

## CHARITY LAND TRANSACTIONS

Jean Warburton<sup>1</sup>

### Introduction

Charity trustees are required by s.29 Charities Act 1960 to obtain the consent of the Charity Commissioners to sell, lease for more than 22 years or otherwise dispose of land forming part of the permanent endowment or which is functional land. The consent of the Commissioners is also required if the charity's permanent endowment is to be mortgaged or otherwise charged. These provisions are viewed as a mixed blessing. The Charity Commissioners point to additional money gained for charities on sale<sup>2</sup> and a means to bring to their attention the administration and affairs of charities, for example, the need to widen the purposes by means of a scheme to ensure that the income is used effectively.<sup>3</sup> Charity trustees point to long delays in dealing with applications which can cause considerable difficulties.

### Rationale of Control of Land Transactions by Commissioners and of Abandonment of Control

The main reason advanced for the retention of the Charity Commissioners' control over land transactions is that it protects charity property and prevents abuse by the trustees. The whole question of the monitoring and supervision of charities and the prevention of abuse has received considerable attention in the last five years<sup>4</sup> culminating in a White Paper *Charities: A Framework for the Future* (1989) Cm 694. The recommendations of that White Paper have now been enacted in the Charities Act 1992 whose underlying purpose was said to be to enhance public confidence in the charitable sector by ensuring that charities are well managed and properly

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<sup>1</sup> Jean Warburton, Senior Lecturer in Law, University of Liverpool.  
Tel: (051) 794 3088 Fax: (051) 794 2829

<sup>2</sup> See for example [1983] Ch. Comm. Rep. para 75 - sale of a part of the site of a church for £230,000 after the trustees wished to accept an offer of £115,000.

<sup>3</sup> [1986] Ch. Comm. Rep. para 30.

<sup>4</sup> See the National Audit Office Report, 'Monitoring and Control of Charities in England and Wales' (1987); the report of the Public Accounts Committee, 'Monitoring and Control of Charities in England and Wales'; 'Efficiency Scrutiny of the Supervision of Charities' (the Woodfield Report).

regulated.<sup>5</sup> In the light of all the emphasis on the control and supervision of charities it may be a little surprising to learn that the 1992 Act removes the majority of land transactions from the control of the Charity Commissioners. The view was taken, however, that the resources of the Commissioners could be better directed at other forms of monitoring and supervision.

Sections 32 to 37 Charities Act 1992 introduce<sup>6</sup> a new régime for charity land transactions which dispense with the need to obtain the consent of the Commissioners where the trustees have satisfied certain conditions. The new régime can best be understood by considering separately, sales and leases for more than seven years, leases for seven years or less, mortgages and rentcharges. It then remains to consider the effectiveness of the new régime in the context of the other changes to be brought about by the 1992 Act.

### **Sales and Leases for More than Seven Years**

Sales and leases of *all* charity land will, in future by virtue of s.32(1)(2) of the 1992 Act, only require the consent of the Charity Commissioners if the transaction is to a connected person or a trustee or nominee for a connected person or the requirements of s.32(3) have not been complied with. Connected persons are listed in sch 2 and include a charity trustee, a close relative of a trustee, an officer, agent or employee of the charity and an institution or body corporate controlled by such person. A sale or lease to any of those connected persons would be a breach of the trustees' fiduciary duties and, in this regard, the provisions can be said merely to state the general law in statutory form.<sup>7</sup> In addition, a donor of any land to the charity, a close relative or an institution or corporate body controlled by him is a connected person. The reason for requiring such sales and leases to go before the Commissioners is the fear of tax avoidance by a gift of land to the charity followed by a lease back to the donor at a low rent.

Sales and leases for more than seven years to unconnected persons do not require the consent of the Charity Commissioners if three conditions are complied with before the agreement is entered into. First, the trustees must have obtained and considered a written report on the proposed disposition from a qualified surveyor. Section 32(4) specifies that the surveyor must be a fellow or a professional associate of the Royal Institution of Chartered Surveyors or of the Incorporated Society of Valuers and Auctioneers or satisfy such other requirements as may be prescribed in regulations. The surveyor must also be instructed by the trustees, act exclusively for the charity and be reasonably believed by the trustees to be of ability and experience in that particular type of land valuation. Regulations may prescribe the content of the

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<sup>5</sup> Hansard H.L. Vol. 532 col. 826 (Minister of State, Home Office, Earl Ferrers).

<sup>6</sup> The date of commencement is not yet known but it is anticipated that this part of the Act will be brought into force quickly - Hansard H.L. P.B.C. 273.

