



**CHARITY COMMISSION**  
FOR ENGLAND AND WALES

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## **Inquiry Report**

**The Spiritualist Association of Great Britain  
(formerly The Marylebone Spiritualist Association) Limited**

Registered Charity Number 225455

# A statement of the results of an inquiry into The Spiritualist Association of Great Britain (formerly The Marylebone Spiritualist Association) Limited (registered charity number 225455).

Published on 30 March 2017.

## The charity

The Spiritualist Association of Great Britain (formerly The Marylebone Spiritualist Association) Limited ('the charity') is a charitable company. It was incorporated on 14 December 1905 by Companies House and was registered by the Charity Commission ('the Commission') on 29 April 1963<sup>1</sup>. It is governed by a memorandum and articles of association dated 1905 which was most recently amended on 23 April 2006.

More details about the charity can be found on the [register of charities](#).

The charity owned a leasehold interest in property at Belgrave Square ('the property'), which commenced on 23 January 1956 and was due to expire on 25 December 2047. The property consisted of the main building, from which the charity operated, and a mews house, which was used to generate income. Although under the terms of the lease the charity paid only a minimal annual rent, it was being asked by the landlord to expend substantial sums on the upkeep of the property (for which the charity was responsible under the terms of the lease) which the charity could not afford to do. This being so, the charity trustees wished to dispose of the property and find alternative premises. The disposal of the property was complicated by a particularly restrictive clause in the lease about the use of the property<sup>2</sup>.

## Issues under investigation

On 8 July 2013 the Commission opened a statutory inquiry ('the inquiry') into the charity under section 46 of the Charities Act 2011 ('the act'). The inquiry closed on 30 March 2017 with the publication of this report.

The Commission had been engaging with the charity since January 2013 to establish the facts about the disposal of its property for a consideration of £6 million. It did so because questions were raised about the disposal by the media, which had information that shortly after the disposal by the charity the property was sold on to a third party for over £21 million, which gave rise to concerns that the charity may have suffered a significant loss of over £15 million<sup>3</sup>.

By 30 May 2013 the charity trustees had been unable to demonstrate to the satisfaction of the Commission that the steps they had taken and their decision-making in relation to the disposal were in the interests of the charity.

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<sup>1</sup> The Commission was first required to maintain a public register of charities by the Charities Act 1960.

<sup>2</sup> ie as the headquarters of a non-profit learned or charitable or cultural association or society, or as an embassy.

<sup>3</sup> Articles about the disposal were published on 17 December 2012 and 26 January 2013.

Having reviewed the information available, the Commission's regulatory concerns, which included the inability of the charity trustees to satisfy the Commission as to their decisions and actions, were considered to be of sufficient seriousness as to warrant the opening of the inquiry.

The scope of the inquiry was confined to considering the activities of the charity and the conduct of the charity trustees in relation to the disposal of the property. It examined whether, and to what extent, there had been misconduct and/or mismanagement in the administration of the charity. To do this, it needed to determine whether, with regard to the disposal:

- the charity trustees or other persons associated with the charity derived an unauthorised private benefit
- the charity trustees discharged their legal duties
- the charity trustees sought, received and acted upon appropriate professional advice

The inquiry corresponded with the charity, largely through its legal adviser ('the second solicitor') and with its former legal and professional advisers ('the first solicitor' and 'consultant' respectively) in order to obtain information and documents related to the disposal of the property, which involved using information gathering powers under section 47 of the act (see 'Regulatory action taken and conduct of the inquiry'). Of its own volition the charity obtained and provided the inquiry with witness statements from 2 individuals ('the property adviser' and 'the first surveyor'). The inquiry also met with 3 of the charity trustees and the second solicitor on 18 October 2013 ('the meeting').

## Findings

### Preliminary issues connected to the circumstances of the disposal

The inquiry established that, in light of the onerous provisions of the lease, the charity trustees had since 2004 been negotiating the disposal of the property with the landlord. These protracted negotiations culminated in 2009, when it became clear that the landlord would not be prepared to buy out the charity for more than £1.85 million.

Once the charity trustees had concluded that it was necessary to dispose of the property their duty was clear: the disposal must be in compliance with the legal requirement set out under section 36 Charities Act 1993 ('the statutory requirement') and the terms of the disposal must be in the best interests of the charity.

On 10 September 2009, the charity entered into an agreement with Platinum Prime Properties Limited (PPP), a company registered in the British Virgin Islands ('BVI'), to dispose of its property for a consideration of £8 million ('the 2009 agreement'). During the meeting and in subsequent correspondence, the charity told the inquiry that this figure reflected the prospect of enfranchisement (ie purchase of the freehold) by the purchaser/end user<sup>4</sup>.

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<sup>4</sup> The charity trustees were of the view that the charity could not itself afford to pursue enfranchisement.

On 18 May 2010 the charity rescinded the 2009 agreement and, on the same day, entered into an agreement with Platinum Prime Property Investments Limited (PPPI), another company registered in the BVI, to dispose of its property for a lesser consideration of £6 million ('the 2010 agreement'). A supplemental agreement was signed by the parties on 22 November 2010. The disposal was completed on 23 December 2010. The property was then immediately sold on by PPPI to another BVI registered company, Rose Season Enterprises Limited, for over £21 million.

The implication here is that the property attracted a greater value (£8 million) because the purchaser/end user expected to achieve, for a premium, enfranchisement or a change of use of the property, which would enable the purchaser to sell on the property at a (much) greater value. The charity told the inquiry that at the point of entering into the 2009 agreement it was not aware that the reason the purchaser was prepared to make such a good offer was because it was hoping to be able to enfranchise.

The findings of the inquiry relate to the issues under investigation and have been set out to address first the issue of unauthorised private benefit and then the seeking, receiving and acting upon appropriate professional advice, before addressing the question of whether the charity trustees discharged their legal duties and responsibilities.

