



CHARITY COMMISSION
FOR ENGLAND AND WALES

Inquiry Report

Durand Education Trust

Registered Charity Number 1136362

A statement of the results of an inquiry into Durand Education Trust (registered charity number 1136362).

Published on 21 October 2016.

The charity

Durand Education Trust ('DET') is a charitable company which was incorporated on 18 May 2010 and first registered with the Charity Commission ('the commission') on 15 June 2010. The commission is the principal regulator of DET, which is governed by a memorandum and articles of association.

DET is established for educational purposes and in particular for advancing the education of pupils at Durand Academy ('the academy'). In practice, DET provides support to Durand Academy Trust ('DAT'), which operates the academy.¹ DET also owns the land and property used by the academy. One of the sites, the 'Hackford Road' site, contains facilities which include a gym, a swimming pool, an all-weather pitch and an accommodation block ('the accommodation and leisure facilities'). The accommodation and leisure facilities are used by the academy both to further its educational purposes and to generate income for DET to financially support the academy's activities through commercial trading.

The trustees of DET are both charity trustees under charity law and directors under company law. Historically, a number of people have served as trustees of both DAT and DET, sometimes simultaneously. There is nothing wrong or inappropriate about this provided any actual and potential conflicts of interest are identified and managed in accordance with the terms of the charities' governing documents and the law.

More details about DET are available on the [register of charities](#) ('the register').

¹ DAT was incorporated on 13 August 2010. Company number 07345831. DAT is an exempt charity. Exempt charities are exempt by statute from registration and direct regulation by the commission, and instead have principal regulators who directly regulate them and who are responsible for ensuring they comply with charity law. Usually the principal regulator is the charity's main regulator under another legal framework. Principal regulators do not have any special compliance powers to enforce charity law. They can however refer a matter to the commission to open an inquiry and use its powers. DAT's principal regulator, which supervises it for charity law compliance, is the Department for Education.

Background: The organisations connected to Durand Academy and the development of the accommodation and leisure facilities

Overview

DET and DAT form part of a broader structure of companies, which are connected to the academy. The arrangements and regulatory framework are complex and a diagram summarising the main relationships between the various entities is provided in figure 1 on page 4.

The academy was formed in 2010 from Durand Primary School ('DPS').² DPS was overseen by an unincorporated board of governors also known as the governing body ('GB'). The governors became the trustees/directors of DAT on its formation.

The academy operates on 3 sites owned by DET³

- the Mostyn Gardens site in Lambeth London, which is the site of nursery provision and provision for years 1 to 3
- the Hackford Road site in Stockwell London, which is the site of education provision for years 4 to 8 and which also contains the accommodation and leisure facilities
- the St Cuthman's site in West Sussex, which is used for the senior boarding school provision for years 9 and 10 and which started in the autumn term of 2014

Academies and the role of the EFA

Academies are publicly-funded schools that are independent of local authority control. Each academy school is part of an academy trust, a charitable company limited by guarantee, which is the legal entity responsible for its schools' financial management and governance. The Department for Education ('DfE') is the principal regulator of academy trusts, which are classed as exempt charities. Academy trusts are directly accountable to the Education Funding Agency ('the EFA'), an executive agency of the DfE, through the academy trusts' funding agreements with the Secretary of State for Education.

The EFA has day-to-day responsibility for monitoring academies' compliance with their funding agreements. In particular, it monitors compliance with the Academies Financial Handbook ('the handbook'), which details the responsibilities and requirements with which academies are expected to comply to ensure the appropriate use of public funds. The handbook takes into account the relevant financial reporting requirements for charities, as well as setting out the standards expected of academies' accounting officers to ensure probity in relation to the use of public funds. The funding agreement signed between an academy trust and the Secretary of State requires the trust to abide by the requirements of the handbook.

² Prior to this DPS was a foundation school and DET was the foundation which held the school's land.

³ The Mostyn and Hackford Road sites were subject to a statutory vesting in DET under paragraph 2A of the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007, on DPS's conversion to a foundation school with foundation. DET purchased the freehold of St Cuthman's on 28 May 2010.

The de-registration of DET in 2011 and the impact on its regulation

Under the provisions of the Academies Act 2010, on 1 August 2011, all academy trusts, and associated charities which met certain legal definitions, automatically became exempt charities.⁴ As a consequence the commission was obliged to remove all academy trusts and associated charities which were then on the register.

Records held by the DfE about academies at that time did not map against an exact and corresponding list of charities on the register and the word 'academy' is not a unique identifier for charity registration purposes.

In order to identify the exempt charities that had to be immediately removed from the register, the commission used an uncommon phrase in the model academy objects which the DfE requires all academy trusts to have.

At the time, the commission had reasonable grounds for thinking that any charity with this phrase in its objects would be either an academy trust or an associated charity meeting the relevant legal definition.

DET was identified as a charity whose purposes included the model academy objects. The commission removed it from the register on 25 August 2011 and notified the trustees on 6 September 2011. DET was however subsequently reinstated to the register on 17 October 2014.⁵ During the intervening period, DET was presumed to be an exempt charity and subject to the regulatory control of the DfE/EFA. DET remained a separate legal entity from DAT and both remained subject to their respective obligations under charity law at all times.

Development of the Hackford Road site and the contracts with GMG

The development of the accommodation and leisure facilities on the Hackford Road site started in the early 1990s with the construction of an all-weather sports pitch and swimming pool, partly funded by a £100,000 grant from the Greater London Council legacy fund. Income was subsequently generated by turning the site and, in particular, these facilities, to account for commercial use when not required by the school. The income was re-invested to develop the first 15 rooms of students' and teachers' accommodation in the upper floors of the school building in around 1995-6.

The development of the accommodation and leisure facilities and the generation of income from the commercial activities have from the outset been primarily managed by Sir Greg Martin, who was head teacher of DPS and then executive head teacher of the academy from 1986 until his retirement in 2015 (although he remains acting chair of DAT). From 2001 Sir Greg Martin received separate recompense beyond his remuneration as head teacher for his work in developing and managing the accommodation and leisure facilities.⁶

In 1997, the governors of DPS established a private trading company limited by guarantee called London Horizons Limited ('LHL') as a tax efficient means of generating income for the school. DPS governors served as directors of LHL although there were no formal links between DPS and LHL.⁷ Following the formation of DET and DAT in 2010, the governors, in their capacity as DAT trustees, continued to exert informal control over LHL's affairs. LHL became formally controlled by DET in 2015.