<sup>7</sup> See *Re Thompson's Settlement* [1985] 2 All ER 720 (the self-dealing rule).

surveyor's report.<sup>8</sup> Secondly, the sale or lease must be advertised in accordance with the surveyor's advice. Thirdly, the trustees must decide that they are satisfied that the terms of the sale or lease are that best that can reasonably be obtained for the charity. This last condition will probably be satisfied if all the trustees set the policy for disposals and then delegate decisions as to particular sales or leases to a committee of their number who report back at regular intervals.<sup>9</sup>

The conditions in s.32(3) should not come as any great surprise. They are, in effect, the requirements the Charity Commissioners have always imposed before giving their consent under s.29 of the 1960 Act.<sup>10</sup> In more recent years, they are also the requirements the Commissioners have looked for before granting exemption under s.29(4) from the need to obtain their consent for individual transactions.<sup>11</sup> Indeed, it can be said that compliance with the conditions is no more than the trustees should be doing in any event in order to comply with their general obligations to act in the best interests of the charity.

Further conditions are imposed by s.32(6) of the 1992 Act where land is held on trusts which stipulate that it must be used for the purposes of the charity, i.e., in specie. Thus, no sale or lease of an almshouse, for example, is possible unless public notice has been given of the proposed disposition and any representations made following such notice have been considered. This subsection is not quite the protection it might appear, however, as there is no right for objectors to ask the Charity Commissioners to supervise the disposition. In addition, by s.32(7), the subsection does not apply at all if the disposition is with a view to acquiring replacement property or is the granting of a lease for two years or less. Nor, by s.32(8), does the subsection apply if the Commissioners have granted exemption for either all or some of the dispositions of a charity or a particular disposition. Exemption is likely to be granted to such charities as the National Trust which have a large number of straightforward land transactions.<sup>12</sup>

By s.32(9) a sale or lease for more than seven years of charity land does not need the consent of the Charity Commissioners or have to comply with the conditions in s.32(3) if there is a general or special authority for the disposition by another statutory provision<sup>13</sup> or by a legally established scheme. There is similarly no need to comply with the conditions if the disposition is to another charity for less than the

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<sup>8</sup> Section 32(4). The White Paper para 7.6 recommended that the contents of the surveyor's report should be specified to prevent trustees seeking to impose inappropriate conditions on surveyors.

<sup>9</sup> Hansard H.L. Vol. 535 col. 416.

<sup>10</sup> [1986] Ch. Comm Rep. para. 28.

<sup>11</sup> [1987] Ch. Comm. Rep. para 53; [1990] Ch. Comm. Rep. para 84.

<sup>12</sup> Hansard H.L. Vol. 535 col. 191.

<sup>13</sup> For example, ss.8-12 of the Housing Associations Act 1985, as amended by s.78(1) and Sch 6 of the Charities Act 1992, for dispositions by housing associations.

best consideration and such a sale is within the authority of the charity trustees. Finally, a grant of a lease for less than the best rent need not comply with the conditions if it is intended that the property should be occupied for the purposes of the charity. This enables a charity established to provide housing for the poor, for example, to grant a lease to a beneficiary at less than the market rent.

### **Leases for Seven Years or Less**

A lease for seven years or less requires the consent of the Charity Commissioners if it is to a connected person or the requirements of s.32(5) are not complied with. The requirements for short leases are less onerous in that the trustees need only consider the advice of a person whom they reasonably believe to have the requisite ability and experience, rather than the advice of a qualified surveyor, and the lease does not have to be advertised. The trustees must still decide, after considering the advice, that the terms are the best that can reasonably be obtained for the charity.

As with sales and longer leases, leases for seven years or less of land held in specie must be given public notice in accordance with s.32(6) unless one of the exceptions applies. Similarly, a shorter lease does not have to comply with the conditions in the same circumstances in which s.32(3) does not apply to a sale or a longer lease.

### **Mortgages**

Mortgages of any land held by a charity are also taken out of the control of the Charity Commissioners if a set of requirements are complied with.<sup>14</sup> Section 34(2) provides that a mortgage shall not require the consent of the Commissioners if the trustees have obtained and considered proper advice before executing the mortgage. The advice must be from a person whom the trustees reasonably believe is qualified by ability and practical experience in financial matters and who has no financial interest in making the loan in question. By s.34(4) such an adviser may be an officer or employee of the charity.

Section 34(3) requires that the advice must address three matters. First, is the proposed loan necessary in order for the charity to pursue the particular course of action for which the loan is sought?<sup>15</sup> Secondly, are the terms of the proposed loan reasonable having regard to the fact that the borrower is a charity? Thirdly, the ability of the charity to repay the loan must be considered.

### **Rentcharges**

The release of a rentcharge by a charity is taken outside the control of the Charity Commissioners by s.37(1) if at least ten times the annual amount of the rentcharge is received. A release for anything less than ten years' purchase will only require the consent of the Commissioners if the conditions in s.32(2) cannot be complied with.

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<sup>14</sup> There is no need to comply with the requirements if other general or specific statutory authority is given - s.34(5).

<sup>15</sup> Advice as to necessity may be available formally or informally from the Charity Commissioners under s.24 of the Charities Act 1960.