### **Whether, with regard to the 2009 and 2010 agreements, the charity trustees or other persons associated with the charity derived an unauthorised private benefit**

The inquiry found:

- no evidence of the charity trustees, or any one of them, having derived an unauthorised private benefit in relation to the disposal of the property
- no evidence of other persons associated with the charity having derived an unauthorised private benefit in relation to the disposal of the charity's property
- however, the fees of the charity's advisers (other than those of the second solicitor) were paid, in part or whole, by PPP and then PPPI - this practice, although unusual, is permissible subject to the charity being satisfied that its advisers were acting at all times exclusively for and on behalf of the charity

### **Consultant**

The charity told the inquiry that it instructed a consultant to advise on aspects of charity law in relation to the disposal of the property. Although the charity was unable to provide the inquiry with a copy of its instructions, the inquiry was provided with the consultant's acknowledgement and terms and conditions letter dated 15 December 2008.

The consultant's fees were paid in part by the charity and in part by PPP and then PPPI. The fees were paid on the basis of work carried out on behalf of the charity and were not dependent on the eventual successful disposal of the property<sup>5</sup>.

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<sup>5</sup> This is demonstrated by fees being paid as and when, rather than at completion.

## The property adviser

During the meeting the inquiry was told that in 2007 the charity was introduced to an individual who wished to purchase the charity's interest in the property. After having decided not to do so, it was agreed that the individual would act as the charity's property adviser. The inquiry was told that initially the role of the property adviser was to negotiate a buy out of the charity's interest with the charity's landlord whom the property adviser had worked with previously. The charity was unable to provide the inquiry with its instructions to, or terms of reference for, the property adviser.

The charity provided the property adviser with an undated 'To whom it may concern' letter<sup>6</sup>. According to the letter, the property adviser had a free hand, having "*total charge to negotiate, and to deal as [the property adviser] see fit at all times*" in relation to the charity's property. The letter confirmed that the charity was "*... happy to have a lock out agreement for a stipulated period of time, so that any potential purchaser of the Leasehold interest can do their due diligence. These potential purchasers will be advised to us by ... [the property adviser] ... exclusively*". In practice, the property adviser reported to the president or the charity's manager.

It fell to the property adviser to identify prospective purchasers and to lead on all negotiations, including negotiations with PPP and PPPI, the eventual purchaser.

During the meeting the charity trustees told the inquiry that the charity did not remunerate the property adviser and that as far as they were aware the property adviser had not been remunerated by a third party. The inquiry subsequently learnt, however, that the property adviser had negotiated (undisclosed) fees with PPP and this formed part of the 'lock out agreement' referred to in the 'To whom it may concern' letter. This exclusive option and lock out contract ('the lock out agreement') was entered into by the charity and PPP on 7 July 2009. Payment of the property adviser's fees under the lock out agreement was subject to the successful disposal of the property to PPP; however, the agreement with PPP was rescinded on 18 May 2010.

The property was sold to PPPI. The lock out agreement made it clear that PPP intended to pay the property adviser. The inquiry has concluded that it is highly probable that PPPI (which, in relation to PPP, the consultant described as being the 'same players, different company') paid the property advisers' (undisclosed) fees when the disposal was completed.

## The first solicitor

The charity formally instructed the first solicitor on 28 July 2009 in relation to the disposal of the property. It did so on the recommendation of the property adviser. The first solicitor was not a specialist in charity law.

The first solicitor's fees were paid in part by the charity and in part by PPP and then PPPI. The fees were paid on the basis of work carried out on behalf of the charity and were not dependent on the eventual successful disposal of the property<sup>7</sup>.

## The second solicitor

The charity dispensed with the services of the first solicitor on 13 December 2010. On the same date, it instructed the second solicitor in relation to the disposal of the property.

The second solicitor's fees were paid by the charity.

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<sup>6</sup> The charity subsequently told the inquiry that this letter comprised its instructions to the property adviser.

<sup>7</sup> This is demonstrated by fees being paid as and when, rather than at completion.

### **The first surveyor**

Three valuation reports dated 11 March 2010, 17 May 2010 and 19 May 2010 respectively were produced by the first surveyor in relation to the property. Although the charity told the inquiry that the first surveyor was instructed by the consultant acting on its behalf, it has been unable to demonstrate this to the inquiry.

The inquiry found the first surveyor corroborated the charity's account, but the consultant did not. The consultant provided the inquiry with emails dated 17 and 18 February 2010. The 17 February email is from the consultant to the first surveyor, in which the consultant sets out what is required of a surveyor to comply with the statutory requirement. The 18 February email is the first surveyor's reply; the first surveyor is to discuss fees and instructions with PPP and that "*as soon as ... [these] ... instructions and fees are confirmed ... [the first surveyor] ... will be in contact regarding the addressing and physical delivery of the valuation reports*".

The first surveyor's (undisclosed) fees were paid by PPP and then PPPI.

### **The second surveyor**

Once the inquiry had been opened, the charity instructed the second surveyor to provide a retrospective valuation of the property.

The second surveyor's fees were paid by the charity.

### **Whether, with regard to the disposal of the property, the charity trustees sought, received and acted upon appropriate professional advice**

The inquiry found that the charity had:

- obtained, but not acted on, professional advice
- acted on advice not in compliance with the statutory requirement
- disregarded/failed to take proper account of valid concerns raised by its professional advisers
- obtained retrospective advice on the value of the property

### **The charity had obtained, but not acted on, advice**

On 15 December 2008 the consultant provided the charity with extensive and, in the opinion of the inquiry, appropriate advice as to the statutory requirement in relation to the disposal of the property. The advice set out matters to be considered and acted on by the charity trustees, including instructing a properly qualified surveyor to report on the value and advise on marketing of the property. It also set out the circumstances where the prior consent of the Commission to any disposal may be required.

When entering into the 2009 agreement the charity trustees failed to act on the consultant's advice; specifically, they did not obtain a formal valuation and advice on the disposal of property from a surveyor. By this omission the charity trustees acted in breach of their fiduciary duty of care and the statutory requirement<sup>8</sup>.