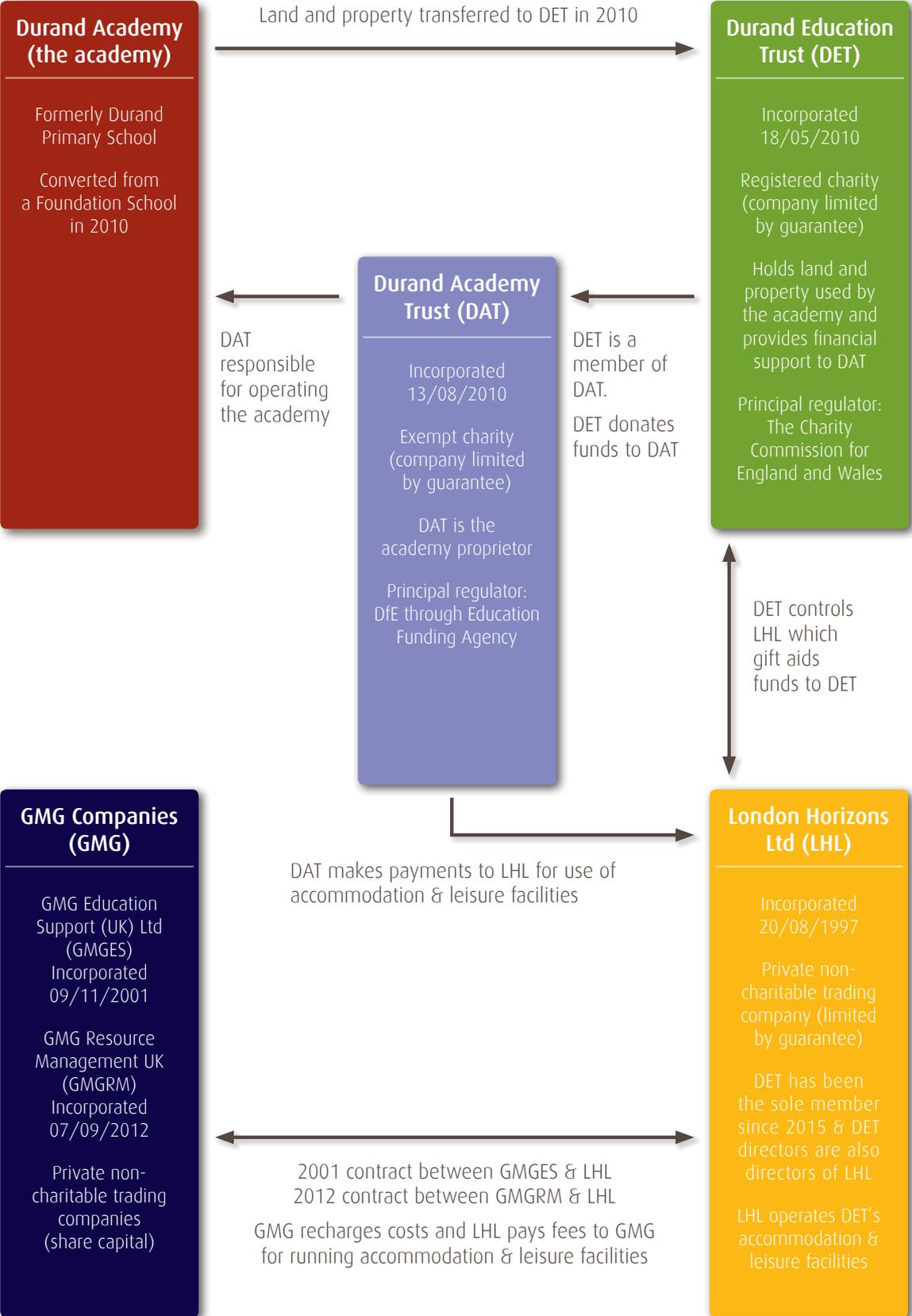
4 The exemption applies to a 'qualifying academy proprietor' as defined under section 12 of the Academies Act 2010. Those institutions which are (a) administered by or on behalf of a qualifying academy proprietor, and (b) established for the general purposes of, or for any special purpose of or in connection with that qualifying academy proprietor, are also exempt.

5 Further information is contained on page 6.

6 The former executive head teacher received remuneration for his role as executive head teacher of £146,415 for 2011-12 (£128,322 plus pension contributions of £18,093), rising by 56.5% to £229,138 in 2012-13 and 2013-14 (£200,822 plus pension contributions of £28,316).

7 LHL was incorporated on 20 August 1997. Company number 03422748.

Figure 1: Overview of the organisations connected to Durand Academy



In 2001, the governors of DPS through LHL decided to formalise the arrangements for the day-to-day management of the accommodation and leisure facilities. They did so by awarding a 10 year fee-based contract ('the 2001 contract') to GMG Education Support (UK) Ltd ('GMGES'), a service company controlled, and initially wholly owned, by Sir Greg Martin.⁸ This arrangement provided for him to receive remuneration for his work in developing and managing the accommodation and leisure facilities over and above his remuneration for his role as head teacher.

During the life of this contract, LHL's profits were gifted to the school to support its activities. Further enhancement of the leisure and accommodation facilities also took place, including the development of a sports centre and the swimming pool.

Following the expiration of the 2001 contract LHL awarded another fee-based contract on 1 December 2012 to a new service company operated and wholly owned by Sir Greg Martin - GMG Resource Management UK Ltd ('GMGRM').⁹

GMGRM is engaged under the terms of the 2012 contract for 'Managing the Income Generating Facilities at all times for the periods when they are not required by Durand Academy for educational purposes, for the purposes of producing an income'. The original parties to this contract were GMGRM, LHL and the trustees of DAT.

The 2012 contract is for a minimum term of 5 years and both parties are required to provide 18 months' notice to terminate the contract. Under the original terms of the 2012 contract, GMGRM was entitled to:

- management fees paid each year, which comprise a retainer of £32,362.08 (excluding VAT) increased annually in accordance with the retail prices index, and 15% of gross turnover
- special payments payable on termination of the contract based on 50% of 3.5 times the average of the previous 3 years' gross turnover; these payments will be made howsoever the contract ends

Throughout this report, GMGES and GMGRM are referred to collectively and/or interchangeably as GMG, unless there is a specific need to distinguish between the 2 companies.

At the time Sir Greg Martin entered into the contract on behalf of GMG in 2012, he was the executive head teacher of the academy, and a trustee of both DAT and DET. In this report, Sir Greg Martin is referred to as 'the former executive head teacher.'

Trustees have fiduciary duties to the charity that they manage and administer. As part of these duties, trustees must comply with any specific conditions imposed by the charity's governing document on remuneration and benefits, or obtain a legal authority to act in a way that might not otherwise be authorised from the commission or the courts.¹⁰

8 GMGES was incorporated on 9 November 2011. Company number 04320341.

9 GMGRM was incorporated on 6 September 2012. Company number 08205551.

10 Further information about this is contained on page 10 under the section 'The legal framework governing any decision to remunerate'.

Background to the inquiry

The involvement of the EFA

Following a review of DAT's financial statements for 2012-13 and further follow up work, the EFA raised various concerns with DAT, which included concerns that it had become 1 of the 3 parties to the 2012 contract along with LHL and GMG. The agreement recorded the terms upon which LHL subcontracted its obligations to GMG and was underwritten by the trustees of DAT. By becoming a party to the contract, DAT had incurred additional obligations and contingent liabilities.

DAT agreed in principle to a number of actions proposed by the EFA in 2014 to address its concerns. The actions included the immediate cancellation of the obligations which arose when DAT became a party to the contract between LHL and GMG, the immediate termination and re-tendering of the 2012 contract with GMG, and the transfer of land held by DET to DAT. The latter 2 actions were not subsequently implemented.

The involvement of the commission

In October 2014, DET approached the commission for advice about the EFA's request for it to transfer its land to DAT. DET also asked for advice about its status, following its de-registration in August 2011.

Following representations from DET's professional advisers, the commission took the view that DET was not an exempt charity. The exact wording of its charitable objects meant that it did not meet the legal definition of being established for general or special purposes in connection with DAT, but rather for broader purposes to advance education for the public benefit. It was not, and had therefore never had the status of, an exempt charity. DET was reinstated to the register of charities on 17 October 2014.

The commission began to engage with the trustees of DET on other matters of regulatory concern which came to light through this engagement including: the apparent lack of separation in governance terms between DET and DAT and the related organisations; the extent to which there were suitable dispositions (and associated written agreements) in place to protect DET's land assets; and the contract between LHL and GMG.

Events in November 2014 to February 2015

In response to correspondence addressed to the Comptroller and Auditor General and the chair of the Committee of Public Accounts ('PAC'), the National Audit Office ('NAO') investigated the EFA's oversight of DAT and in particular, its compliance with guidance on conflicts of interest and related party transactions. The NAO published **its report** in November 2014.

