, practical solution that the Trustees should consider in deciding how to further the objects of the Charity in its dealings with Bath Rugby. In the second paragraph of Decision [41], the Tribunal said this:

“The Tribunal takes the view that the objects of the Charity require that the Recreation Ground cannot be used otherwise than as an open space and that its use will not show any undue preference for one sport in favour of any other or for one club in favour of any other. It is therefore unlikely that any grant of significant additional land, including the land on which the East Stand can be erected, to Bath Rugby will be justifiable on the basis that such a grant is in furtherance of the objects of the Charity. The effect of a lease of additional land that permitted the pitch and all four sides of the rugby stadium to become a permanent presence on the Recreation Ground would, on the face of it, conflict with the requirement in the objects of the Charity that the Recreation Ground be preserved as an open space and that it should not show a preference for one sport or club over another. However, it is possible for a Charity to use its land or property in order to raise funds where, by doing so, this will enable the Charity to better pursue its objects. The Tribunal accepts that this may be the position that the Trustees find the Charity to be in, but notes that this did not form part of any submission by the Trustees or the Commission in the course of these appeals. It will, in the view of the Tribunal, be necessary for any additional lease or grant of rights to Bath Rugby to be justified on a basis that the overall effect will be to put the Charity in a stronger position to achieve its charitable objects. The Tribunal does not accept that the administrative provisions of the Scheme, such as paragraph 4, should be used in such a way as to cause or permit any departure from the objects of the Charity. Therefore, the Tribunal has sought to consider whether the proposals in the Scheme to provide a framework under which the occupation of part of the Recreation Ground by Bath Rugby can be resolved in such a way that the overall effect will be to permit the Trustees to further the existing objects of the Charity. The Tribunal finds that significant improvements are required to this aspect of the Scheme in order to ensure that they are expedient and in the interests of the Charity. These improvements are considered in more detail below.”



18. And so, in Decision [42], the Tribunal took the view that the power to authorise the exchange of land was not necessary to preserve the interest of the Charity, but might be expedient. This was an area where the Tribunal believed the Scheme required improvement which they went on to consider later in the Decision.
19. At Decision [53ff], the Tribunal turned to how the Scheme should be amended in the light of their conclusions (only some of which we have mentioned above). At Decision [54], the Tribunal addressed how the Trustees should approach the grant of any further lease of additional land to Bath Rugby, noting that the Trustees “must work to ensure that the Recreation Ground is preserved as an open space on which a range of games and sports and recreational activities can take place”. They contemplated amendments to the Scheme which would ensure, among other matters, that the Trustees “may not enter into an agreement for the grant of land to Bath Rugby over and above the 1995 Lease unless they have decided that the grant will assist the Charity to achieve its purposes either directly or by the raising of funds or other resources that will assist it to do so”. Further, the extent of any such agreement was to be restricted. The Trustees were to ensure

“that the land made available under any agreement with Bath Rugby for the site of the East Stand and for any other use that restricts free public access to, or the use of, any part of the Recreation Ground as open space, shall not exceed in surface size the maximum extent of any grant that has been approved by the Commission for the erection of the East Stand on a temporary basis since 2002. All such land shall be returned to open space and made available to the Charity for its own purposes for a least three consecutive months in the summer of each year in a condition that permits the playing of other sports for the full three month period.”

20. The Tribunal, in the light of all of their conclusions and reasoning, decided to exercise their powers under Schedule 6 Charities Act 2011 to “make an order substantially in the terms set out in the Annex to this decision amending the order of the Commission of 12<sup>th</sup> June 2013 effecting the Scheme”. As well as clauses 2, 3 and 4 of the Scheme, we also set out in the Annex to this decision the relevant amendments made to certain provisions of the Scheme, namely Clauses 2 and 4, and Part 4 of the Schedule.

*The Law relevant to this appeal*

21. Section 6 of the Trusts of Land and Appointment of Trustees Act 1996 (“**TOLATA**”) provides that:

“(1) For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

.....

(6) 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.”

22. The question arises whether the Trustees are able to exercise the power conferred by section 6(1).
23. Section 62 Charities Act 2011 is concerned with *cy-près* applications of property held for charitable purposes. So far as material, it provides, in sub-section (1) as follows:

“(1) Subject to subsection (3), the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied *cy-près* are—

(a) where the original purposes, in whole or in part—

(i) have been as far as may be fulfilled, or

(ii) cannot be carried out, or not according to the directions given and to the spirit of the gift,

.....

(e) where the original purposes, in whole or in part, have, since they were laid down—

.....

(iii) ceased .... to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.

24. Reliance has been placed by Mr Smith on *Varsani v Jesani* [1999] Ch 219 (“*Varsani*”) in support of his contention that a *cy-près* occasion arose as a result of the grant of the 1995 Lease notwithstanding that the grant was, or might have been, a breach of trust. In that case, the adherents of a Hindu charity split into two factions, neither of which felt able to worship together in the same temple. Both groups sought a scheme under what is now section 62(1)(e)(iii) for the administration of the charity’s property together with a declaration about which group was the true proponent of the faith and therefore entitled to continue to worship in the temple. Although there was no doubt as to the original charitable purposes, there was now an impasse which was incapable of resolution as a matter of faith. The Court of Appeal held that it was not necessary first to ascertain the precise limits of the purpose of the charity before deciding whether or not the case fell within the section so that it was unnecessary to decide which group professed the true faith. Since the original purpose had ceased to provide a suitable and effective method of using the property, regard being had to the spirit of the gift, the court had jurisdiction to order a scheme.