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<sup>8</sup> The consultant was instructed for the purpose of advising the charity on the disposal of the property and a copy of the 15 December 2008 advice was provided to the inquiry by the second solicitor. However, the second solicitor told the inquiry that "*The Trustees have no recollection as to the advice from ... [the consultant] ... dated the 15th December 2008 and wonder if the date is correct ...*" The consultant subsequently confirmed to the inquiry that the date was correct.

Different explanations were given to the inquiry as to why the 2009 agreement was rescinded. Initially, and before the inquiry had been opened, the charity told the Commission that as it had not complied with the statutory requirement when entering into the 2009 agreement, it had to rescind and start again<sup>9</sup>. This position was subsequently maintained in correspondence addressed to the inquiry. In effect, this meant that as the charity trustees had not complied with the statutory requirement, which was designed to ensure that charities dispose of property on the best possible terms, they sought to rectify the breach by rescinding the 2009 agreement even though they knew that by so doing the result would be a less advantageous deal for the charity. Given that the transaction had not yet reached the point of completion, and having subsequently obtained valuation reports (albeit that these did not meet the statutory requirement<sup>10</sup>), the charity trustees could have sought the Commission's consent to move to completion of the 2009 agreement, thereby rectifying the breach. They did contact the Commission by way of the consultant, but sought instead authority to rescind the 2009 agreement, which is an entirely different matter<sup>11</sup>. A proposal to continue on the basis of the 2009 agreement was not put to the Commission for consideration.

In fact, the determining factor here was that PPP did not wish to proceed and the charity could not enforce the 2009 agreement because, as it became clear, PPP was effectively a 'shell company' with no assets.

Prior to the 2009 agreement, but linked to it, the charity and PPP had entered into the lock out agreement dated 7 July 2009. They did so without the benefit of independent professional advice.

The lock out agreement was an agreement between the 2 parties. It described PPP as the 'buyer' and the charity as the 'seller', identified the property in question (being the charity's leasehold interest) and stated that both parties agreed and were contractually bound by the provisions therein. However, there was provision for PPP to withdraw from the lock out agreement "*at any time during the 12 months term with no financial penalty or obligation on either party if it believes it will not be able to meet the timeline as set out in [the lock out agreement]*". There was no withdrawal provision for the charity. The lock out agreement was entered into by PPP to reserve it the right to purchase the property for the purchase price of £8 million "*subject to contract*" and it having completed such due diligence as may be necessary. The charity, as seller, was prohibited from "*market(ing) the property for sale or promot(ing) the property for sale in any way to any party other than the buyer during the term of ... [the lock out agreement or from] ... enter(ing) into any negotiations or discussions whatsoever regarding the sale of the property other than to or with the buyer for the term of ... [the lock out agreement]*".

The lock out agreement set out and effectively locked the charity into the terms of the anticipated disposal. This being so, before entering into the lock out agreement the charity trustees should have complied with the statutory requirement. By failing to comply with the statutory requirement at this stage they would be unable to do so subsequently at the point of disposal without obtaining prior authorisation from the Commission.

The inquiry's findings are that by these omissions the charity trustees were in breach of (a) their fiduciary duty of care and duty to promote the success of the charity and (b) the statutory requirement.

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<sup>9</sup> ie revoke, cancel, or repeal (a law, order, or agreement).

<sup>10</sup> See under 'The charity acted on advice not in compliance with the statutory requirement'.

<sup>11</sup> The Commission said that it could not intervene in contractual arrangements.

## The charity acted on advice not in compliance with the statutory requirement

Although the charity told the inquiry that the first surveyor was instructed by or on behalf of the charity, it has been unable to demonstrate this (see section 'The first surveyor'). The first surveyor did, nevertheless, produce 3 valuation reports in relation to the property, dated 11 March 2010, 17 May 2010 and 19 May 2010 respectively. The 11 March 2010 report was a retrospective valuation of the property, intended to legitimise the 2009 agreement (with PPP). The 17 and 19 May 2010 reports related specifically to the second disposal (ie culminating in the 2010 agreement and completion on 23 December 2010). The reports were produced after the consultant had again provided the first surveyor (and the charity) with full details of the statutory requirement, including the necessary qualification of the advising surveyor<sup>12</sup>.

However, the first surveyor and the first surveyor's firm did not meet the statutory qualification criteria<sup>13</sup> and the reports did not comply with the Charities (Qualified Surveyors' Reports) Regulations 1992<sup>14</sup>. In particular, the reports made no recommendation about, or did not properly address, how the property should be marketed.

During the meeting the inquiry was told that the charity trustees assumed the first surveyor, having been introduced to the charity by the consultant, was suitable. They understood that the consultant had worked for the Commission and so would be fully aware of what was required<sup>15</sup>. They believed the first surveyor had worked with the Commission in the past and so would be familiar with the rules.

Responsibility for the management and control of the administration of the charity is vested in the charity trustees. Before instructing and taking advice they (and they alone) must be satisfied that the person to be instructed is suitably knowledgeable about the matter in hand and qualified so to act.

The inquiry's finding is that by accepting and acting on these reports the charity trustees were acting in breach of (a) their fiduciary duty of care and duty to promote the success of the charity and (b) the statutory requirement.

## The charity disregarded/failed to take proper account of valid concerns raised by its professional advisers

By December 2010 the charity was looking to complete the disposal of the property to PPPI. However, on 10 December 2010, having liaised with the consultant, the first solicitor expressed concern that as matters stood the charity was in breach of the statutory requirement; this being so, and in that knowledge, the first solicitor would be unable to act for the charity to complete the transaction<sup>16</sup>. The first solicitor believed that the breach may be cured by obtaining an order from the Commission. Three days later, on 13 December 2010, the charity wrote to the first solicitor dispensing with that firm's services because it was "*clear that the relationship between [the first solicitor] and the [charity] has broken down to such an extent*

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12 The 17 May 2010 report was prepared in light of the new arrangement ie a new deal to be entered into with PPPI. It offered advice about enfranchisement. The new deal was not to involve enfranchisement and so the third report (dated 19 May 2010) was produced to reflect this. However, the third report was obtained after the parties entered into the 2010 agreement (in breach of the statutory requirement).

