[2014] UKUT 0364 (TCC)

Charity Commission inquiry –nature of review jurisdiction of First-tier Tribunal — whether error of law in approach of FTT – no – appeal dismissed

FTC/124/2013

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ON APPEAL FROM THE FIRST -TIER TRIBUNAL (CHARITY)

BETWEEN

REGENTFORD LIMITED

Appellant

AND

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

AND

HER MAJESTY'S ATTORNEY GENERAL **Intervener**

TRIBUNAL: The President, the Hon Mr Justice Warren
Judge Alison McKenna

Sitting in public in London on 3 July 2014

The Appellant did not appear but made submissions in writing

Ben Jaffey of counsel, instructed by the Legal Department Charity Commission appeared for the Respondent

William Henderson of counsel, instructed by the Treasury Solicitor appeared for the Intervener

DECISION

The Appeal is dismissed.

REASONS

1. This is an appeal against the decision of the First-tier Tribunal (General Regulatory Chamber) (Charity) (Judge Nicholas Warren CP), released on 21 August 2013 (reference number CRRA/2013/0002) ("the FTT"). Permission to appeal was refused by the FTT but granted by the Upper Tribunal ("the UT") on limited grounds.

2. The proceedings in the FTT took the form of a "review" under s. 322 of the Charities Act 2011 ("the Act") because the disputed decision of the Charity Commission is listed as a "reviewable matter" in s.322(2)(a) of the Act. Section 321(4) of the Act provides that in determining a review the Tribunal "*must apply the principles which would be applied by the High Court on an application for judicial review*". Schedule 6 of the Act provides that if it allows the review application, the Tribunal may direct the Commission to end the inquiry.

3. The FTT's decision in this case, following an oral hearing on 30 July 2013, was to dismiss the Appellant's application for review of the Charity Commission's decision to open an inquiry under s. 46 of the Act.

4. The Appellant's grounds of appeal to the UT included the following:

> "*The Applicant had submitted that the Commission's internal report - upon which the decision to open the inquiry was based - was erroneous but the Tribunal erred in law in failing to decide that question and merely stating at paragraph 2 of its Decision that the question of whether there was sufficient material to "look and see" was different from the question of whether there was sufficient material on which to make a finding of fact. The Tribunal had also made an assumption that the Commission had reviewed its own decision to open the inquiry in the absence of any evidence to support that assumption*".

5. In granting permission to appeal on this ground alone, Judge McKenna commented that

> " *This ground concerns the threshold which was required to be crossed in order for the Commission reasonably to have decided to open a statutory inquiry…I am aware that this was the first case heard under the First-tier Tribunal (Charity)'s "review" jurisdiction. It seems to me that the parties and the First-tier Tribunal would benefit from a decision of the Upper Tribunal offering guidance as to the questions which the First-tier Tribunal should properly address in considering an application for review of a decision to open a statutory inquiry…The permission to appeal that I have given relates to a relatively narrow question of law and would, in my view, be suitable for determination on the papers without a further oral hearing, but the parties will be invited to express their own views about the form of hearing of the substantive appeal in due course".*

6. The Respondent requested an oral hearing of the appeal in the UT. The Appellant made substantial written submissions but did not attend the oral hearing. The UT invited Her Majesty's Attorney General to intervene in the appeal pursuant to s. 318(4) of the Act and he agreed to intervene by sending his counsel to make submissions. We are grateful to all involved for their clear submissions, whether written or oral.

Factual Background

7. The Appellant is a charity (registered number 1001491) and a company limited by guarantee. Its objects are the advancement of the Orthodox Jewish faith, the relief of poverty and any other charitable purpose.

8. The Appellant last filed accounts with the Charity Commission in 2006. On 23 October 2012 the Respondent decided to open an inquiry into the Appellant pursuant to s. 46 of the Act. The Respondent's concerns which lead to the opening of the inquiry related to financial management, the handling of conflicts of interest and trustee decision-making.