25. In *Oldham*, the Court of Appeal allowed an appeal against Chadwick J’s ruling that the High Court had no power to permit Oldham Borough Council, as sole corporate trustee, to sell or exchange land held on charitable trusts for use as playing fields. The Court of Appeal held that Chadwick J had erred in holding that the stipulation that the land should be retained was so fundamental to the gift that it should be regarded as one of the original purposes of the gift; he should

have held that the charitable purpose of the gift was the provision of playing fields for the inhabitants of the relevant areas rather than the retention of the land and that such a purpose could be carried on elsewhere. In his judgment, Dillon LJ referred at page 222 to a category of cases in which an alternative approach would be justified, as follows:

“There are, of course, some cases where the quality of the property which is the subject matter of the gift are themselves the factors which make the purposes of the gift charitable, e.g. 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 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-pres* 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 such as the present, 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.”

26. The question arises whether the Recreation Ground is of such intrinsic merit that it falls into the category of property which Dillon LJ was considering and, if it is, whether the trusts of the Charity do, in fact, impose an enforceable trust to retain it *in specie*.

27. In *BANES v HM A- G*, Hart J concluded at [48] in this way:

“In the result I have been finally, and narrowly, persuaded that the public character of the Corporation, and the fact that it was intended to be the trustee in perpetuity enables one to conclude that the dominant intention of the trusts, to which all the express provisions should be regarded as ancillary, was to provide a recreational facility for the public, and that, construed as such, the trusts are valid charitable trusts...”

28. The question arises whether, in the light of Hart J’s decision and reasoning, it is open to the first to third Respondents to argue that the Charity is to be afforded charitable status not only because it was established for charitable recreational purposes but also because the 1956 Conveyance creates a charitable trust to retain the Recreation Ground as an open space.

### *Submissions*

#### *(1) For the Trustees*

29. Mr Smith, appearing for the Trustees, submitted that the effect of the Tribunal’s decision was to restrict the powers of the Trustees in their management of the land and suggested that it was unusual for trustees’ powers to be limited by the Charity Commission or the courts other than on trustees’ own application. The Scheme had been made on the assumption that the Trustees enjoyed all the powers of a beneficial owner of land, including the power of disposal under section 6(1) of

TOLATA. Under that provision, the ordinary position is that trustees with a power of sale can dispose of land and re-invest. In contrast, in the present case, if the land was required to be preserved *in specie*, then the Trustees would have no power of sale because section 6 (6) of TOLATA would apply.

30. The Tribunal's decision has, in Mr Smith's submission, the effect of narrowing the range of options available to the Trustees in relation to the land subject to the trusts of the Charity as a result of their misunderstanding of the trusts on which the land is held. He referred us to the history of the Recreation Ground. He said it appeared to have been a field in 1894, and had later been used as a skating rink and a recreation ground although Mr Sparrow says that the skating rink was housed in the Pavilion which lies outside the area defined as the Recreation Ground. We do not place any reliance on the suggestion that the Recreation Ground once had a skating rink on it. He submitted that there was nothing about the history of the land or the legal documents relating to it which suggested that it was charitable to preserve this piece of land *in specie*. Nor was there any evidence about the character of the land in 1956 as an open space in the centre of Bath sufficient to justify a conclusion that such a purpose was at that time charitable. The relevant date is 1956: this was when the 1956 Conveyance was made and whether or not the trusts created by it are charitable is to be assessed by reference to the facts existing at that time. He submitted that the Tribunal appeared to have viewed the trusts as creating a requirement to hold the land as an open space in addition to the requirement to hold it for public recreation, but that this approach was not easy to reconcile with Hart J's decision.
31. Mr Smith's contention was that, as the trusts did not refer to the preservation of the land itself as part of the Charity's purpose, it would be extremely odd for the Trustees not to have the usual power of sale under TOLATA. Referring us to the 1956 Conveyance, he pointed out that it provided expressly for the recipient trustee to "manage let or use" the land conveyed for the purposes specified (as set out in paragraph 9 above).
32. Furthermore, it was clear from the Schedule to the 1956 Conveyance that the land was already subject to certain leases and agreements. These appeared to have been entered into for the purpose of raising income rather than in direct furtherance of the purposes of the Charity. Mr Smith submitted that it would have been open to the owners of the land to have conveyed the freehold interest on trust without a power to let it, but in the 1956 Conveyance it was made clear not only that there was a power to let the land but that the conveyance was subject to existing leases.
33. He submitted that it was also clear from Hart J's decision that the existence of the letting power was regarded as an administrative power only. We agree with that last proposition which, we think follows from Hart J's statement at [48] of his judgment (see paragraph 23 above) that all of the express powers should be regarded as ancillary to the purpose of providing a recreational facility for the public. Mr Smith's case went further; it was to the effect that the power to dispose of the land contained in the 1956 conveyance was inconsistent with a trust to preserve land *in specie*. He said that the power to let contained in the 1956 Conveyance, a power which was not limited to letting in the direct furtherance of the objects, provided a complete answer to the point before us. He added that the

power to let was no surprise where there is a gift of land with no accompanying endowment, as here, as there must be a means of raising money to pay for necessary expenditure.