Neither the consent of the Commissioners or compliance with s.32(3) is necessary if the rentcharge is redeemed under sections 8 to 10 Rentcharges Act 1977, i.e., the owner of the land affected by the rentcharge applies to the Secretary of State for a redemption certificate. If the release is for less than £500, s.37(2) provides that any costs of the charity incurred in connection with proof of title are recoverable from the other party.

### Effectiveness

The new régime for charity land transactions in the 1992 Act places the control of the majority of dispositions firmly with the trustees; other provisions in statutes or in the trusts of a charity requiring the Charity Commissioners' consent to land dealing are removed by s.36. This clearly has considerable advantages for charities whose land transactions will no longer be delayed by the need to seek the consent of the Commissioners. The potential disadvantage is that the régime makes it more difficult to check abuse by charity trustees. The régime itself contains a number of provisions directed to prevent abuse, and other provisions in the 1992 Act intended to improve monitoring and supervision generally may have the effect of preventing misuse of the new freedom in relation to land transactions.

There are several provisions to alert those entering into land transactions with charities that a special régime applies. Section 33 requires that any contract for sale<sup>16</sup> or conveyance, lease or transfer of charity land shall state that the land is held by or in trust for a charity and that either restrictions on its disposition apply or that it is exempt. A similar statement must be included where, as a result of the disposition, land will become charity land. If the restrictions do not apply, the reason why must be stated, for example, because the charity is exempt or there is other statutory authority. Further, the charity trustees must certify, if appropriate, that either the consent of the court or the Commissioners has been obtained or that the trustees have power to effect the disposition and the relevant conditions have been complied with, i.e., the conditions in s.32(3) or s.32(5). If the charity land is registered, a restriction must be entered on the register either on the first disposition or on registration of title in the case of unregistered land. A similar restriction must be entered if land becomes charity land as a result of a declaration of trust or a charity ceasing to be exempt. Similar provisions as to statements and certificates apply to mortgages of charity land by virtue of s.35.

These provisions are limited to a certain extent by the need to protect purchasers. Thus, in favour of a person who acquires an interest in charity land for money or money's worth, it is conclusively presumed by ss. 33(3) and 35(3) that the facts stated in the certificate are correct even if it subsequently transpires, for example, that the terms were not the best that could reasonably be obtained. In addition, by ss.33(4) and 35(4), in favour of a purchaser in good faith acquiring an interest in charity land for money or money's worth, a disposition is valid whether or not the Charity Commissioners have consented or whether or not the relevant conditions have been

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<sup>16</sup> Any contract for the disposition of charity land must be conditional on the consent of the Charity Commissioners being obtained or the conditions in s.32(3) or (5) must be complied with - *Michael Richards Properties Ltd v Corporation and Wardens of St. Saviours Parish Southwark* [1975] 3 All ER 416; *Haslemere Estates v Baker* [1982] 1 WLR 1109.

complied with. This provision will only apply where a purchaser is unaware that he is dealing with charity land.

Despite the supplementary provisions to enforce the new régime of charity land transactions, compliance is essentially a matter for the trustees; a purchaser is protected by the certificate. In the vast majority of cases charity land transactions will not come to the attention of the Charity Commissioners. Breach of the new régime does, however, require the agreement or concurrence of all the trustees. In this regard, it should perhaps be remembered that an additional £13m was obtained for the Hampton Fuel Allotment Society<sup>17</sup> on a sale of their land, not because the Charity Commissioners refused to consent to the sale under s.29 of the 1960 Act, but because two of the trustees applied for the sale to proceed only under the order of the court.<sup>18</sup>

Other provisions of the 1992 Act require regular information to be presented to the Charity Commissioners which obviates the need for the Commissioners to consent to charity land transactions purely to bring the affairs of a charity to their attention. Thus, by ss.20 to 27 and to be enforced ultimately by criminal sanction, a charity will be required to prepare annual accounts which have been either independently examined or audited and to submit them to the Commissioners with an annual report. The contents of the report are to be prescribed by regulations but if the Accounting Standards Committee's Statement of Recommended Practice is followed any significant land transactions will probably have to be noted. All these provisions will make it more difficult for trustees to breach the new régime applying to charity land transactions.

### **Conclusion**

The 1992 Act introduces a new régime to govern charity land transactions freeing the majority of transactions from the control of the Charity Commissioners. The régime cannot be said to impose new burdens on trustees as the 1992 Act does little more than set out in statutory form the steps necessary for trustees to comply with their existing duty to act in the best interests of the charity. In this regard the new régime clearly complies with one of the objectives in para 1.18 of the White Paper of encouraging trustees to shoulder their responsibilities. It can be said that contrary to another objective of the White Paper, the new régime widens rather than narrows the scope for abuse. Placed in the context of the 1992 Act as a whole, however, this fear may well turn out to be overstated.

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<sup>17</sup> [1988] Ch. Comm. Rep. para. 62.

<sup>18</sup> *Richmond London Borough Council v Rogers* [1988] 2 All ER 761.