9. At the time it made the decision to open the inquiry, the Respondent had the following information about the Appellant:

    (a) the Appellant owned a block of flats, which it decided to refurbish. The Appellant was prosecuted by the Health and Safety Executive (the "HSE") in relation to the death of a construction worker on the site in 2005, convicted and fined £250,000 in 2010. The Respondent was then informed by the HSE of the conviction and the Judge's sentencing remarks;

    (b) when the refurbishment was completed, the Appellant had decided to release some of the value of the property by taking out a mortgage on it. The Appellant's board minute dated 19 July 2007 (provided to the Respondent by its former solicitor as an attachment to a letter dated 16 September 2011) recorded that a lease of the flats was to be granted to a company known as Quain Limited for no consideration, and that Quain Limited would enter into a declaration of trust so that it held the flats on trust for the Appellant. Quain Limited was described in the board minute as a wholly-owned subsidiary of the Appellant, but when the Respondent checked Companies House records in January 2012 they showed that the sole shareholder was Anthony Markovic. The Respondent had been sent, as an attachment to a letter from the Appellant's former solicitor dated 16 February 2012, a copy of the trust deed, which was said to have been drafted by Mr Markovic himself. It does not appear to have implemented the Appellant's board resolution and is of uncertain legal effect, referring as it does to the Appellant and Quain Limited's interest in the flats as "jointly entitled in equity". Furthermore, the provisions of the Act regarding the disposal and mortgage of charity property appeared not to have been complied with;

(c) The mortgage released £950,000 of equity but it was unclear what had happened to that money. The Respondent had obtained bank records and established that it had not been paid into the Appellant's bank account. (Subsequent information provided by the Appellant suggests that this money was lost by making a number of unsuccessful investments in America);

(d) The Appellant's bank accounts showed substantial payments to MasterCard, Visa and BMW and payments to individuals. It was unclear how these payments related to the charity's objects.

(e) The Respondent had been engaged in correspondence with the Appellant and its representatives from July 2011 to July 2012, but had not received replies which were to its satisfaction on these issues. In particular, no accounts had been produced, despite repeated requests.

10. The Respondent commenced the internal process by which it decides whether to open a statutory inquiry in September 2012. This process was as follows:

(a) on 6 September 2012 the Respondent's officer Emma Cardwell sent a memorandum to the Pre-Investigative Assessment Unit, detailing the issues of regulatory concern as indications of fraud; lack of charitable activity; charity property being at risk; and a perceived lack of co-operation by the charity trustees with the Respondent's informal enquiries;

(b) on 23 October 2012, the Respondent's officer Tamsin Long reviewed the facts then known (in reliance upon Emma Cardwell's memorandum) and the Respondent's legal powers. She considered mitigating factors, Human Rights Act and Equality Act provisions and whether a decision to open an inquiry was proportionate at that stage. She considered whether further informal engagement with the trustees would be appropriate. Finally, she concluded that misconduct and/or mismanagement may have occurred; that there was a risk to charitable assets; that there was likely to be significant damage to public trust and confidence in charities arising from this case; and that it was necessary to establish or verify facts or to collect evidence. She stated that she did not consider that it was necessary to engage with the charity trustees further before opening an inquiry and that they would still have the opportunity to respond to the issues of regulatory concern during the course of the inquiry;

(c) Tamsin Long's deliberations and conclusion were entered into a "Decision Log" form, which she signed and her decision to open a statutory inquiry was authorised and countersigned (apparently on the same day, although the signature is misdated) by the Respondent's officer David Walker, described as "Head of Investigation M, A and D".

At the end of this process, the inquiry was formally opened on 23 October 2012. The Appellant was notified of the opening of the inquiry in March 2013.