34. Mr Smith submitted that the approach taken in the Scheme was to assume that the Trustees had all the usual powers under the general law but to make clear, for the avoidance of doubt, that they had power to enter into a land swap instead of (or in addition to) receiving a capital sum as consideration for the disposal of the land. He argued that the provisions of clause 4 of the Scheme were clarificatory only; in contrast, the Tribunal's amendments to clauses 2 and 4 and to Part 4 of the Schedule had served to make the power found in those provisions the only power of disposal available to the Trustees and had imposed additional restraints on their ability to exercise their pre-existing powers.
35. Turning to the first ground of appeal, Mr Smith contends that the Tribunal erred in law in regarding the Recreation Ground as falling into the exceptional category of cases mentioned in Dillon LJ's judgment (see paragraph 58 below). He identified in Decision [56] four factors on which the Tribunal had relied in reaching their conclusion, namely (1) the location of the land (2) the status of the area (3) the reference in the conveyance to the use of the land for a range of entertainments as well as for games and sport and (4) the reference to preserving the Recreation Ground as open space. Thus, given the first three factors, the Tribunal concluded that it was reasonable to interpret the 1956 Conveyance on the basis that the reference to preserving the Recreation Ground as open space reflected the particular characteristics of the land and that these characteristics were relevant in deciding whether a charitable trust had been created.
36. The Trustees' case is that the Tribunal's conclusion contradicted Hart J's decision, and further, that its conclusion appeared to be based on a misunderstanding by the Tribunal of the relevant passage in Dillon LJ's judgment in *Oldham* because the location of land was not of itself a characteristic which could render it charitable to preserve it *in specie*. As an example of this approach, Mr Smith submitted that it would be charitable to preserve "Anne Hathaway's cottage" but not "land near Anne Hathaway's cottage". The status of the area (green space alongside the heart of the historically and culturally important centre of the city of Bath) was similarly not a characteristic of the land *per se*, and the desire for entertainments was not relevant to the quality of the land at all. He commented that, whilst the 1956 Conveyance referred to open space, it neither stated nor implied that no other open space would be capable of fulfilling the charitable purposes identified by Hart J.. In any case, the purpose identified by the Tribunal would have been inconsistent with the express power to dispose of the land which was conferred by the 1956 Conveyance and which is now exercisable by the Trustees.
37. Mr Smith submitted that there was no evidence before the First-tier Tribunal which could have supported a conclusion that the purpose of the Charity included the preservation of this land in *specie* as an open space. In this context, he referred to Dillon LJ's allusions to educational value, outstanding natural beauty and architectural merit and suggested that the public benefit arising from the provision of open space was necessarily fact specific.

38. In respect of the second ground of appeal, Mr Smith submitted that the Tribunal had erred in law in suggesting at Decision [37] that the issue of whether a *cy-près* occasion had arisen was not raised with them. The issue had been raised in the Charity Commission's skeleton argument (which was produced to us) but the Tribunal had not addressed the argument. This was an error of law. Whilst Mr Smith made clear that he was not asking us to deal with the point in the context of this appeal, he stated that the Trustees' case was that the fact that a lease had been granted in breach of trust did not preclude the Charity Commission (or indeed us) from taking the view that a *cy-près* occasion had arisen.
39. He submits that both section 62(1)(a)(ii) and section 62(1)(e)(iii) (set out at paragraph 23 above) are met by virtue of Bath Rugby's possession of a substantial part of the Recreation Ground under the 1995 Lease. He submits that the decision in *Varsani* (see paragraph 24 above) supports his proposition that the fact that the 1995 Lease was (assuming that a trust to retain the Recreation Ground *in specie* as open space was created) granted in breach of trust does not preclude the making of a *cy-près* scheme.
40. Mr Smith's submission with regard to remedy, if the appeal is allowed on the second ground of appeal but not the first ground of appeal, is that there should be a new hearing by a different panel of the F-tT. As the issue was one of law, he invited us to remit the case to a judge-only panel although he did suggest that the appointment of the same judge as previously might save time.

*For the Charity Commission*

41. Mr Dibble, appearing for the Charity Commission, outlined its position as follows. First, there was insufficient evidence from which the Tribunal could properly have concluded that the 1956 Conveyance imposed a requirement to retain the land, or that factors associated with the land required its retention. Secondly, the Tribunal should have considered whether a *cy-près* occasion had arisen and if so made a finding as to what *cy-près* occasion had justified the Charity Commission's variation of the trusts. Thirdly, this matter should be remitted to the First-tier Tribunal for a fresh hearing; he saw no reason why the same panel should not sit.
42. Mr Dibble confirmed that the Scheme had been made on the understanding that section 6(1) of TOLATA applied, as the Charity Commission had taken the view that the land was not held upon trust to retain it *in specie*. He acknowledged that this was a long-running case and that views about the land were sharply divided in Bath. The Charity Commission's approach had been to include at clause 4 of the Scheme a confirmatory power to enter into a land swap but to prescribe the circumstances in which that power could be exercised.
43. In respect of the first ground of appeal, Mr Dibble supported Mr Smith's submission that the 1956 Conveyance, as interpreted by Hart J, had not provided for the retention of the Recreation Ground land. He submitted that the requirement not to use the land otherwise than as an open space should be read as subsidiary, or ancillary, to the purposes for which Hart J had found the land to be held. Hart J had clearly envisaged the letting of the land, and not only as a means of furthering directly those charitable purposes, so the "open space" provision could not, in his submission, be elevated to the status of a formal part of the trusts

on which the land is held. Referring to Decision [56], he noted that the Tribunal had not related the special qualities which it had discerned back to Dillon LJ's dicta. He acknowledged that, if a further inquiry were to be undertaken, it might be established that there were special qualities leading to the conclusion that the land is held on charitable trusts to preserve it as an open space. However those qualities would, in his submission, have to have been in existence at the time when the trust was created in 1956: subsequent changes in those qualities cannot be taken into account in establishing the extent of the charitable purposes of the Charity at the time of its creation. He submitted that the Tribunal had no evidential basis on which to conclude that the purpose of preserving the Recreation Ground as an open space would, in 1956, have been a charitable purpose.

44. Mr Dibble confirmed in relation to the second ground of appeal that the Charity Commission's case at the Tribunal hearing had been that a *cy-près* occasion had occurred under section 62(1)(e)(iii) Charities Act 2011 as a result of the irresolvable breach of trust occasioned by the granting of the 1995 Lease to Bath Rugby.