On 26 January 2015, the PAC heard oral evidence in a follow-up hearing into the EFA and DfE Financial Statements.¹¹ The committee heard from a number of witnesses, including the former executive head teacher¹² and the chief executive of the EFA. The committee raised specific concerns about the academy, including the issue of asset ownership, the fee-based contract between LHL and GMG and the complexity of the governance arrangements and operating structures of organisations connected to the academy.

11 The transcript of the hearing is available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/education-funding-agency-and-department-for-education-financial-statements-recall/oral/17774.html>

A follow up letter issued by the Chair of the PAC to the DfE is available at: <http://www.parliament.uk/documents/commons-committees/public-accounts/Chair-to-Chris-Wormald.pdf>

12 At the time of hearing he was still serving as executive head teacher of the academy.

On 28 January 2015, the PAC heard oral evidence in an unconnected and separate hearing with the commission.¹³ The chief executive of the commission confirmed to the PAC that the commission was already engaged with DET and was considering whether to open a statutory inquiry. The commission's chief executive also explained that the commission would assess evidence provided to the PAC by the former executive head teacher.

It is part of the commission's statutory objectives to protect public trust and confidence in charities. In view of the heightened public interest in ensuring that DET's charitable assets were being adequately safeguarded, the commission decided to open a statutory inquiry into DET under section 46 of the Charities Act 2011 ('the Act') on 11 February 2015.

The issues under investigation

The inquiry was established to consider whether or not:

- the former trustees/trustees of the charity discharged/were discharging their duties and responsibilities as charity trustees
- there were or remain governance failures in the administration of the charity as a result of the lack of oversight/review of various agreements entered into between the DET, DAT, LHL or GMG
- conflicts of interest were or are being identified or adequately managed
- there were unauthorised private benefits arising from the contract arrangements with LHL, and subsequently GMG
- to what extent there was mismanagement or misconduct on the part of those acting in the administration and management of DET

The issues in this case are both factually and legally complex. In practice the inquiry considered these matters under 3 main headings:

- land:
 - the terms on which the Hackford Road site are held and whether income arising from use of the site can be applied for the boarding school at St Cuthman's or the general purposes of DET ('the land trust issue')
 - the extent of formal leases or other dispositions between DET, DAT and related parties ('the leases and licences issue')
- DET trustees' remuneration and benefits:
 - decision making by the trustees, in particular decisions which resulted in remuneration/benefits to DET trustees ('the decision making issue')
 - whether in practice the remuneration provided to the former executive head teacher via GMG was reasonable in the circumstances for the services provided ('the reasonableness of remuneration to the former executive head teacher issue')
- governance:
 - whether adequate governance arrangements were or are now in place to protect the interests of DET and to ensure that its trustees are discharging and will discharge their duties and responsibilities as charity trustees ('the governance issue')

¹³ The transcript of the hearing is available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/charity-commission-followup/oral/17844.html>

Findings

Land - the land trust issue

The inquiry established that DET holds the land at the Hackford Road site, that site having been transferred on trust to the charity by operation of the School Organisation (Prescribed Alterations to Maintained Schools) (England) Regulations 2007 ('the 2007 Regulations'). DET had become the foundation for DPS. The effect of this is set out in paragraph 2A of Schedule 6 of the 2007 Regulations, which, by way of summary, states that any land that immediately before the transfer was held or used by the local authority or governing body 'for the purposes of the school' must on that date transfer to and vest in the trustees of the school - in this case, to DET.

One of the key legal issues dealt with by the inquiry has been the nature of the trust on which DET holds the Hackford Road site, in particular whether the site was only held for the purposes of the school on that site, or multiple sites, or for DET's general purposes. This was important in order to understand the extent to which the trustees had complied with their legal obligations, and was relevant to the question of whether income generated from the Hackford Road site had been applied in accordance with its trusts, for example by using those funds to purchase the St Cuthman's site. The terms on which the land is held by DET were also relevant to the consideration of the remuneration and benefits issue and therefore needed to be resolved before that matter could be fully dealt with by the inquiry.

DET approached the commission for regulatory advice on the land trust issue in March 2015, shortly after the inquiry opened.

The commission and the trustees separately sought specialist advice on this point. In the commission's view, the terms of the trusts, in particular 'for the purposes the school', were insufficiently precise to definitively determine the scope of the trusts.

The trustees' view was that the terms of the trusts permit them to apply the income generated from the Hackford Road site for the purposes of the school and are not restricted solely for application on the Hackford Road site.

The commission recognised that the school has grown and expanded from being a single primary school based on 1 site to an all-through academy based on 3 sites. In addition, the commission established that the trustees had decided that the purchase of the St Cuthman's site was in the best interests of DET and its beneficiaries.

Only a court can conclusively determine the construction of the legal trusts upon which DET occupies land, given the legal difficulties referred to previously. In light of these difficulties, and in an effort to resolve the issue proportionately and pragmatically without resort to uncertain and expensive court proceedings, the commission provided regulatory advice to the trustees on the issues. On the understanding that the trustees fully considered that advice, the commission confirmed it had no objection to the trustees following the legal advice they had obtained that DET held the land as trustee for 'the purposes of the school' in accordance with the 2007 Regulations and that the terms of the trusts permitted the income arising from the Hackford Road site to be applied for 'the purposes of the school' on the St Cuthman's site. The commission also offered to provide an order pursuant to section 105 of the Act to provide regulatory authority to assist in facilitating the purchase of the St Cuthman's site.

Land - the leases and licences issue

The need to formalise DAT's use of land held by DET, and DET's proposals in response, formed part of the commission's pre-inquiry discussions and were put on hold at the commission's request, to enable the inquiry to review more fully the arrangements which are in place and ensure the results of the land trusts issue were taken into account.

The inquiry established that the current position on leases and licences is as follows:

- there is no lease agreement or other disposition in place between DET and DAT for the use of the Hackford Road site or the St Cuthman's site; the commission issued an action plan before opening the statutory inquiry in February 2015 to require DET to legally formalise DAT's use of its land and property
- there is no lease agreement or other disposition in place between DET and LHL for the use of the Hackford Road site; any such disposition must comply with the requirements of charity law including section 117 of the Act -this will include ensuring that any disposition to LHL is for the best commercial rent that can be reasonably obtained when the facilities are not required by the academy
- school staff occupy residential accommodation belonging to DET without any form of tenancy or rental agreement, although DET advised the inquiry that the terms of occupancy are 'made clear to staff at interview. Staff leave accommodation when they leave the school and there has been no issue about this over the last 17 years'
- GMG uses DET's property under licence from LHL; however LHL does not have a lease or licence with DET
- GMG allows students to occupy accommodation under licence; DET have stated in correspondence that 'GMG recognise that it may be preferable to produce a document that could be more fireproof although it is noted that no problems have been encountered to date over some 17 years of operation. It is also recognised that where an occupant wishes to be difficult the remedy open to LHL is to obtain possession through a court order or otherwise. GMG has thought of itself as providing something comparable to hotel or hostel accommodation. Limited services are incorporated such as clean linen and continental breakfast for foreign students.'

The inquiry's view is that these arrangements do not adequately safeguard DET's interests, or demonstrate that the trustees have been adequately discharging their fiduciary duties to DET in this regard.

DET has recognised these deficiencies and is fully in agreement with putting in place dispositions and revised licence arrangements which adequately safeguard DET's interests and clearly set out the respective obligations of each party and their terms of occupancy.