13 Section 36(4)(a) of the then Charities Act 1993 stated that a person is a qualified surveyor if –  
(a) He is a fellow or professional associate of the Royal Institution of Chartered Surveyors or of the Incorporated Society of Valuers and Auctioneers or satisfies such other requirement or requirements as may be prescribed by regulations made by the Secretary of State ...

14 The regulations are set out in the annex to this statement of reasons.

15 There is no record of the consultant working for the Commission.

16 The 2010 agreement was entered into on 18 May 2010, which is before the third valuation report was provided by the second surveyor. That report was, of course, deficient, for the reasons already mentioned. The actual decision of the charity trustees to proceed appears to have been made over a 3 day period from 21 to 23 May 2010. They did not meet, but the president telephoned each charity trustee individually and noted the results. According to the note, the charity trustees were unanimous that it would be "*in the best interests of the Charity to move forward, and to accept this deal, and to exchange contracts*". Of course, this 'meeting' and decision was too late; the 2010 agreement was already in place.

that it is no longer possible for the association to instruct [the first solicitor]". On the same day, the charity instructed the second solicitor. Ten days later, the parties completed the disposal of the property.

The second solicitor told the inquiry that the charity was happy to proceed with completion in December 2010 "following advice from its advisers and the Charity Commission". However:

- it is clear that by this time the first solicitor, having expressed serious concerns, was no longer instructed and the consultant shared those concerns - the second solicitor had "not undertake(n) any investigation" in relation to the first solicitor's concerns - the remaining advisers were the first surveyor (who was not properly qualified, had produced reports that did not comply with the 1992 regulations, and who was paid and possibly instructed by the purchaser) and the property adviser, who would be conflicted in the event that his fees were payable by the purchaser upon completion
- the Commission was approached by the consultant in May 2010 - it was explained that the charity wished to rescind the 2009 agreement with PPP in favour of an agreement with PPPI (the 2010 agreement) and sought the Commission's consent so to do - on 19 May 2010 the Commission responded, setting out the statutory requirements, noting that the charity had not complied with those requirements, and explaining what the law required for the purpose of any further disposal - there was no further substantive correspondence between the Commission and the charity or its representatives - 7 months later, the disposal of the property was completed

In light of the above, the inquiry's finding is that the charity trustees disregarded or failed to take proper account of the concerns and advice of the consultant and first solicitor, potentially to the detriment of the charity, and so acted in breach of (a) their fiduciary duties to the charity (duty of care) and (potentially) (b) the statutory requirement.

### **The charity obtained retrospective advice/valuation<sup>17</sup>**

On 12 September 2013, in response to the opening of the inquiry and the Commission's regulatory concerns, the charity instructed the second surveyor to prepare a retrospective valuation report in relation to the property<sup>18</sup>. The second surveyor reported to the charity on 10 October 2013 and was of the opinion that the market value of the charity's interest in the property as at 18 May 2010 was, subject to vacant possession, £5,450,000. The second surveyor considered that the disposal of the property for £6 million had been compliant (in terms of obtaining best value) with the statutory requirement.

One of the concerns of the inquiry had been that the charity was not properly advised or, if it had been, had not taken proper account of that advice in relation to securing a purchase price that reflected the potential value of the property to the purchaser. Given the restriction of use of the property, it would be the case that any prospective purchaser (unless a non-profit learned or charitable or cultural association or society or embassy) would be looking to achieve a change of use, whether by enfranchisement or otherwise. This being so, and should the change of use be achieved, it would have been reasonable to anticipate a considerable uplift in the value of the property from which the charity might expect to benefit. The second surveyor did consider overage<sup>19</sup> resulting from a change of use being secured, but concluded that the landlord would have been likely to reserve any such uplift in the value of the property largely to itself and that, in any event, the payment of overage monies to the charity post-sale would be too difficult to enforce, particularly where the purchaser is or may be little more than a 'shell company'.

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<sup>17</sup> See also under 'The charity failed to obtain independent specialist advice'.

<sup>18</sup> The retrospective valuation report was prepared by 2 individuals who were representatives of a firm of chartered surveyors, hereafter referred to collectively as the second surveyor.

<sup>19</sup> 'Overage' is the term normally used, in the context of a property transaction, to mean a sum which the vendor may be entitled to receive after completion if a specified condition is satisfied eg a change of use of the property, the granting of planning permission, development.

Although the inquiry accepted that it was unclear as to whether the charity could reasonably have expected to benefit from overage, it disagreed with the second surveyor's conclusion that enforcement of any overage agreement would be too difficult. The inquiry was of the view that it would have been possible to create restrictions on the title which would have enabled any overage agreement to have been enforced against purchasers and any successors in title.

### **Whether, with regard to the disposal of the property, the charity trustees discharged their legal duties**

The inquiry found that the charity failed to:

- conduct proper due diligence before entering into the 2009 agreement with PPP
- conduct proper due diligence before entering into the 2010 agreement with PPPI
- obtain independent specialist advice

### **The charity failed to conduct proper due diligence before entering into the 2009 agreement with PPP**

The Commission recognises that most charity trustees are volunteers who sometimes make honest mistakes. They are not expected to be perfect, but they are expected to take reasonable steps to comply with their duties. Charity law generally protects charity trustees who have acted honestly and reasonably. In its judgment delivered on 17 October 2013 in relation to the Mountstar (PTC) Limited and the Charity Commission for England and Wales appeals, the First-tier Tribunal (Charity) considered the decision-making of charity trustees. It concluded: *"When making decisions, a trustee is under a duty to act with reasonable diligence and to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs, save that he must consider that he is acting for the benefit of the charity's objects which usually excludes speculative transactions which he might occasionally make for himself"*<sup>20</sup>. There must be a serious question as to whether the charity trustees in this case acted with due care and diligence across the transactions.