*For the first, second and third Respondents*

45. Mr Healey, appearing for the third Respondent, submitted that Hart J's judgment should be interpreted as recognising the preservation of the Recreation Ground as an open space as one element of the complex mix of reasons for finding that this land was held for charitable purposes. He submitted that Hart J had left open the question of whether the recreation ground land was required to be retained *in specie* and did so because it was simply not argued before him that preservation of the land as an open space was charitable *per se*. Mr Healey submitted that Hart J should be regarded as having addressed himself only to a specific challenge to charitable status and that he had not, in resolving that issue, meant to exclude other possibilities.
46. Mr Healey asked rhetorically whether the keeping of this land was amongst the reasons that the 1956 Conveyance of the land was found to have established a charity. His answer to his own question was that it cannot be answered in the negative by reference either to Hart J's decision or to the decision in *Oldham*, so it remains a possibility.
47. He submitted that there are a number of reasons for saying that the Recreation Ground falls into a special category so that there is a public benefit in preserving it as open space. These come to this, namely that it is a unique space within a historic city centre. The 1956 Conveyance referred to its character as an open space: it was this feature which made it special and unique. He argued that even a field can be special by reason of its location; and so the recreation ground is unique because it is strikingly beautiful, sitting in the bowl of Bath City. He submitted that this special quality should be viewed as an intrinsic quality which rendered it capable of having the relevant character to make it charitable to preserve. Mr Healey submitted that it was an exaggeration to say that the Tribunal's decision had rendered the land inalienable. He did not argue that the land was inalienable but, nonetheless, contended that it was right that the charitable trusts to which it was subject should inhibit its disposal.

48. On the second ground of appeal, Mr Healey's submission was that there was a fundamental difference between the breach of trust occasioned by the 1995 Lease to Bath Rugby (because it runs contrary to the purposes of the Charity to make the land available to the public for recreation) and the existence of the leisure centre, (which does not run counter to that purpose). He submitted that the Tribunal had taken the correct approach in not sanctioning a breach of trust by reference to the *cy-près* doctrine.
49. Mr Sparrow, who appeared in person, commenced his submissions by stating that everyone present knew that the playing of professional rugby on the Recreation Ground is an "illegal use" of the land. He explained that he interpreted the 1956 Conveyance as a "reader of the English language". He referred to the entry on the Charity Commission's register which includes the words "open space". He referred to the map of land which accompanied the 1956 conveyance and submitted that this map made the trusts site-specific.
50. In relation to Dillon LJ's judgment in *Oldham*, Mr Sparrow's submission was that this was not relevant to the issue before the Tribunal. He noted that it had not been cited in argument before Hart J and asked us to take into account that Oldham, unlike Bath, is not a World Heritage City.
51. Turning to the second ground of appeal, Mr Sparrow stated that he would not expect the *cy-près* rule to be adopted; rather, a simpler solution would be for Bath Rugby to leave. He added that if the Trustees obtained the money which he perceives to be owing to them in respect car parking and for the leisure centre's licence to occupy the land, then they would not need the income from Bath Rugby in the first place.
52. As to that submission, Mr Smith explained that the evidence relied on by Mr Sparrow, which was produced to the Tribunal about the financial position of the Charity, was disputed. Mr Sparrow had, without obtaining permission, attached extracts from this evidence to his skeleton argument. As we told Mr Sparrow, we would not take account of his submission on this point as our task is only to decide if there has been an error of law in the Tribunal's decision.
53. Miss Carne read out a pre-prepared statement and provided us with copies. She submitted that "everyone agrees" that the Recreation Ground is there to provide an open space for the people of Bath for ever but she also referred to her concerns about parking problems in the "special quiet residential area" and the "noise, nuisance and annoyance" caused to local residents on match days.
54. Miss Carne agreed with the Tribunal's conclusion that the Recreation Ground was to be retained *in specie* as an open space. She asked us to conclude that this was the intention of Captain Forester, who owned the land in 1922. As to him and his involvement, see [6] and [7] of Hart J's judgment.
55. She asked the Tribunal to refer the matter of the Charity Commission's "*ultra vires*" Scheme to a higher court to investigate criminal and fraudulent activity and suspected private enrichment. In answer to our question asking her to clarify the remedy she was asking us to grant, she confirmed that she was asking us to refuse the appeal.



## *Discussion*

### *The first ground of appeal*

#### *Oldham*

55. We start our discussion by saying something more about *Oldham*, although we have already set out at paragraph 25 above the critical passage from Dillon LJ's judgment. The relevant provision was "...upon trust to preserve and manage the same at all times hereafter as playing fields to be known as 'Clayton Playing Fields'....". Counsel, Mr Unwin, had suggested a number of alternative meanings of this provision, all of which, in Dillon LJ's view, came to the same thing and which we can formulate as "upon trust to be used as playing fields for ever". But after citation of Lord Cranworth LC in *President and Scholars of the College of St Mary Magdalen, Oxford v A-G* (1857) 6 HL Cas 189, 205, Dillon LJ gave an alternative formulation namely that "the donor intended that the land he was giving should be used for ever for the purposes of the charity, *sc.*, as playing fields to be known as the Clayton Playing Fields" for the benefit and enjoyment of the relevant class. On that formulation, retention of the land was not a purpose of the trust at all.
56. Later in his judgment (in a section to which we will come), Dillon LJ considered the approach of the Court of Chancery to the alienation of charity property. But before he did that, he considered the meaning of the words "original purposes of a charitable gift" in section 13 Charities Act 1960 (now reflected in section 62 Charities Act 2011). He asked himself whether those "original purposes" included the intention and purpose of the donor that the land given should be used for ever for the purposes of the charity, or whether they were limited to the purposes of the charity in the sense of the alternative formulation which we have mentioned. He saw the meaning of section 13 as the crux of the issue before him. Although he did not expressly state this, the reason why he did so was, it seems to us, because if the case did not fall within section 13, the court would have had power to authorise a sale of the land without a *cy-près* scheme. In contrast, if the case did fall within section 13, a *cy-près* scheme would have been necessary and the powers of the court would have been constrained.
57. He put aside some of the authorities which had been cited such as *In re JW Laing Trust* [1984] Ch 143 (where a particular provision was held to be administrative and was plainly not a "purpose") and *In re Dominion Students' Hall Trust* [1947] Ch 183 and *In re Robinson* [1923] 2 Ch 332 (where conditions had been attached to the gift (respectively a restriction of benefits, namely the provision of a hostel, to dominion students of European origin and a requirement, in relation to an endowment for an evangelical church, for a preacher to wear a black gown and where the condition could be cut out by way of a *cy-près* scheme)). The position in *Oldham* was clearly not the same as in *In re JW Laing Trust*. But nor was it the same as in *In re Dominion Students' Hall Trust* or *In re Robinson*. As Dillon LJ put it:

“But unlike those conditions, the intention or purpose in the present case that the actual land given should be used as playing fields is not a condition qualifying the use of that land as playing fields.”