DET's trustees' remuneration and benefits issue (the decision making issue and the reasonableness of remuneration to the former executive head teacher issue)

In order to consider whether the remuneration and benefits to DET trustees were properly authorised and/or reasonable in the circumstances, the inquiry has considered:

- the legal framework governing any decision to remunerate trustees
- who, when and how decisions about the 2012 contract were undertaken
- the impact of the commission's de-registration of DET between 25 August 2011 and 17 October 2014
- whether in practice the remuneration provided to the former executive head teacher via GMG was reasonable in the circumstances for the services provided
- remuneration and benefits paid to 2 other DET trustees

The legal framework governing any decision to remunerate

The trustees of DET are subject to fiduciary duties as charity trustees, and in addition are also subject to various statutory duties which arise because DET is a company.

These include in particular the duties to act in accordance with the DET's articles of association and to avoid conflicts of interest,¹⁴ unless authorised in accordance with those articles. Charity trustees are obligated to act in the interests of the charity only, and are not allowed to place themselves in a position where their personal interests, or interests or loyalties in another fiduciary capacity, conflict or may conflict with that duty.¹⁵

As part of their fiduciary duties, trustees must comply with the charity's governing document and the law and can only receive a benefit from a charity if it is authorised by the governing document, the commission or the court. In the absence of such authorisation, a trustee must account for any benefit that he or she has obtained as a result of a breach of fiduciary duty: that is to say, he or she must hand over to the charity any financial or other profit gained, and the other trustees when on notice of a breach have a responsibility to regularise the matter.

This strict rule may be subject to some reprieve under the equitable relief principle¹⁶, but that principle will not apply if there is a strict prohibition against trustees benefit in the governing document.¹⁷ Neither the courts, nor the commission, can override a prohibition in a governing document. There is also a principle of relief from personal liability if trustees have acted honestly and reasonably and ought fairly to be excused from any breach of trust.¹⁸

14 Section 171 and 175 Companies Act 2006 respectively.

15 As per Lord Herschell in *Bray v Ford* [1896] AC 44, at 51.

16 See House of Lords decision in *Boardman v Phipps* ([1967] 2 AC 46).

17 See *Guinness v Saunders* [1990] 2 AC 663 at 691 to 692.

18 Section 61 of the Trustee Act 1925 sets out that a trustee may be wholly or partly relieved from liability if a trustee is or may be personally liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach. Section 1157 of the Companies Act 2006 sets out that, in proceedings for negligence, default, breach of duty or breach of trust against an officer of a company, or a person employed by a company as auditor, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit if the officer or person has acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused. Section 191 of the Charities Act 2011 which gives the commission the power to relieve trustees and others from liability for breach of trust or duty who has acted honestly and reasonably and ought fairly to be excused for the breach.

Both DET's and DAT's articles of association¹⁹ specify the circumstances in which remuneration and benefits can be received by trustees. Remuneration or benefits covered by these provisions include companies or persons who are connected to trustees. For example, the articles of DET contain a prohibition against directors receiving any payment or benefit 'from the company' unless authorised in accordance with DET's articles. DAT's articles of association also contain a number of provisions which must be satisfied in respect of director remuneration. This includes the requirement that such remuneration does not exceed 'an amount that is reasonable in all the circumstances'.

The 2012 contract resulted in a benefit to GMG which could be said to have arisen 'from the company'. It is therefore possible that this fell within the scope of the prohibition in DET's articles as being a benefit which derived 'from the company'. On this basis there would be no scope for any equitable allowance or any payments for the services provided.²⁰

The former executive head was a fiduciary both as regards DET and DAT due to his position as headmaster and then trustee of both charitable entities, whether registered with the commission or not.

The decision making issue

The inquiry established that the origins of the commercial trading activities²¹ on the Hackford Road site, primarily managed by the former executive head teacher, pre-date the formation of DET and DAT in 2010.

In respect of the decision making issue, the inquiry has therefore considered only the decision to award the second contract to GMG in 2012, following the expiry of the 10 year contract between LHL and GMG. The remuneration to the former executive head's service companies arising from the 2012 contract needed to be authorised in accordance with the conditions specified in DET's articles of association, since he was a director and trustee of DET at that time.

Which body took the decision to award the 2012 contract

The inquiry has established that no separate meetings were held by DET to consider the contract or to authorise remuneration to the former executive head teacher, who was a trustee of DET between August 2010 and September 2014 and a director of DAT from August 2010 until his retirement from the role of executive head teacher in 2015 (although he remains the acting chair of DAT).

The interviews conducted by the inquiry and the records provided to the inquiry by DAT and DET show that the governing body of DPS began to consider renewing the contract with GMG in 2010. At a meeting on 28 January 2010, the governors had noted that the contract with GMG was due to expire in 2011. The minutes of the meeting show that the governors considered 'it was very important that the school thinks about securing Mr Martin for the future, as without him it would be impossible to build a secondary school [ie at St Cuthman's] as his expertise and experience was priceless'.

19 See Articles 5.2 to 5.3 in DET's Articles and Article 6.6 to 6.8 in DAT's Articles.

20 In legal terms known as a 'quantum meruit.'

21 The commission and HMRC distinguishes between trading which is directly conducted in, or ancillary to, the furtherance of a charity's objects (known as 'primary purpose trading') and commercial (or 'non primary purpose' trading).

DAT then took over from the governing body of DPS. DAT's trustees turned to consider the question of a renewed contract in the spring / summer of 2011 prior to DET's de-registration by the commission. DET's professional advisers have informed the inquiry, 'With regard to the 2012 contract, this was awarded after deliberation by DAT and LHL. DET had no involvement and was not party to the discussions. Minutes are enclosed demonstrating that thorough and proper discussions took place in awarding the contract and that legal advice was taken. The committee that considered the contract acted solely as a committee of DAT. Neither SGM [ie the former executive head teacher] nor GMG were party to any of these discussions. The trustees now understand that this was not in fact a satisfactory procedure in respect of DET's real position as owner of the sites ... During this period the EFA visited and they advised that DAT was the awarding authority for such a contract ... So when the contract was awarded to the GMG, it was signed by and on behalf of DAT and LHL. The contract was also presented to the full GB [ie the trustees of DAT] for their consideration'.

The decision to award the contract should have been authorised by the trustees of DET. It was not. It was instead authorised by the trustees of DAT, who did not have authority to act on behalf of DET.

The impact of the commission's de-registration of DET between 25 August 2011 and 17 October 2014

DET made representations to the inquiry that the de-registration of DET by the commission in August 2011 led them to believe that DET was simply a holding company or controlled undertaking of DAT, and that this was reinforced by their engagement with DfE or its agencies, in particular the EFA, from April 2012. DET have also contended, in effect, that it was the commission's actions in removing the charity from the register which led to the contract renewal decision being taken by the DAT trustees, rather than the DET trustees.

The commission acknowledges that DET's de-registration from August 2011 until DET's re-registration in October 2014 should be taken into account by the inquiry.

However, the evidence gathered by the inquiry shows that the de-registration was not the cause of the misconception about the relationships between, and the duties of, the respective parties. The inquiry has established that the misconception pre-dated the commission's de-registration of DET in 2011 and resulted in substantive progression of the contract renewal by DAT prior to DET's de-registration. This misconception has been acknowledged by DET's professional advisers on behalf of its trustees: 'it has become increasingly clear to our clients that the previous understanding by the various parties of the DET/DAT/LHL/GMG relationship has been very confused and in certain respects mistaken'.

Notwithstanding the de-registration of DET, the trustees were still obliged to ensure that DET, as a charity, whether registered or not, was managed and administered in accordance with charity and company law.

How the decisions to award the 2012 contract were made

Taking account of DET's representations, and the background circumstances in this case, the inquiry requested evidence of how DAT's trustees took the decision to enter into the 2012 contract.