The inquiry was told by the second solicitor that the charity trustees only conducted *"limited due diligence on PPP ..."* before entering into the 2009 agreement (or the lock out agreement) and made assumptions as to whether PPP had sufficient financial resources to acquire the property<sup>21</sup>.

By entering into the lock out agreement the charity had committed to an agreement for up to one year with PPP, a shell company, with no certainty of disposing of the property at the conclusion and no means of enforcing such. Throughout that period, it was prohibited from promoting the property for the purpose of disposal to any other party.

The inquiry was told that the charity trustees were of the view that there was little likelihood of there being any other prospective purchaser and so the risk of the charity missing out on a beneficial offer was small. Given that the property was not put on the market, it is unclear how they were able to reach such a conclusion<sup>22</sup>.

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20 CRR/2013/0001 & CA/2013/0003 judgment in the First-tier Tribunal (Charity): Mountstar (PTC) Limited and the Charity Commission for England and Wales (paragraph 17).

21 It is not clear what form the 'limited due diligence' took. The inquiry has seen no evidence of any due diligence exercise being carried out. The second solicitor told the inquiry that the charity had *"no details of the financial position of [PPP] ..."*

22 The property adviser's witness statement touches on this point: *"I talked to contacts in the larger estate agencies but as I have already detailed, they were not going to be able to sell the Property with the current lease ... [ie the restrictive user clause] ... and therefore any placing of the Property would be futile and would cause considerable disruption to the ... [charity]"*.

Under the terms of the 2009 agreement the charity had committed to wait for the best part of 15 months for the sale to complete and to take receipt of the purchase price. In the event that PPP failed to complete at the end of that period, the charity would have been unable to enforce completion because PPP was a 'shell company' with no assets. The charity would have continued to be responsible for a property it could not afford to maintain, have no immediate prospect of disposing of it and, if it had relocated, might also have additional rental obligations.

The inquiry has seen no evidence to show that the charity trustees received advice from the first solicitor or the consultant about the terms of, and whether to enter into, the 2009 agreement.

Before entering into the lock out agreement and the 2009 agreement the charity trustees should have taken practical steps so as to be satisfied that the offer for the property was sound and that the charity would not be unnecessarily exposed to risk by contracting with PPP. For example, the charity trustees should have taken appropriate professional advice and taken all reasonable steps to obtain information about the finances and assets of PPP. If they were unable to conduct or complete such an exercise, it is not clear how the charity trustees could have concluded that by entering into the lock out agreement and 2009 agreement the best interests of the charity would be served<sup>23</sup>.

There was a financial imperative for the charity to dispose of the property and the charity trustees appear to have been of the view that at the time PPP was the only prospective purchaser. This being so, they were prepared to risk entering into an agreement that may be (and was) unenforceable and that could leave the charity exposed. In the event, the 2009 agreement had to be rescinded because it was unenforceable and the risks were born by the charity, not PPP.

By failing to conduct proper due diligence in relation to PPP the charity trustees were unable to properly assess the risks to the charity arising from the lock out agreement and subsequent 2009 agreement and so were in breach of their fiduciary duty of care and duty to promote the success of the charity.

### **The charity failed to conduct proper due diligence before entering into the 2010 agreement with PPPI**

After entering into the 2009 agreement, PPP began negotiations with the charity about how the charity might assist PPP in the enfranchisement process.

The consultant was formally reengaged by the charity on or about 26 November 2009 to advise the charity on the charity law aspects of the PPP enfranchisement proposals. At that time, and in the context of the enfranchisement negotiations, the first solicitor was voicing concerns about the status of PPP ('effectively an empty company') and the potential vulnerability of the charity as a consequence.

The charity's manager, first solicitor, consultant and property adviser (and accountant) met on 7 December 2009. The record of the meeting notes that *"Appears PPP is only a shell company set up for the purpose. PPP could walk away from the deal and wind up tomorrow leaving [the charity] heavily exposed"*. The record of a later meeting, held on 10 February 2010, notes that *"PPP only took what they called a 'punt' on the exchange of contracts"*.

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<sup>23</sup> It was only in February 2010 that the charity was beginning to ask questions about the implications of PPP pulling out of the 2009 agreement.

It was not until 13 May 2010 that the consultant was made aware of the new proposal (ie what was to become the 2010 agreement). The consultant raised questions about the new proposal, reiterated the steps the charity needed to take to comply with the statutory requirement, and asked if any research had been undertaken into the new purchaser (PPPI) *“as to whether it is a new company set up for the purpose ... [and suggested the charity’s accountant] ... does a little checking as to [PPPI’s] financial position”*.

The inquiry has seen no evidence to show that the charity conducted any due diligence in relation to PPPI.

It is the case, therefore, that by February 2010 at the latest the charity was aware that PPP was a ‘shell company’ that could walk away from its agreement with the charity, leaving it heavily exposed, and that by *“taking a punt”* PPP had not been serious when entering into the agreement. With that foreknowledge, and without conducting due diligence, the charity entered into the 2010 agreement with PPPI (effectively PPP in all but name). The 2010 agreement still only required the purchaser (this time, PPPI) to pay a nominal deposit of £1000 (so mirroring the 2009 agreement with PPP). [Due to relocation costs, the charity found it necessary to negotiate a supplemental agreement dated 22 November 2010, which required a more substantial deposit of £225,000 to be paid]<sup>24</sup>.

Again, there was a financial imperative for the charity to dispose of the property and the charity trustees appear to have been of the view that now PPPI was the only prospective purchaser. This being so, they were prepared to risk entering into an agreement that may be unenforceable and that could leave the charity exposed. The 2010 agreement required a subsequent supplemental agreement to secure a more realistic deposit (of £225,000). Even so, given their knowledge about PPP and the fact that PPPI was owned by the same people, and in the absence of any information about the assets and finances of PPPI, it is unclear how the charity trustees could have concluded that by entering into the 2010 agreement (particularly in its original form) the best interests of the charity would be served<sup>25</sup>.