58. Dillon LJ then considered the legislative purpose of section 13 of the Charities Act 1960, concluding that there was nothing to suggest any intention to extend the cases where a *cy-près* scheme is necessary to cases where, before that Act, no scheme was required. He addressed the position before the Act in a passage starting at p 221H. The mere sale of charitable property and reinvestment of the proceeds to be held upon the same trusts did not require a scheme. The Court of Chancery had a general jurisdiction, as incidental to the administration of a charity estate, to alienate charitable property where the court clearly saw that the alienation was for the charity’s benefit. In modern times, where a *cy-près* scheme is not necessary, trustees of a charity will, unless it is excluded, have the power of sale conferred by section 6(1) of TOLATA. It was after that consideration of the law that Dillon LJ considered a particular type of case in the passage of time we have set out in paragraph 25 above.
59. That passage is not, of course, an exhaustive catalogue of the cases where the qualities of the property which is the subject matter of the gift are what makes it charitable. But it gives a strong indication of the sort of factors which are to be taken into account in any particular case where it is said that a preservation trust is charitable. We should make this point in the light of the way the Tribunal expressed themselves. It is that the qualities being discussed by Dillon LJ are the factors which of themselves make the gift charitable. These are not qualities which make a gift which is already charitable somehow “more” charitable, or which enable a gift which has some philanthropic aspect but does not otherwise qualify as charitable to pass the threshold into the realm of charity. Thus, in the present case, Hart J’s decision has shown the trusts of the 1956 Conveyance to create valid charitable trusts for recreational purposes. It is not necessary to rely on the qualities of the Recreation Ground to which the Tribunal referred to render those trusts charitable. Those qualities are not among the factors which feature in determining whether the gift for recreational purposes in the 1956 Conveyance is charitable and Hart J did not rely on them or, indeed, even mention them. Conversely, if the 1956 Conveyance purported to create a trust one of the purposes of which was to preserve the Recreation Ground as an open space, that purpose is either charitable or it is not. It does not assist in establishing its status as a charitable purpose that the recreational trusts in the same document are charitable.
60. Further, as Dillon LJ’s analysis of the position prior to the Charities Act 1960 demonstrates, the position (apart from cases where the very qualities of the land are the factors which can render a gift charitable) is that there is no need for a *cy-près* scheme in order to effect an alienation of land held on charitable trusts. It may be that there is a qualification to that. Suppose that a gift of land was made on charitable trusts which required the charitable activity to be carried on in a particular building, for instance a conveyance of a school to be held on trust for charitable educational purposes with an express provision for the education to be provided at the particular building and no other building. It might then be said that the “original purposes” of the charity included the requirement for education

to be provided at the building concerned. For reasons which will become apparent, we do not need to form a view about this possible qualification.

*Requirements for valid charitable preservation trust in the present case*

61. Applying these principles to the present case and ignoring that possible qualification for the moment, it is our view that, in order to establish a valid charitable trust to preserve the Recreation Ground as an open space, it would need to be shown (i) that the qualities of the Recreation Ground were such that the purpose of preserving it as an open space was capable of being a charitable purpose and (ii) that the 1956 Conveyance, as a matter of construction, in fact created such a trust.

62. It is not entirely clear to us what the Tribunal concluded on either of those matters. It might be inferred from Decision [26] and [28] that they considered that one of the purposes was to preserve the Recreation Ground as an open space but what they actually addressed in those paragraphs was intention rather than purpose. As to intention, it seems to us that the intention that the Recreation Ground should be retained as an open space for recreation is no different from the position in *Oldham* as to which Dillon LJ said this at p 220A:

“...I have no doubt at all that the original purpose, in ordinary parlance, of the donor was, in one sense, that the particular land conveyed should be used for ever as playing fields for the benefit of [the relevant class].”

That did not lead Dillon LJ to conclude that the original purpose within the meaning of section 13 Charities Act 1960 included retaining the land *in specie*. Nor, in our view, does an *intention* to retain the Recreation Ground as open space lead us to conclude that the original purpose within the meaning of section 62 Charities Act 2011 includes retaining the Recreation Ground *in specie*. The question is whether there was a trust to do so.

63. So far as the qualities of the Recreation Ground are concerned, apart from the reference in Decision [27] to “some of the most attractive and historic parts of Bath” the only qualities referred to by the Tribunal are found in Decision [56] namely “the location of the land and its status as an area of green space alongside the heart of the historically and culturally important centre of the city of Bath”. There is no other factor identified as a relevant characteristic of the land (we see as irrelevant the desire, referred to in Decision [56], that the land be used for a range of entertainment as well as for games and sports). If the reference to “the particular characteristics” in Decision [56] was intended to include some other qualities, there is not a hint of what those might be.

64. In any case, the Tribunal did not express the conclusion that the qualities of the Recreation Ground were of themselves the factors which give rise to a charitable purpose. Instead they said two things: first that the qualities of the Recreation Ground “are themselves amongst the factors which make the purposes of the gift charitable”. Secondly, that these characteristics were “relevant to the decision to

create a charitable trust for the benefit of the public”. If by this statement they meant that, in deciding to create a recreational charity, account was taken of the location and nature as green space of the land being dedicated to recreational purposes, that may well be so but it goes nowhere near demonstrating that the retention of the Recreation Ground as an open space was of itself a charitable purpose. It seems to us that this must be what they meant, for the alternative is that they meant that those qualities were of themselves enough to result in the preservation of the Recreation Ground as an open space being a charitable purpose. They certainly did not say that in so many words and such an interpretation does not fit comfortably with the words “amongst the factors which give rise.....”.