On 14 June 2011, DAT obtained legal advice regarding the proposed new contract with GMG. The advice consisted of a 3 page briefing note regarding the scope of the Public Procurement Regulations 2006 (the '2006 regulations'). DAT was advised that a renewed contract would be unlikely to fall within the full scope of the 2006 regulations. LHL would therefore not be required to advertise the contract or to follow 1 of the contract award procedures stipulated in the 2006 regulations. This advice was considered by a sub-committee of the board of DAT on 15 June 2011. The sub-committee also considered a proposal from the former executive head teacher regarding the terms of the renewed contract. The ongoing confusion between the entities is demonstrated in a briefing note that was prepared for this meeting: 'although the contract is with LHL, it is the governors (ie the DAT trustees) who must be satisfied that the use of the schools assets for income generation fulfils a number of criteria,' the criteria in question being then listed as a specification of requirements for the management of the accommodation and leisure facilities. The assets in question however in fact belonged to DET - not DAT.

On 21 November 2012, the trustees of DAT agreed to enter into the contract with GMG. The minutes of the meeting state that, 'the committee set up by the GB and LHL Directors have carefully reviewed the GMG contract over the years and taken extensive legal advice in drawing up the current version. They continue to be satisfied that it represents good value'. The inquiry has established that the committee referred to was the sub-committee that had last met on 15 June 2011. The 'extensive legal advice' was the 3 page briefing note regarding the scope of the 2006 Regulations - this advice did not cover the trustees' broader duties under company and charity law.

The former executive head teacher was not present when the contract was discussed or when the decision to enter into it was taken.

The EFA had written to DAT on 25 September 2012 to advise 'that you test the market whenever a contract is significantly extended to demonstrate continuing value for money'. In respect of the management services contract for the leisure and accommodation facilities at the Hackford Road site, the EFA also specifically advised, 'we do recommend that this contract is considered for re-tendering'.

The EFA also advised that the trustees should update their procurement policy and procedures. At their meeting on 21 November 2012, DAT followed EFA's advice and adopted a new procurement policy. It states that there are a number of requirements when purchasing goods or services, including demonstrating 'that all parties are dealt with on a fair and equitable basis and that there is no private gain, favouritism or corruption involved in any of the dealings of the governing body' and also demonstrating 'the achievement of value for money,' which can be shown by ensuring 'economy, efficiency and effectiveness'. The policy sets out a range of considerations and processes that should be followed and documented as part of any procurement exercise. These include:

'It may be that in some cases and for certain services there is a sole provider. In such cases as well as demonstrating and evidencing that this is the case, alternative tests may be applied to ensure that value for money is obtained. These might include benchmark comparisons with similar services and comparisons with services that may be on offer, if such benchmarking is possible. These tests may also include an examination of outcomes thus far where a historically successful provider of goods or services is chosen and governors feel that a tendering process is unnecessary because of the track record of the provider. The risk register may also prove useful in these circumstances, where governors feel that there is significant risk in not retaining a current provider.

‘There may be cases where the governing body is looking to procure goods or services from a supplier in whom one of the governors or a member of staff or a related person has a business interest. In such cases there is a potential conflict of interest and particular care will be taken to ensure that the procurement process is competitive, fair and open and that public funds are protected. As a minimum requirement the governor or member of staff will declare their interest and withdraw from any part of the selection process.’

Notwithstanding the adoption of this procurement policy and the advice it had received from the EFA, DAT trustees decided to enter into the 2012 contract with GMG without seeking to test value for money by going out to tender or by testing the market.

DAT has advised the inquiry that it did not do so because its trustees had been very pleased with the outcome of the previous 10 year agreement (ie the 2001 contract). The trustees were also concerned about the risk of a loss of funding if they changed to an untested service provider. DAT has also pointed to the advice it had received regarding the scope of the 2006 Regulations.

The inquiry acknowledges that the continuity risk of changing the service provider, and the former executive head teacher’s track record and experience in delivering and developing those services were relevant factors to take into account in the decision making.

However, although these factors help to explain why DAT decided to contract with GMG, the inquiry considers they do not in themselves justify not putting the contract out to tender or taking any other steps to test the market. They also do not help to explain why they set the level of remuneration as they did.

The evidence provided to the inquiry shows that the terms of the 2012 contract are substantially the same as those proposed by the former executive head teacher when he wrote to the trustees of DAT in 2011 and reflects on the fact that at the meeting of the governing body of DPS on 28 January 2010, he was described as being ‘priceless’.

The minutes of the DAT trustees’ meeting dated 21 November 2012 records that they ‘confirmed that the [2012] contract represents good value’. There is however no evidence in the minutes, or other records, of any consideration or analysis on the likely range of payments which would become due under the terms of the new contract, or applying those terms to LHL’s turnover at that time.

The trustees of DAT could reasonably have anticipated that the level of remuneration due under the basic and special payment provisions of this contract would be significant (page 5 refers). For the year ending 31/03/2012, GMG received basic payments of £171,846 on gross turnover of £934,197. The value of the special payment is derived from the 3 previous years’ gross turnover. This means that when the new contract was signed in 2012, the value of the termination payment would have been an additional £1,440,807. LHL had however been steadily increasing its turnover since 1997. It would therefore have been reasonable for the trustees to assume that the sums due under the terms of the contract would end up being higher than this. This has indeed been the case. In 2014, GMG received basic payments of £175,341 on gross turnover of £1,094,777. In 2015, the special termination payment was estimated to be at least £1.8 million based on the original contract terms.

The inquiry has also established that special payments would be made regardless of why the contract was terminated and whether or not there was a breach of performance under the contract.

Summary findings on the decision making issue

The former executive head teacher was a trustee of both DET and DAT at the time that the 2012 contract was agreed.

It is difficult and complex to apply the legal rules to the circumstances which have arisen in this case in particular because of the confusion between the 2 entities and the extent to which both or either were bound by the terms of the 2012 contract. It does however appear on balance that the benefits under the contract were not authorised as is required by the legal rules governing the management of charity property.

While taking into account DET's representations about the impact of de-registration, based on the evidence examined, the inquiry established that DET should have, but did not, authorise the remuneration to the former executive head teacher. The trustees of DAT or DET did not give adequate consideration at the time to the fact that the decision to enter into the contract should have been taken by DET. This was mainly due to the lack of delineation between the different entities and the confused understanding of the then DET and DAT trustees.

The situation in 2012 and what was required under the contract was different from the situation from 2001. In 2001, gross turnover was £61,444, rising to £934,197 in 2012. This should have led the trustees to apply greater scrutiny to assure themselves of the reasonableness of the terms and benefits to be offered to GMG, regardless of whether the decision was taken by DET or DAT.

Consequently, the inquiry's view was that although the trustees believed that they took the decision to enter into the contract as trustees of DAT rather than as trustees of DET, adequate steps were not taken in decision making terms to comply with the requirement in DAT's articles of association that the remuneration was 'reasonable in all the circumstances'.

The reasonableness of the remuneration to the former executive head teacher issue

The commission considered the legal and factual complexities in this case, and the likelihood that, one way or another, any court would consider the reasonableness of the trustees' actions and whether the trustees ought to be relieved of any liability when exercising its jurisdiction. It therefore took the view that the most practical resolution to this issue was to assess whether in practice the remuneration provided to the former executive head teacher was reasonable in the circumstances for the services provided, and for the trustees to enter into negotiations with the former executive head to bring remuneration in line with that assessment.

In February 2015, the commission issued an action plan which required the DET trustees to undertake, amongst other things, the following steps:

'Once control of LHL has been established the relationship with GMG must be reviewed. The trustees must:

- a) Carry out a benchmarking exercise to satisfy themselves that the payments made to GMG and to Sir Greg Martin in particular are reasonable (the results to be sent to the Commission).
- b) Review the termination payment provisions.
- c) Enter into negotiations to bring the contractual obligations for payments to GMG into line with the results of the benchmarking exercise (minutes of meetings or other evidence of this process to be supplied to the Commission)
- d) Prepare a strategy for tendering for the services once the contract is ended.'