By failing to conduct proper due diligence in relation to PPPI the charity trustees had no good reason to believe that PPPI would be better placed than PPP before it to see the matter through to completion. The inquiry is, therefore, of the view that the charity trustees were in breach of their fiduciary duty of care and duty to promote the success of the charity.

### **The charity failed to obtain independent specialist advice**

The inquiry was told that whereas the 2009 agreement was entered into with the expectation that the purchaser (or subsequent purchaser) would achieve enfranchisement, there was no such expectation in relation to the second agreement. It would appear, therefore, that the £8 million sale price in the 2009 agreement included an ‘extra’ £2 million, which represented additional value (to the charity) arising from the prospect of securing enfranchisement, whereas the 2010 agreement sale price did not. Even so, within a very short space of time after completion the property was sold on for over £21 million. An examination of the title as recorded by the Land Registry shows that the proprietor, Rose Season Enterprises Limited, holds the leasehold rather than the freehold, and the indications are therefore that a change of use, rather than enfranchisement, has been secured.

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24 The deposit funds were released to the charity on or about 24 November 2010. The charity used these funds for the purpose of relocation. The second solicitor told the inquiry that there was a downside to this arrangement in that the charity was thereby committed ‘to completing the transaction for the property come what may. Should the charity fail to complete, it was in a position of paying the rent of its new premises, returning the deposit of £225,000 which had been used in securing the new premises and having a potential claim made against it whilst also still having the financial burden of the property’.

25 The second solicitor told the inquiry that: *“The 2010 agreement was also equally unenforceable, with the exception of the increased deposit amount ...”*

The charity trustees told the inquiry that they could not have known the intentions of the purchaser or what would happen after the disposal of the property. For example, during the meeting the inquiry noted that the property advisor had told the charity that with a change of use the value of the property could increase to as much as £20-£22 million. The inquiry asked the charity trustees why they had not factored this into the 2010 agreement so that the charity could derive some benefit in the event that the value increased subsequent to disposal. The second solicitor said that the charity trustees could not know what would happen in the future and that it would be unfair to ask the charity trustees to speculate. The charity trustees said the advice given by the property advisor was speculative rather than a formal property valuation.

However, the charity met with representatives of PPP on 10 February 2010 specifically to discuss PPP's enfranchisement proposals. After entering into the 2010 agreement, the charity wrote to PPPI in June 2010 undertaking to only engage with PPPI in relation to the property and the proposed enfranchisement of the freehold interest. The charity was to be kept informed in relation to the enfranchisement and all related costs were to be met by PPPI, which is a clear indication that there was an expectation that the charity would have some role to play in the enfranchisement process. Ultimately, the charity decided that it did not wish to be involved in that process, and instructed the first solicitor to that end in July 2010.

In light of the evidence, it is hardly conceivable that the charity did not know of the plans, at least in part, of PPP/PPPI/Rose Season Enterprises Ltd in the period leading up to and after the 2010 agreement.

The charity trustees should have obtained specialist and independent advice about how to achieve maximum return on a property disposal where the post-disposal value would be likely to appreciate significantly. This is particularly so given that at the time of the 2010 agreement the legal position generally regarding the right to enfranchise was unclear and subject to appeal in the courts, and negotiations between the landlord and any prospective purchaser would have taken place in that context.

The charity expressed and reiterated the view throughout the inquiry that the 2010 agreement secured a good deal for the charity, citing the report of the second surveyor; this being so, the second solicitor could not understand the purpose or continuation of the inquiry. The Commission accepts the retrospective valuation as the value of the property without the benefit of enfranchisement or change of use. However, there were avenues open to the charity trustees to secure, or at least attempt to secure, a benefit to the charity should there be a significant uplift in the value of the property post sale (which always seemed likely)<sup>26</sup>.

The position of the charity seems to be that it did not and could not know PPPI's intentions. It considered PPPI would do what PPPI would do and that that was nobody's business but PPPI's. Based on the evidence provided, it is the inquiry's view that the charity trustees did know what PPPI intended or, at least, that a commercial company would only purchase the property if it had good reason to believe it would secure enfranchisement or successfully negotiate a change of use and thereby achieve a significant uplift in the value of the property. They had advice that the uplift would be considerable and so it proved. The charity might have benefited by such an uplift had the charity trustees given consideration to the matter.

The charity trustees did not take advantage of the opportunity to obtain maximum value when disposing of the property to the detriment of the charity, which was in breach of their fiduciary duty of care and duty to promote the success of the charity.

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26 In any event, the scope of the inquiry was not restricted to the 2010 agreement alone. That agreement and subsequent completion represented a culmination of events, decisions and transactions since 2008 (at least), all of which were relevant to the inquiry and shed light on whether the charity trustees acted at all times in accordance with their fiduciary duties and the statutory requirement.

## Conclusions

The charity trustees made 2 attempts to dispose of the property. The charity entered into the 2009 agreement without conducting proper (or any) due diligence and found it necessary, as a result, to rescind that agreement because it could not be enforced. The charity then entered into the 2010 agreement, again without conducting proper due diligence, for a lesser consideration. Within a very short space of time after completion the property was sold on for over £21 million which the charity could have taken advantage of. When the charity trustees took appropriate advice they did not follow it and they disregarded or failed to take proper account of the concerns and advice of the consultant and the first solicitor in relation to the 2010 agreement. The charity trustees failed to obtain contemporaneous specialist independent advice about how to achieve maximum return on a property disposal where the post-disposal value would be likely to appreciate significantly.

The charity trustees failed to comply with the statutory requirements when entering into the lock out agreement, the 2009 and 2010 agreements and before completing the disposal on 23 December 2010 and they were in breach of their fiduciary duties to the charity. However, there was no evidence of the charity trustees or persons connected to them having derived an unauthorised private benefit in relation to the disposal of the property.

The failures and breaches were not minor or technical in nature, which could be ignored or passed over in light of an apparently successful outcome. They amount to basic and serious mismanagement by the charity trustees.