65. If, however, the Tribunal are to be taken as having decided that qualities of the Recreation Ground were themselves factors which would render its preservation as an open space a charitable purpose we consider that this is a conclusion which they could not properly, on the evidence before them, have reached. Taken as a site on its own and ignoring its location there is nothing to suggest that its intrinsic nature warranted its preservation. Taking account of its location, there has been no suggestion that the preservation of the Recreation Ground as open space was a charitable purpose on the basis that this would be to maintain the attractiveness and beauty of the surrounding area and the question whether that would, in any case, be a public or private benefit has not been considered. See also paragraph 15 above. The fact that the Recreation Ground is an area of green open space in the heart of an historic and culturally important city is not, in our view, a sufficient basis for a conclusion that a trust for its preservation as open space is a charitable public purpose. Still less would it be possible to reach that conclusion when the matter must be tested against the facts in 1956 when the 1956 Conveyance was made as to which there was little, if any, evidence before the Tribunal. Moreover, the facts identified by Hart J in [46] of his judgment point, if they point anywhere, to the conclusion that the Recreation Ground did not display the necessary qualities.

#### *Construction of the 1956 Conveyance*

66. We now turn to the issue of construction of the 1956 Conveyance on the footing that it was possible, at the time of the 1956 Conveyance, to have created a valid charitable trust for the preservation of the Recreation Ground as an open space. We have reached the conclusion that it was not a purpose of the trusts of the 1956 Conveyance to preserve the Recreation Ground *in specie* as an open space. Our reasons appear in the following paragraphs.

67. It is plain that the focus of the 1956 Conveyance was on recreational use. The Recreation Ground was conveyed “for the purposes of or in connection with games and sports *etc*” and “for no other purpose”. The preservation of the land as an open space is not expressed to be one of the purposes for which it was conveyed; rather, the conveyance was subject to a proviso that “the Corporation shall not use the property hereby conveyed otherwise than as an open space...”. Were it not for that proviso, it would be clear, in the light of *Oldham*, that the Recreation Ground could be alienated without a *cy-près* scheme notwithstanding the opening words of the habendum of the conveyance requiring that the

Corporation “for ever hereafter shall manage *etc*”. In our view, the inclusion of that proviso, worded as a restriction and not as additional purpose, does not lead to a different conclusion. Rather, the proviso is to be operated according to its tenor, that is to say as a restriction: and being no more than a restriction, it can apply only so long as the person on whom the restriction is placed – the Corporation (or its successors in title as trustee) – retain the land. The restriction is not to be treated as introducing a restriction on alienation that would not otherwise be there. Support for that conclusion can be found when the placing of the proviso in the clause as a whole is noted. The structure is this: a trust for recreational purposes and no other purposes, followed by four matters not expressed to be purposes, namely: (i) an obligation to maintain, equip or lay out the land for those purposes (ii) not to use the land otherwise than as an open space (iii) to exercise the power at (i) in a way which will secure use principally for games and sports of all kinds (iv) not to show any undue preference for any game or sport or particular body of persons. Clearly (i), (iii) and (iv) are concerned with ways in which the primary trust is to be implemented. We consider that (ii) should also be approached in the same way and not as giving rise to a separate trust purpose.

68. This conclusion also takes account of the words “and for no other purpose”. It is one thing to be bound not to use the land other than as open space; it is another to hold it upon trust to maintain it as an open space. The scope for conflict between the recreational purpose and a preservation purpose may be small. But it is possible to envisage a situation where the Trustees, in pursuance of a trust to maintain the Recreation Ground as open space – for instance by enhancing its attractiveness by landscaping or planting – might wish to take actions which could not be justified by reference to maintaining it as a recreational facility. If they incur expenditure in such actions, they would be doing so for a purpose other than the recreational purpose.
69. Hart J concluded that there was a charitable trust but he was only “narrowly persuaded” that this was so. In reaching that conclusion, he stated that “the dominant intention of the trusts... was to provide a recreational facility for the public”; he also stated that this dominant intention was one to which all the express provisions should be treated as ancillary. Hart J was here concerned with the question of public/private benefit. Nonetheless, what he said is apposite also to the requirement prohibiting use other than as an open space; what he said is consistent with the view that that requirement is a restriction (*ie* is ancillary to) the recreational purposes and the way in which the Corporation could act in fulfilment of those purposes.
70. There is further support for the conclusion that the preservation of the Recreation Ground *in specie* as an open space is not one of the purposes for which it is held under the 1956 Conveyance. As Mr Smith and Mr Dibble point out, some of the land was already subject to certain leases and agreements and the power to let contained in the 1956 Conveyance was not limited to letting in the direct furtherance of the objects as found by Hart J. Although this may not prevent any part of the Recreation Ground which is fact let from remaining open space, it would not be open space available for access to the public. That is at least a pointer away from the public benefit which would need to be shown for the retention of the Recreation Ground as open space to be a charitable purpose.

71. In the light of the discussion above, it cannot successfully be argued that, although there is no independent purpose of preserving the Recreation Ground *in specie* as open space, the requirement not to use it other than as open space is part of the recreational purpose and therefore part of the “original purpose” for the purposes of section 62 Charities Act 2011. The reasoning by which we have reached our conclusion on construction applies equally to the question whether the restriction on use other than as an open space is part of the “original purpose”. We would only add that that restriction is not to be seen as a condition of the sort which Dillon LJ considered in *Oldham*, as to which see paragraph 57 above. Just as the intention or purpose in *Oldham* that the actual land given should be used as playing fields was not a condition qualifying the use of that land as playing fields so too, in the present case, the intention or purpose that the Recreation Ground should be used as open space was not a condition qualifying the use of that land for recreational purposes.

#### *Conclusion on the first ground of appeal*

72. The 1956 Conveyance did not, as a matter of construction, purport to create a trust to preserve the Recreation Ground *in specie* as an open space. The trusts actually created (*ie* the trusts for recreation) cannot properly be distinguished from those in *Oldham*. Accordingly, the Trustees succeed on Ground (1)(b) of the Grounds of Appeal. As to Ground (1)(a), the subjective intention of the sellers is irrelevant to the issue of construction. The objective intention is determined as part of the process of construction which we have resolved in favour of the Trustees.