DET subsequently commissioned a benchmarking exercise from external consultants and a copy of their report was submitted to the commission in September 2015. The DET trustees also entered into negotiations with the former executive head teacher regarding a substantial reduction in the special payment provisions payable on termination of the 2012 contract to GMG. These negotiations were finalised after the inquiry had provided regulatory advice to the trustees about the benchmarking exercise.

The benchmarking exercise identified that from 1997 and 2014, LHL covenanted profit of approximately £3.7 million to DPS and then to DET, which has been used to support the work of DPS and the academy.

Under the terms of the 2012 contract, LHL has paid GMG basic management fees of £161,034 for 2013 and £175,341 for 2014. The contract runs for a minimum of 5 years and so would produce at least another 3 years of basic management fees. Based on an average annual basic management fee of £168,187, and projecting forward for another 3 years, this provides for projected total management fees of £840,936. The special termination payment due to GMG at the end of the 2012 contract is projected to be an additional £1.8 million.²² Based on the original 2012 contract terms, the total remuneration under this contract would therefore be at least £2,640,936 and will be higher if turnover increases.^{23 24}

The inquiry interviewed the benchmarking consultants and DET representatives to clarify the methodology and approach to the benchmarking exercise. Following this interview, the inquiry went on to examine 2 particular aspects of the benchmarking report:

- the rationale for selecting the particular benchmarking model used in the exercise and the consultant's consideration of other relevant comparators
- the use of LHL's declared profit figures for calculating the benchmark figures and the basis on which LHL's profit figures are derived

The inquiry's analysis is that there are different benchmarking models or comparators that may be used to assess the reasonableness of the remuneration. One such approach would be to benchmark against senior executive pay in the sector. The benchmarking consultants however considered that the payments should instead be assessed according to common commercial practice on the principle that the contract was an entrepreneurial deal between 2 parties. They therefore assessed the remuneration against the profit and value created from the venture. The consultants relied on what they describe as a private equity model, where 20% of total cash returns is paid to the active partner (ie the former executive head teacher), in order to calculate whether the remuneration was reasonable.

The commission is not permitted to replace the discretion of the trustees, or its professional advisers, in which methodology has been employed when the approach taken falls within the reasonable range of options available. Given the range of trustee discretion permitted by law, the commission could not be sufficiently confident that imposing its own or a different methodology would be possible under its powers in the circumstances.

22 As calculated by the benchmarking consultant in 2015.

23 In addition, prior to this, under the terms of the 2001 contract, between 2001 and 2012, LHL paid GMG basic management fees of approximately £1.189 million. GMG was entitled to special termination payments under this contract but did not take them.

24 The former executive head teacher received separate remuneration for his role as executive head teacher of £146,415 for 2011-12, rising by 56.5% to £229,138 in 2013-14.

Notwithstanding the merits of alternative comparators, the inquiry accepted that the use of profit and value created could be an appropriate method, amongst others, for assessing the reasonableness of payments to the former executive head teacher. However, if that method is used, the profit figures that are relied on must be robust enough for the trustees to rely on.

The inquiry established that:

- DET does not charge LHL commercial rent for its use of the accommodation and leisure facilities, use of which is not confined to the pupils of the school
- LHL charges DAT at commercial rates for use of the accommodation and leisure facilities (£159,672 for the financial year ending 31 August 2015 and £157,925 for the financial year ending 31 August 2014); the majority of the charges relate to use which is primary or ancillary to DAT's charitable purposes

The inquiry considered that the combined effect of these accounting practices between DET, DAT and LHL has resulted in, or will result in, an increase in:

- LHL's gross turnover on which GMG's contractual entitlement to special payments is based
- LHL's profit figures on which the consultant's benchmarking of the reasonableness of the remuneration exercise is based

The inquiry took into account representations by the trustees that because of the organic development of the accommodation and leisure facilities, it would be difficult to restate the benchmark figures with precision. The inquiry therefore provided regulatory advice to the trustees on how it should take into account the impact of these accounting practices on the benchmark figures, which they used as a basis for their negotiations with the former executive head teacher to address this issue by reducing the special payment provisions that become due on termination of the contract.

Summary findings on the reasonableness of the remuneration to the former executive head teacher issue

The former executive head teacher benefitted substantially under the terms of the contract - in addition to basic payments, he was entitled to a special payment on termination of the 2012 contract of at least £1.8 million.

In the inquiry's view it could not be satisfied that the original payment terms in the 2012 contract, in particular the special payment due on termination, were 'reasonable in all the circumstances'. The trustees did not competitively tender, or conduct a benchmarking exercise in 2012, and they agreed to a special payment provision which was payable irrespective of the grounds for terminating the contract.

However, the commission acknowledges that the trustees have since complied with the relevant points in the commission's February 2015 action plan to address this. They have acted on the benchmark exercise, and the commission's regulatory advice, to agree with the former executive head teacher reduction to the remuneration arising from the 2012 contract. As a result, a cap of £850,000 has been agreed to the special payment, instead of the £1.8 million potentially due. This reduction was formally agreed by all the relevant parties in a deed of variation dated 26 April 2016.

Remuneration to other DET trustees

The inquiry also considered the remuneration of 2 former DET trustees who were also trustees of DAT.

The inquiry established that the remuneration to 1 of those former trustees was paid by DAT rather than DET.

The other trustee was remunerated as a director of LHL while serving as a trustee of DET. The inquiry has confirmed that the authorisation for the remuneration of that trustee was taken by the governors of DPS prior to the formation of DAT and DET and that his remuneration was paid by LHL.

As in the first case the remuneration was from DAT not DET and in the second case, the remuneration has ceased and was authorised prior to the existence of DET, the inquiry took the view it was not appropriate or proportionate to pursue these matters further.

Governance

DET, DAT and LHL have distinct legal personalities, and are therefore owed separate duties, under the terms of their governing documents and company and charity law.

Following the creation of DET and DAT, there was insufficient recognition of the separate legal status of the different entities supporting the academy and the differing roles and responsibilities of those legal entities. The inquiry's view is that, notwithstanding DET's period of de-registration, the trustees/directors did not take sufficient steps to recognise the distinction and to put in place adequate measures to ensure they were able to fully discharge their duties under company and charity law.

The inquiry has established that this issue pre-dated the commission's de-registration of DET. However, although the de-registration of DET between August 2011 and October 2014 was not the cause of the misconception about the relationships between, and the duties of the respective parties, it nevertheless may have helped to perpetuate (in part) the problem, which was not fully recognised by either DAT or DET until 2014.

The blurring of the lines between these entities has had significant consequences regarding governance in general and in particular to a lack of clarity regarding asset ownership and trustees' remuneration and benefits. For example, LHL was not placed under the formal control of DET at the time that the Hackford Road site was vested in DET in 2010. This exposed the charity and its assets to risk.

The inquiry acknowledges the steps taken in January 2015, following engagement with the commission and clarification of DET's status. DET has now become the sole member of LHL, which means that for the first time, it exercises formal control over the company. DET is now holding trustees' meetings which are separate from DAT.

DET has agreed that it needs to take further steps to address the governance issue. Further work remains to ensure that the conflicts of interest that arise between DET and the other legal entities engaged in the support of the academy can be adequately avoided or managed, in particular by ensuring that each respective entity can take quorate decisions on matters where a conflict of interest arises. This is particularly important as currently all 3 trustees of DET are also directors of LHL and there is no independent representation on either board.