11. Following the decision to open the inquiry, the Appellant provided the Respondent with a copy of a note dated 6 September 2009 in which charity trustee Anthony Markovic had recorded that it had been decided to use one of "my companies" as contractor for the refurbishment of the flats. The note also added that as he does not receive any remuneration from the charity for the time he spends on its affairs, it seemed reasonable that he should receive some remuneration for the considerable extra time spent on dealing with the construction works. The Respondent was also provided with receipts from the contractor showing that it had received many thousands of pounds from the Appellant in respect of the works. Also following the decision to open the inquiry, the Respondent became aware that the share in Quain had in fact been transferred from Mr Markovic to the Appellant in February 2012. Although the Appellant's then-solicitor had indicated to the Respondent in February 2012 that this was the intention, he had not confirmed it in writing or during his (minuted) telephone conversation with the Respondent's officer in August that year. The Respondent finally became aware of the share transfer in November 2012, by undertaking its own Companies House checks, .

Legal Framework

12. Section 46(1) of the Act provides as follows:

> "*The Charity Commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes"*.

13. Section 14 of the Act, gives the Respondent the following five objectives:

> "*1 The public confidence objective*
>
> *The public confidence objective is to increase public trust and confidence in charities.*
>
> *2 The public benefit objective*
>
> *The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.*
>
> *3 The compliance objective*
>
> *The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.*
>
> *4 The charitable resources objective*

The charitable resources objective is to promote the effective use of charitable resources.

5 The accountability objective

The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public".

14. The Respondent also has statutory general functions at s. 15 of the Act and general duties at s. 16 of the Act. Section 15 (1) includes the following general function:

> *"3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities".*

15. Section 16 includes the following duties:

> *"1. So far as is reasonably practicable the Commission must, in performing its functions, act in a way—*
> *(a) which is compatible with its objectives, and*
> *(b) which it considers most appropriate for the purpose of meeting those objectives"*
>
> and
>
> *"4. In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)".*

16. The Respondent has published guidance on its approach to statutory inquiries (*"Statutory Inquiries into Charities: Guidance for Charities and their Advisers")* in which it explains that before it makes a decision to open an inquiry it will apply its *"Risk Framework"* and that it is likely to consider opening a statutory inquiry where the regulatory issues are serious, where there is evidence or serious suspicion of misconduct or mismanagement, and where the risk to the charity or to public confidence in charity more generally is high.

The FTT's Decision

17. At paragraph [2] of the FTT's decision, it is stated that:

> *"….[The Tribunal] must apply the principles which would be applied by the High Court on an application for judicial review. It is important also to bear in mind that, at this stage, the Commission has not made any final findings. The question whether there is sufficient material on which to 'look and see'*

is very different from the question of whether there is sufficient material on which to make a finding of fact".

18. Having reviewed the facts, the FTT records at [16] that the Appellant had asked for the FTT hearing not to go ahead so that the Respondent could carry out an informal review of its decision to open the inquiry. The FTT concludes at [18] that it should proceed with the hearing, *inter alia* because it is implicit in the Tribunal's procedural rules that a respondent to proceedings must carry out a review of the appealed decision when deciding whether to defend the proceedings as this is an inherent part of its duty to the Tribunal under the overriding objective. Therefore, nothing was to be gained from putting off the hearing to another day to permit the Respondent to repeat that process.

19. The Appellant's submissions as put to the FTT hearing are recorded at [19] to [21] of the decision. They were, firstly, that the Respondent had no jurisdiction to open the inquiry because the statutory provision which applied at the time of the events which concern the Respondent was the Charities Act 1993 and not the Act; secondly, that there was no jurisdiction to open the inquiry because the Appellant was no longer a charity at the time the inquiry was opened, having ceased to operate as such and having only been restored to the Companies House Register (and consequently to the Register of Charities) for the purposes of litigation arising from the accident during the refurbishment of the flats. The FTT rejected both of those submissions (at [20], [23] and [24]).

20. The FTT also rejected the Appellant's submissions that the Respondent could not properly be concerned with the matters which had led it to open the inquiry (at [26]); an allegation of bias (at [27]); an "attack on the merits" (at [28] and [29]); and a submission that the decision to institute the inquiry was disproportionate as matters could have been resolved informally (at [30]).