73. In any event, the Tribunal did not have sufficient evidence before it to find that the qualities of the Recreation Ground were factors which, of themselves, would make possible the creation of a charitable trust for its preservation *in specie* as a charitable trust. For that reason too the Tribunal were wrong to distinguish the trusts considered in *Oldham*. The appeal succeeds on Ground (1)(b) on this basis.

#### *The second ground of appeal*

74. Our conclusion on the first ground of appeal makes it unnecessary to consider the second ground of appeal. However, we wish to say a little about it. If, contrary to our view, the 1956 Conveyance did create a trust to preserve the Recreation Ground as an open space then it would appear that the 1995 Lease was granted in breach of trust. If the lease is nonetheless valid, we consider that Mr Smith and Mr Dibble are correct to say that a *cy-près* occasion has arisen. It does not matter whether it is section 62(1)(a)(ii) or section 62(2)(e)(iii) or both which apply. It is certainly the case that a power of sale which did not otherwise exist cannot be conferred on the Trustees by an administrative scheme.

75. However, the Tribunal did not know, and we do not know, whether there is any prospect of successfully challenging the 1995 Lease or, if there is, whether it is a sensible course of action. If there is no possible challenge, then a *cy-près* scheme will be necessary in relation to that land if the Trustees are to have a power of sale or a power to swap land. In contrast, if it were a straightforward matter to set the 1995 Lease aside (we infer that it is not), then it is not easy to see how a *cy-près* occasion would have arisen.

76. We do not address, and have heard no argument, about the position – which we suspect to be the reality – that there may be grounds for challenging the 1995 Lease but they are fraught with legal difficulty and would be expensive to mount.

*Disposition*

77. The appeal on Ground (1) is allowed. We will receive further submissions as to the order we should make as indicated in the Decision at the start of the document.

78. Finally, we note that Mr Sparrow and Miss Carne were critical of the Trustees in a number of respects. We do not consider that these criticisms, even if they are justified, as having any bearing on our decision. For our part we see no basis on the evidence before us for concluding that the Trustees are acting other than as public-spirited individuals, taking prudent decisions on the basis of legal advice.

**ANNEX**

**Clauses 2, 3 and 4 of, and Part 4 of the Schedule to, the Scheme**

**2. Administration**

(1) The property of the charity identified in part 1 of the schedule is to be administered in accordance with the provisions of this clause.

(2) From the date of this scheme, the property identified in part 2 of the schedule will be administered and managed by the trustees constituted by clause 6 of this scheme in accordance with the existing trusts as altered or affected by this scheme.

(3) Until the Order is made, the property identified in part 3 of the schedule will continue to be administered and managed by the Council in accordance with the existing trusts as altered or affected by this scheme. For the avoidance of confusion, the property will (until the date of the Order) be known as The Bath Recreation Ground (Sports & Leisure Centre) Trust.

(4) By the Order, the Commission will appoint (if it thinks fit):

(a) the trustees constituted by clause 6; or

(b) any charitable company or charitable incorporated organisation established by those trustees

as trustee of the property identified in part 3 of the schedule. At that date, the land identified in parts 2 and 3 of the schedule will constitute the property of a single charity.

(5) The trustees constituted under clause 6 must (with the benefit of such professional advice as necessary):

(a) seek to negotiate and enter into binding arrangements with the Council in respect of the Sports and Leisure Centre for its on going maintenance, including provision for the future demolition when the building is deemed life expired; and

(b) when or if binding arrangements are validly executed, either:

(i) the trustees constituted under clause 6; or

(ii) the trustee of The Bath Recreation Ground (Sports & Leisure Centre) Trust,

must apply to the Commission for the Order

## **THE BATH RECREATION GROUND (SPORTS & LEISURE CENTRE) TRUST**

### **3. Sports and Leisure Centre**

(1) In sub-clause (2) below, ‘‘the relevant date’’ is the date on which the existing sports and leisure centre building can no longer be used for indoor recreation for the benefit of the public at large.

(2) Until the relevant date, the provision in the existing trusts that the land may only be used as an open space is suspended in respect of the land identified in part 3 of the schedule to this scheme. It may be used during this period as a facility for indoor recreation for the benefit of the public at large (including ancillary car parking). For the avoidance of doubt, after the relevant date, the trustees must return the land to open space suitable for the furtherance of the Charity’s objects.

(3) The Official Custodian for Charities is discharged in respect of the land identified in part 3 of the schedule. From this date, the land is vested in the Council as trustee of The Bath Recreation Ground (Sports & Leisure Centre) Trust.

## **BATH RECREATION GROUND**

### **(excluding The Bath Recreation Ground (Sports & Leisure Centre) Trust)**

#### **4. Powers**

(1) For the purpose of resolving the issues arising from the continuing occupation by Bath Rugby Club of the land contained in the 1995 lease, and in the event of the surrender of the 1995 lease, the trustees may (subject to sub-clause (2) below) exercise all or any of the powers in this clause.

(2) Before exercising the powers conferred by this clause, the trustees must fully consider all options for the management of the land belonging to the charity (including the option of making no changes to the current arrangements) and before adopting any option satisfy themselves that that option is in the best interests of the charity.

(3) Sub-clause (4) applies only to the land:

(a) currently subject to the 1995 lease; and

(b) described in part 4 of the schedule to this scheme.

(4) Subject to sub-clause (2) above and the conditions, the trustees may grant a lease or leases of the land and receive replacement land instead of, or in addition to, consideration by way of a capital sum and by way of further consideration. The conditions are:

(a) the term of any lease(s) must not exceed the unexpired term of the 1995 lease; and

(b) any replacement land must be suitable for the purpose of the charity.