Conclusions

Land

The land trust issue

The commission has provided regulatory advice and offered to make an order under section 105 of the Act, which would have had the effect of assisting in facilitating the purchase of St Cuthman's. However, on the understanding that the trustees have fully considered that advice, the commission has no objection to them following their own legal advice that the terms of the trusts permit them to apply income generated from the Hackford Road site for 'the purposes of the school' on the St Cuthman's site.

The leases and licenses issue

There are 3 separate legal entities which use the land and property owned by DET. The inquiry concluded that the current arrangements do not adequately safeguard DET's interests, or demonstrate that the trustees have been adequately discharging their fiduciary duties to DET in this regard; in particular, there is no lease or disposition arrangement in place between DET and DAT for the use of the 3 sites; or between DET and LHL, the non-charitable trading company connected to the accommodation and leisure facilities.

Specific leases should be put in place to protect DET's legal and charitable interests. DET's trustees have accepted this and agreed to put in place dispositions and revised licence arrangements to safeguard DET's interests and clearly set out the respective obligations of each party and their terms of occupancy.

DET trustees' remuneration and benefits arising from the contract between LHL and GMG to manage the income generating activities from the accommodation and leisure facilities

The former executive head teacher has in the past received under the contract significant financial benefit from the remuneration for the development and management of the income generating activities from the accommodation and leisure facilities. Under the first 2 years of the 2012 contract, LHL paid the GMG service companies £336,375 in basic payments. Based on an average annual management fee of £168,187, and projecting forward for another 3 years, this provides for projected total management fees of £840,936. The special termination payment due to GMG at the end of the 2012 contract was projected to be an additional £1.8 million. Based on the original 2012 contract terms, the total remuneration under this contract would therefore have been at least £2,640,936 and would have been higher if turnover increased or the contract ran beyond the minimum term.²⁵

The former executive head teacher was a trustee of both DET and DAT at the time the 2012 renewal contract was signed. There was nothing wrong or inappropriate about this provided any actual or potential conflicts of interest were identified and managed, and any remuneration to him arising from the 2012 contract was made in accordance with the charities' governing documents and the law.

This contract to remunerate the service company, wholly owned by the former executive head teacher, should have been authorised by DET not DAT and in accordance with DET's articles of association and conflicts of interests dealt with under the terms of that governing document in accordance with charity law, whether or not DET was a registered charity at the time.

Due to the lack of demarcation between the different entities and a misunderstanding by the then DET's and DAT's trustees of each entity's separation and responsibilities, DET did not properly authorise the payments as required under charity and company law as the matter was considered by DAT.

²⁵ These figures exclude the remuneration he received as head teacher and then executive head teacher.

The track record and experience of the former executive head in managing and developing the income generating activities were relevant factors to take into account in the decision making for the contract renewal in 2011/12, particularly since the income from these trading activities was crucial to funding the academy's boarding school project at St Cuthman's.

The inquiry recognises that DAT/DET trustees did what they considered at the time to be in the best interests of the academy.

The inquiry also recognises that the DAT trustees took steps to identify and manage conflicts of interest by ensuring that the former executive head teacher was not involved in the decision to enter into the contract with LHL and GMG in 2012.

However, in the inquiry's view further steps should have been taken at that time to ensure that the trustees fulfilled their duties; that the terms of the contract and the remuneration agreed were 'reasonable in all the circumstances', and that the charity's interests were protected and maximised. This should have included steps to seek professional advice on the market value of the land and contract prior to awarding the 2012 contract and/or to open the contract up to tender in order to test the market place and to provide an objective comparison to the terms offered by the current service provider. The trustees did not however take these steps. The trustees have not been able to demonstrate to the inquiry how the original payment terms in the 2012 contract, in particular the special payment due on termination, was 'reasonable in all the circumstances'.

During the inquiry, the trustees of DET took professional advice and commissioned a benchmarking exercise to assist them in assessing the reasonableness of the level of remuneration paid to the service companies of the former executive head. The commission highlighted to the trustees and their advisers several key issues that could have an impact on the benchmarking exercise used by the trustees to make their assessment. These issues include the impact of using the particular comparator model for the benchmark exercise and the current accounting and charging practices between LHL, DET and DAT, including the lack of a charge for commercial rent to LHL for non-charitable use of the accommodation and leisure facilities, which impacts on both LHL's turnover and profit figures.

The commission took into account representations by the trustees that because of the organic development of the accommodation and leisure facilities it would be difficult to restate the benchmark figures with precision. The commission provided regulatory advice to the trustees on how they should take into account the impact of these accounting and charging practices on the benchmark figures which they used as a basis for their negotiations with the former executive head teacher to reduce the special payment provisions that become due on termination of the contract.

The trustees and the former executive head teacher acted responsibly by agreeing to substantially reduce the remuneration due to GMG on termination of the 2012 contract. The introduction of a cap to the special payment fee of £850,000 represents a reduction in excess of 50% of the payment which was due under the original terms of the 2012 contract. This reduction was formally agreed by the relevant parties in a deed of variation dated 26 April 2016. This is a substantial financial benefit to LHL and DET of around £1 million to apply for charitable purposes.

Governance (including the broader discharge of trustees' duties and management of conflicts of interest)

Following the creation of DET and DAT, there was insufficient recognition of the separate legal status of the different entities supporting the academy and the differing roles and responsibilities of those legal entities. The commission's de-registration of DET between August 2011 and October 2014 would not have helped this.

DET's trustees have already implemented some measures to address the governance issue by formalising DET's control of LHL, and by arranging for DET to hold trustees' meetings which are separate from those of DAT.

DET has agreed that it needs to take additional steps to address this matter. Further work remains to ensure that the inherent conflicts of interest that arise between DET and the other legal entities and its personnel engaged in the support of the academy are avoided and/or properly managed, in particular by ensuring that each respective entity can take quorate decisions on matters when a conflict of interest arises.

In summary

Whilst recognising that those involved did what they considered at the time to be in the best interests of the academy, the then trustees did not fully discharge their duties and responsibilities as charity trustees. This was partly due to the fact they did not properly distinguish between DET, which whether registered as a charity with the commission or not, was a separate legal entity and subject to charity and company law, and the other entities in the Durand school portfolio. A network of different bodies such as this, with supporting but interlinking relationships, is likely to result in inherent conflicts of interest when the different bodies are transacting with each other. In this case, some of the conflicts of interest were not properly identified and/or adequately managed. The former executive head was a fiduciary both as regards DET and DAT due to his position as headmaster and then trustee of both charitable entities, whether registered with the commission or not. The decision to award the 2012 contract should have been authorised by the trustees of DET. It was not. It was instead authorised by the trustees of DAT, who did not have the authority to act on behalf of DET.

It is clear that the former executive head teacher had the vision and was the instrumental figure in driving both the development of the school sites and the generation of additional income to support the school's activities and in realising the benefits the school and charity received.

It is also clear to the commission that DPS and subsequently the academy school has derived a substantial benefit from the development of the sites now held by DET, and in particular the accommodation and leisure facilities and the income generated from non-charitable trading activity. The pupils have benefited both from the direct use of those enhanced facilities as well as approximately £3.7 million additional finances which has been gifted since LHL was formed in 1997 to support the school's activities.

However, over time, these arrangements have resulted in a significant reliance on a single individual and service provider, and this presents the trustees with a business continuity risk that has not yet been addressed by DET. The original terms of the 2012 contract was likely to have resulted in remuneration to the former executive head teacher of at least £2.64 million including the special termination payment.²⁶ For the reasons set out in the findings, the trustees were unable to demonstrate to the inquiry's satisfaction that the level of remuneration was 'reasonable in all the circumstances'. The commission therefore concluded that the original remuneration terms of the 2012 contract were too generous.

²⁶ The aggregate financial remuneration under both the 2001 and the original 2012 contracts would have been approximately £3.3 million, prior to the adjustment to the special payment provision in the 2012 contract.