## Regulatory action taken and conduct of the inquiry

During the course of the inquiry the Commission exercised its statutory powers under section 47 of the act to gather information and documents from the charity trustees, consultant and first solicitor.

Subsequently it sought further clarification from the parties - primarily from the charity trustees by way of the second solicitor - about their involvement in and the nature of the transactions.

In February 2016 the charity raised a formal complaint about the duration of the inquiry and delay on the part of the Commission in progressing matters. Although account was taken of the lead investigator's heavy casework in other statutory inquiries, the complaint was upheld under the Commission's internal processes and steps were taken to ensure that the inquiry was concluded expeditiously.

Notwithstanding the mismanagement by the charity trustees, there are a number of factors that militate against further regulatory action by the Commission:

- the agreement to sell was entered into on 18 May 2010 and completion occurred on 23 December 2010 - the inquiry was opened on 8 July 2013, over 3 years after the 2010 agreement and some 2 and a half years after completion
- the prospect of unpicking the transaction by the time the Commission became involved was remote, particularly as it would be necessary to demonstrate bad faith on the part of the purchaser (PPPI), who was otherwise protected in law and could rely on the savings provisions under section 122(6) of the act

- although there are questions about the relationships between the property adviser and the first surveyor with PPP/PPPI and the extent to which these impacted on the interests of the charity, the Commission has found no evidence, based on the evidence it examined, to show that PPPI acted in bad faith
- the inquiry has found no evidence of the charity trustees, or any one of them, having derived an unauthorised private benefit in relation to the disposal of the property
- the inquiry has found no evidence of other persons associated with the charity having derived an unauthorised private benefit in relation to the disposal of the charity's property
- the charity did receive professional advice, albeit that:
  - it did not always act on that advice
  - the first solicitor did not appear to have any charity law expertise (but did raise concerns about compliance with the statutory requirement under charity law)
  - the first surveyor was not appropriately qualified
- the charity trustees obtained a retrospective valuation of the property that could be argued is supportive of the 2010 valuation
- it is not clear from the evidence provided to the inquiry to what extent the charity trustees were collectively involved in, or whether they were kept fully informed of, the disposal, which was ultimately authorised by the president, who is now deceased

Having assessed the facts and circumstances, the Commission concluded it was not possible nor proportionate to take any further regulatory action in this matter.

## Issues for the wider sector

Charity trustees must always act in the best interests of their charity. How they demonstrate this is usually left to their discretion, but when it comes to selling, leasing or transferring their charity's land, the law sets out clear requirements to ensure that these important transactions are properly managed in the charity's interests and that the charity trustees obtain the best price reasonable in the circumstances.

For most disposals involving a sale, lease or other disposal of an interest in land, the law requires that charity trustees obtain and consider a written report from a qualified surveyor, advertise the disposal following advice from the surveyor, and decide whether they are satisfied that the proposed terms are the best that can reasonably be obtained in the circumstances of the disposal. The surveyor must be appropriately qualified and the charity trustees must follow his or her advice on how to market the disposal (or not, if that is the advice). They must receive a written report that complies with the Charities (Qualified Surveyors' Reports) Regulations 1992 (see annex). Charity trustees must ensure that the surveyor that they intend to appoint is appropriately qualified and understands the requirements of these regulations. They must also ensure that the surveyor they propose to appoint is able to act exclusively for, and in the interests of, their charity.

Many charities have valuable property assets, especially in London and the south east. Selling a charity's property assets can generate very significant amounts of money which can then be used to further the charity's purpose. Understanding how to extract the best value out of such assets is a complex and specialist issue so choosing the right professional advisers with the necessary expertise and qualifications to provide pertinent high quality advice in such circumstances is a vital element of a trustee's role.

Charity trustees must ensure that they have properly assessed risk to their charity and its property. Before entering into transactions with third parties, they should conduct such due diligence as may be appropriate. In this case, due diligence would be the range of practical steps that needed to be taken by the charity trustees so that they were reasonably assured that the offers by third party companies were sound and, if not, the potential consequences for the charity. In the absence of such action or where such assurance cannot be obtained, there must be serious doubt as to whether the charity trustees should proceed.

For further advice and guidance on disposals of property and the legal requirements see **Sales leases transfers or mortgages: what trustees need to know about disposing of charity land (CC28)**.

## ANNEX

### Statutory Instruments

1992 No. 2980

#### CHARITIES

#### The Charities (Qualified Surveyors' Reports) Regulations 1992

*Made*

*29th November 1992*

*Laid before Parliament*

*8th December 1992*

*Coming into force*

*1st January 1993*

In exercise of the powers conferred upon me by sections 32(4) and 77(3) of the Charities Act 1992, I hereby make the following Regulations:

**1.**—(1) These Regulations may be cited as the Charities (Qualified Surveyors' Reports) Regulations 1992 and shall come into force on 1st January 1993.

(2) In these Regulations—

“relevant land” means the land in respect of which a report is being obtained for the purposes of section 32(3) of the Charities Act 1992; and

“the surveyor” means the qualified surveyor from whom such a report is being obtained.

**2.** A report prepared for the purposes of section 32(3) of the Charities Act 1992 (requirements to be complied with in respect of the disposition of land held by or in trust for a charity otherwise than with an order of the court or of the Charity Commissioners or where section 32(5) of that Act applies) shall contain such information and deal with such matters as are prescribed by the Schedule to these Regulations (together with such other information and such other matters as the surveyor believes should be drawn to the attention of the charity trustees).

*Kenneth Clarke*

One of Her Majesty's Principal Secretaries of State

Home Office

29th November 1992

#### SCHEDULE INFORMATION TO BE CONTAINED IN, AND MATTERS TO BE DEALT WITH BY, QUALIFIED SURVEYORS' REPORTS

**1.**—(1) A description of the relevant land and its location, to include—

- (a) the measurements of the relevant land;
- (b) its current use;
- (c) the number of buildings (if any) included in the relevant land;
- (d) the measurements of any such buildings; and
- (e) the number of rooms in any such buildings and the measurements of those rooms.