(5) In so far as any lease extends to the land described in part 4 of the schedule:

(a) no lease must be granted unless and until all necessary formalities (including the elapse of time if appropriate) have been properly performed and recorded to exclude sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to that lease; and

(b) the lease must not permit the tenant use otherwise than as a site for a temporary stand (usually referred to as ‘the east stand’) or playing pitch or access areas and must require the site to be available as open space for use for the purposes of the charity for at least three months in each year.



- (6) In exercising the powers conferred by this clause, the trustees must:
- (a) before accepting a surrender of the 1995 lease, satisfy themselves that they are doing so on the best terms reasonably available;
  - (b) satisfy themselves (having undertaken public consultation) that any land taken in exchange will:
    - (i) have suitable amenity value for the purpose of a recreation ground; and
    - (ii) be in a location that is reasonably accessible and suitable for the purposes of the Charity;
  - (c) before entering into any commitment to grant, accept a surrender of the 1995 lease or take any interest in land obtain (from a professional valuer) a valuation of the land in question. A valuation must take full account of:
    - (i) the special interest of Bath Rugby Club in securing a grant of the land in part 4 of the schedule and its marriage value with the existing land held under the 1995 lease for the purpose of proposed development by Bath Rugby Club; and
    - (ii) (in valuing any regrant of the 1995 lease) the other commercial uses which may be made within the current use class and under any planning permission that might reasonably be obtained for the land.
  - (d) in granting any new lease of the land comprised in the 1995 lease:
    - (i) ensure that the lease is non assignable, except to subsequent owners of Bath Rugby Club;
    - (ii) ensure that the lease contains a right of pre-emption should Bath Rugby Club cease to use the property as its principal site for professional rugby football;
    - (iii) require Bath Rugby Club to minimise disruption to local residents and to the users of the charity's land; and
    - (iv) give public notice in accordance with the provisions of s121 Charities Act 2011 (whether or not this would otherwise be required).
- (7) In exercising the above powers (and in administering and managing the charity), the trustees must:
- (a) act only in the best interests of the charity to further the charity's objects for the public benefit;
  - (b) act in good faith (meaning acting in a way that the trustees honestly believe to be in the best interests of the charity);
  - (c) take into account all relevant factors and disregard any irrelevant factors; and
  - (d) adequately inform themselves, including having regard to the views of those who have an interest in the charity.

#### **PART 4**

Land containing 7548 square metres or thereabouts being part of the land described in Part 1 above and adjoining land subject to the 1995 lease.

**Relevant amendments to clauses 2 and 4 of the Scheme made by the Tribunal**

**Note: the amendments appear in the Annex to the Decision. They are reflected in the new provisions in the Tribunal's Order as indicated**

Clauses 2(3) and (4)

Delete in their entirety and substitute the following:

“2.3 The charity may carry out its activities on other sites in addition to the Bath Recreation Ground.

2.4 The charity shall not enter into any transaction that permits the use of part of the Bath Recreation Ground otherwise than as open space or on a basis that favours any particular game or sport or any particular club over another unless and until the trustees have considered such transaction and have decided that the overall effect of the transaction is to provide a net benefit to the charity in furthering its charitable purposes.”

[These are reflected in the new clauses 2(3) and (3)]

Clause 2 (5) (a)

Delete “including provision for the” and substitute the following:

“its continued occupation of part of the charity's land and its”

[This is reflected in new Clause 2]

Clause 2 (5) (b)

Delete in its entirety and substitute with:

“seek to negotiate and enter into a binding settlement of any claims that the charity has against the Council in respect of the past operation of the Sport and Leisure Centre and car parks on the Charity's land.”

[This is reflected in new Clause 2(4)(a)]

Clause 2 (6)

Add the following new paragraph:

“The trustees constituted under clause 6 shall ensure that they hold an AGM in public each year and that details of the AGM and an Annual Report that is targeted at the beneficiaries of the charity shall be widely disseminated to beneficiaries in good time for any interested party to be able to appear at the AGM and ask questions or make comments to the trustees”

[This is reflected in new Clause 2(5)]

Clause 4 (4) (b)

Add after “suitable for”; “and further”

[This is reflected in new Clause 4(4)(b)]

Clause 4 (4) (c)

Add a new sub-paragraph as follows:

“ the Trustees shall have satisfied themselves that the overall effect of the grant of any such lease or leases and the terms of such grant will be to further the charity’s ability to achieve its charitable purposes.”

[This is reflected in new Clause 4(4)(c)]

Clause 4 (5) (b)

Add a new sentence at the end of this sub-paragraph as follows:

“The three months shall be consecutive summer months. The site, including all grass surfaces, shall be made available at the start of the three month period in a condition that is immediately suitable for the playing of sports and the use of the land for leisure purposes”

[This is reflected in new Clause 4(5)(b)]

Clause 4 (6) (b)

Add new sub-paragraph (iii) at the end:

“be better suited to the achievement of the charity’s purpose than any other suitable land available at that time at an equivalent cost to the charity”

[This is reflected in new Clause 4(6)(b)(iii)]

Clause 4 (6) (d) (i)

Delete “except to subsequent owners of Bath Rugby Club”

[This is reflected in new Clause 4(6)(d)(i)]

Clause 4 (6) (d) (v)

Add new sub-paragraph (v) at the end:

“minimise any adverse effects of the grant of such lease on the ability of the charity to pursue its charitable purpose”

[This is reflected in new Clause 4(6)(d)(v)]

Part 4

Delete the existing text and substitute the following:

“Any land not subject to the 1995 lease and not exceeding in total [1042 square metres or such other amount as is established to be the largest gross amount of the surface area of the land that has been made available by the charity to Bath Rugby for occupation by the East Stand in any year since 2002].”

[This is reflected in new Part 4 which reads “Any land not exceeding in total 1136 square metres being part of the land described in Part 1 above” (Part 1 being the land conveyed by the 1956 Conveyance)]

**Mr Justice Warren**

**Judge Alison McKenna**

**Release Date: 30 July 2015**