The trustees of DET acted responsibly by taking the action they did to address this matter by agreeing a reduction in the special termination payment (an estimated financial benefit of around £1 million to LHL and DET which will become available to be applied for charitable purposes).

The commission will monitor the further work that is required to ensure in the future that:

- the potential conflicts of interest between DET and the other connected entities is avoided and/or properly managed
- the transactions and relationships between DET and the other connected entities are adequately formalised and conducted on a proper footing in accordance with charity law

Conduct of the inquiry and regulatory action taken

Conduct of the inquiry

The inquiry examined numerous documents connected with DET, DAT and LHL, including minutes of trustee meetings, policy documents, accounts and title deeds. The inquiry interviewed current and former trustees, including the former executive head teacher. The inquiry also interviewed the consultants commissioned by DET to conduct the benchmarking exercise during the summer of 2015.

The inquiry dealt with 6 requests for information under the Freedom of Information Act and 3 complaints about the commission's handling of the removal of the charity from the register, including an allegation that by doing so, the commission committed a criminal offence under the Computer Misuse Act 1990. The commission also received complaints that when it interviewed the trustees, it should have done so in accordance with the provisions of relevant criminal law rather than the provisions of the Charities Act 2011. These complaints were not upheld.

Regulatory action taken

The inquiry provided regulatory advice to DET on the land trust issue. As a consequence, DET sought legal advice on the terms on which the Hackford Road site is held by DET.

The commission issued an action plan to DET prior to the opening of the inquiry in February 2015 to DET, which required it to conduct a benchmarking exercise on remuneration to the former executive head teacher; to review the special payments due to the former executive head teacher under the 2012 contract; and to negotiate any reduction necessary to bring the special payments in line with the benchmarking exercise.

A new action plan was issued to DET at the conclusion of the inquiry²⁷ to address the outstanding matters in respect of:

- governance, in particular, taking steps to ensure that each respective entity can take quorate decisions when conflicts of interest arise with other legal entities which support the academy, including appointing independent trustees
- reviewing and updating the dispositions and licence arrangements to ensure that DET's land and property interests are adequately safeguarded and clearly set out the respective obligations of each party and their terms of occupancy
- ensuring that any new disposition complies with the requirements of charity law, including section 117 of the Act; this includes ensuring that any disposition by DET to LHL is for the best commercial rent that can be reasonably obtained when the facilities are not required by the academy

27 Under section 84 of the Act.

- modifying the accounting practices between LHL, DAT and DET in a manner which ensures the accounting treatment for DET and LHL follows usual conventions for a charity and a trading subsidiary/company context, where the purpose of the trading subsidiary/company is to turn charity assets to account when not required by that charity; in particular to ensure that:
 - a commercial rental charge is paid by LHL for the use of DET's accommodation and leisure facilities
 - LHL's accounts accurately reflect the revenues and costs associated with its commercial (non-primary purpose) trading activities and exclude financial activity which is primary or ancillary to DAT's charitable purposes
 - preparing a plan for tendering for the services once the contract with GMG is terminated which complies with the trustees' and directors' duties under company and charity law

Issues for the wider sector

Managing property (land and buildings)

If a charity owns or rents land or buildings, charity trustees should:

- make sure the property is recorded as belonging to the charity
- know on what terms it's held
- ensure it's properly maintained and being correctly used
- make sure the charity has sufficient insurance

Charity trustees should regularly review whether the property is suitable for the charity's purposes, and whether any property the charity lets to generate income is still a good investment.

Decisions about property are important, charity trustees should think about the advice and information they may need in order to make decisions in the charity's interests.

Most charities can buy, sell or lease land when they need to. When selling or leasing land, trustees must try to get the best deal for the charity (unless they are making the disposal to further the charity's purposes). So all charities should, and registered charities must:

- obtain written advice, including a valuation, from a qualified surveyor before agreeing a sale or granting a lease for more than 7 years
- advertise the sale or lease, unless the surveyor advises otherwise

Otherwise, charity trustees are likely to need permission from the commission for the sale or lease.

A charity's governing document may specify that land or buildings must be used for a particular purpose. This is called designated land (or 'specie land'). Special conditions apply to leasing or selling designated land. Land belonging to a charity (particularly designated land) might be permanent endowment. This restricts how charity trustees can use the proceeds of sale.

Charity trustees must get permission from the commission to sell or lease property to or from a trustee, someone closely connected to a trustee, or an employee of the charity.

Read more about **charity land and property on GOV.UK**.

Charities and their trading subsidiaries

Charities need to use a trading subsidiary if they carry out commercial (non-charitable) trading which exceeds the threshold for paying income or corporation tax, or involves significant risk.

A trading subsidiary is a separate company controlled by the charity. The charity can raise money from trade without exposing its assets to risk or being liable for income or corporation tax.

There are, however, risks which trustees need to be aware of and manage:

- the charity exists for charitable purposes, but the trading subsidiary exists to generate income; their aims and interests are different; charity trustees need to distinguish between them
- if the trading subsidiary starts to fail, the charity must not bail it out; this would be putting the charity's funds at risk
- charity trustees who are also directors of the subsidiary have a conflict of interest
- if a charity trustee is also a director of the trading subsidiary, the restrictions on payments and benefits to trustees also apply to any payments or benefits as a director

Read more about [charity trading on GOV.UK](#).

Payments and other benefits to trustees

Charities can't usually pay their trustees. When a person becomes a trustee, they usually volunteer their services and receive no payment for their work. This is called the voluntary principle. Charity trustees can, however, reclaim reasonable expenses that they incur such as travel and childcare - being a trustee shouldn't mean being out of pocket.

These restrictions apply to trustees (or someone with a financial connection to a trustee, such as their partner, dependent children or a business partner) benefiting by:

- supplying goods or services to the charity eg building work or specialist services, even if the trustee offers better value or expertise than other suppliers
- being employed by the charity or by a trading subsidiary owned by the charity
- receiving material benefits as a beneficiary of the charity
- being paid to act as a trustee; this is very unusual and only permitted in exceptional circumstances
- entering into a property transaction (or any other financial transaction such as a loan) with the charity - this is called self-dealing

In some circumstances, 1 or more trustees (or persons with a financial connection to a trustee) do receive payments or other benefits from their charity. This is only permitted if:

- the benefit is specifically authorised by the governing document, the Charities Act (or other relevant legislation), the commission or the courts; any specified procedures must be strictly followed
- even if the benefit is authorised, the non-conflicted trustees are satisfied that allowing it is in the charity's best interests
- the conflict of interest is managed; so in most cases the conflicted trustee(s) can't be involved in the decision and only a minority of trustees can benefit

Read more about [payments and other benefits to trustees](#) and [conflicts of interest on GOV.UK](#).

Trustees' decision making and record keeping

Charity trustees are responsible for governing the charity and making decisions about how it should be run. Making decisions is one of the most important parts of the trustees' role. Some decisions are simple and straightforward; others can be complex or far reaching in their consequences.

Trustees can be confident about decision making if they understand their role and responsibilities, know how to make decisions effectively, are ready to be accountable to people with an interest in their charity, and follow the 7 principles that the courts have developed for reviewing decisions made by trustees.

Trustees must:

- act within their powers
- act in good faith and only in the interests of the charity
- make sure they are sufficiently informed
- take account of all relevant factors
- ignore any irrelevant factors
- manage **conflicts of interest**
- make decisions that are within the range of decisions that a reasonable trustee body could make

It is important that charity trustees apply these 7 principles when making significant or strategic decisions, such as those affecting the charity's beneficiaries, assets or future direction.

Charity trustees' must be able to show that they have followed these principles and keep adequate records to evidence that their decisions have been properly made, particularly for important or controversial decisions.