(2) Where any information required by sub-paragraph (1) above may be clearly given by means of a plan, it may be so given and any such plan need not be drawn to scale.

- 2.** Whether the relevant land, or any part of it, is leased by or from the charity trustees and, if it is, details of—
- (a) the length of the lease and the period of it which is outstanding;
  - (b) the rent payable under the lease;
  - (c) any service charge which is so payable;
  - (d) the provisions in the lease for any review of the rent payable under it or any service charge so payable;
  - (e) the liability under the lease for repairs and dilapidations; and
  - (f) any other provision in the lease which, in the opinion of the surveyor, affects the value of the relevant land.
- 3.** Whether the relevant land is subject to the burden of, or enjoys the benefit of, any easement or restrictive covenant or is subject to any annual or other periodic sum charged on or issuing out of the land except rent reserved by a lease or tenancy.
- 4.** Whether any buildings included in the relevant land are in good repair and, if not, the surveyor's advice—
- (a) as to whether or not it would be in the best interests of the charity for repairs to be carried out prior to the proposed disposition;
  - (b) as to what those repairs, if any, should be; and
  - (c) as to the estimated cost of any repairs he advises.
- 5.** Where, in the opinion of the surveyor, it would be in the best interests of the charity to alter any buildings included in the relevant land prior to disposition (because, for example, adaptations to the buildings for their current use are not such as to command the best market price on the proposed disposition), that opinion and an estimate of the outlay required for any alterations which he suggests.
- 6.** Advice as to the manner of disposing of the relevant land so that the terms on which it is disposed of are the best that can reasonably be obtained for the charity, including—
- (a) where appropriate, a recommendation that the land should be divided for the purposes of the disposition;
  - (b) unless the surveyor's advice is that it would not be in the best interests of the charity to advertise the proposed disposition, the period for which and the manner in which the proposed disposition should be advertised;
  - (c) where the surveyor's advice is that it would not be in the best interests of the charity to advertise the proposed disposition, his reasons for that advice (for example, that the proposed disposition is the renewal of a lease to someone who enjoys statutory protection or that he believes someone with a special interest in acquiring the relevant land will pay considerably more than the market price for it); and
  - (d) any view the surveyor may have on the desirability or otherwise of delaying the proposed disposition and, if he believes such delay is desirable, what the period of that delay should be.

7.—(1) Where the surveyor feels able to give such advice and where such advice is relevant, advice as to the chargeability or otherwise of value added tax on the proposed disposition and the effect of such advice on the valuations given under paragraph 8 below.

(2) Where either the surveyor does not feel able to give such advice or such advice is not in his opinion relevant, a statement to that effect.

8. The surveyor's opinion as to—

- (a) the current value of the relevant land having regard to its current state of repair and current circumstances (such as the presence of a tenant who enjoys statutory protection) or, where the proposed disposition is a lease, the rent which could be obtained under it having regard to such matters;
- (b) what the value of the relevant land or what the rent under the proposed disposition would be—
  - (i) where he has given advice under paragraph 4 above, if that advice is followed; or
  - (ii) where he has expressed an opinion under paragraph 5 above, if that opinion is acted upon; or
  - (iii) if both that advice is followed and that opinion is acted upon;
- (c) where he has made a recommendation under paragraph 6(a) above, the increase in the value of the relevant land or rent in respect of it if the recommendation were followed;
- (d) where his advice is that it would not be in the best interests of the charity to advertise the proposed disposition because he believes a higher price can be obtained by not doing so, the amount by which that price exceeds the price that could be obtained if the proposed disposition were advertised; and
- (e) where he has advised a delay in the proposed disposition under paragraph 6(d) above, the amount by which he believes the price which could be obtained consequent on such a delay exceeds the price that could be obtained without it.

9. Where the surveyor is of the opinion that the proposed disposition is not in the best interests of the charity because it is not a disposition that makes the best use of the relevant land, that opinion and the reasons for it, together with his advice as to the type of disposition which would constitute the best use of the land (including such advice as may be relevant as to the prospects of buying out any sitting tenant or of succeeding in an application for change of use of the land under the laws relating to town and country planning etc.).

#### EXPLANATORY NOTE

*(This note is not part of the Regulations)*

Section 32(2) of the Charities Act 1992 disapplies the requirement in section 32(1) of that Act that no land held by or in trust for a charity is to be sold, leased or otherwise disposed of without an order of the court (as defined by section 46 of the Charities Act 1960) or of the Charity Commissioners. Section 32 comes into force on 1st January 1993 by virtue of article 4 of, and Schedule 3 to, the Charities Act 1992 (Commencement No. 1 and Transitional Provisions) Order 1992 (S.I. 1992/1900 (C.64)). One of the conditions for the disaplication of the requirements in section 32(1) is that the requirements in section 32(3) are satisfied.

The first requirement in section 32(3) is that, before the charity trustees enter into an agreement for the sale or (as the case may be) for a lease or other disposition, of the land, they must obtain and consider a report on the proposed disposition from a surveyor who satisfies the requirements of section 32(4) and who is instructed by them and acts exclusively for the charity. The report prepared for these purposes must contain such information, and deal with such matters, as may be prescribed by regulations (section 32(4)). These Regulations (which extend to England and Wales only) exercise that power and the Schedule to these Regulations sets out the matters to be covered in the report.

Those matters include a description of the land (paragraph 1 of the Schedule), whether it is leased by or from the charity trustees (paragraph 2), the easements or covenants to which the land is subject or the benefit of which it enjoys (paragraph 3), whether or not any buildings in it are in good repair (paragraph 4), whether alterations to any such buildings are desirable (paragraph 5), advice as to the way the proposed disposition of the land is to be conducted (paragraph 6), advice about value added tax (paragraph 7), the surveyor's opinion about the value of the land (paragraph 8) and, where appropriate, his suggested alternative ways of disposing of the land (paragraph 9).