21. A further ground of challenge to the decision to open the inquiry had been made by the Appellant in writing prior to the hearing, but this is not mentioned in the FTT's decision. The FTT had issued a "Case Management Note" dated 5 June 2013 in which it had required the Appellant to specify whether any of the assertions of primary fact made by the Respondent in its Response to the application to the Tribunal were disputed and, if so, to state which finding of fact was disputed and on what basis. The Appellant had responded to this direction by submitting on 18 June 2013 that it disputed almost all of the assertions of primary fact in the Respondent's Response. The Appellant asserted (see page 202 of the UT bundle) that the Respondent has proceeded on the basis of a misunderstanding as to the nature of the transaction between the Appellant and Quain Limited because the beneficial ownership of the property had at all times remained with the Appellant and that this had been substantiated by documentation provided to the Respondent.

Submissions

22. We consider here only those of the Appellant's submissions which are germane to the issue now before us (see [4] above). We recognise that the Appellant's concerns are more broadly-based, but we must remind ourselves that we are not engaged in a re-hearing of the FTT case, but rather in the task of deciding whether

there was an error of law in the FTT's decision in relation to the single ground in relation to which permission to appeal was given. In commenting on a draft of this decision, the Appellant made a number of further submissions, including some points about the sequence of events in this case. We have, after consulting the other parties, made some amendments to the text to reflect these. However, we are satisfied that these further submissions do not impact upon the substance of our decision.

23. In the Appellant's two skeleton arguments for the UT hearing, it was submitted that the "report" referred to in [4] above is Emma Cardwell's memorandum of 6 September 2012 (see [11] above), because this provides the factual basis for the opening of the inquiry. It was further submitted that Tamsin Long's entry in the Decision Log had erroneously relied upon Emma Cardwell's memorandum in the following respects. Firstly, that her understanding that the shares in Quain Limited were held by Mr Markovic was mistaken because he held the share on trust for the Appellant. Secondly, her conclusion that the Charities Act requirements had not been complied with in respect of the disposal of the charity's property was mistaken because, it is argued, the statutory requirements did not apply to these particular transactions. Thirdly, that the concerns about conflicts of interest were misplaced because Mr Markovic held the share in Quain Limited on trust for the Appellant. It was submitted that the FTT had erred in law in failing to address the Appellant's submissions as to the alleged inaccuracy of Emma Cardwell's memorandum.

24. The Appellant submitted that, had the FTT considered this issue, it would have found that the Respondent had opened the inquiry prematurely because, if it had engaged properly with the Appellant about the issues of concern, its misconceptions could have been corrected and no inquiry would have been necessary. It argued further that, unless the Respondent considers matters properly and ensures that it understands the information provided to it (as provided in its Operational Guidance) it runs the risk of proceeding to open an inquiry on the basis of an unsafe analysis of the facts. The Appellant complained that in this case it had voluntarily provided information to the Respondent to address concerns of which it had not even been made aware, having only become aware of them through the disclosure of documents in the Tribunal proceedings. It was suggested that guidance from the UT to the Respondent and the FTT is required in order to prevent similar "confused situations" arising in the future.

25. The Appellant submitted, with regard to the FTT's comments about the Respondent's duty to review its decision prior to a hearing, that the FTT should not have made any assumptions about facts because the parties were before it and could have given evidence and so it had erred in law in making assumptions at all.

26. Mr Jaffey on behalf of the Respondent submitted that there was no error of law in the Respondent's decision to open the inquiry in this case. He reminded the Tribunal that (i) there are no statutory criteria to be satisfied before opening an inquiry under s. 46 of the Act and that Parliament has therefore afforded wide discretion to the Respondent in this area; (ii) the opening of an inquiry is the gateway to the use of other powers, namely those requiring the submission of accounts and other information, requiring a person to attend and give evidence, applying for a search warrant and publishing the results of inquiries (ss. 47 to 50

of the Act); power to suspend or remove charity trustees and to appoint an interim manager (ss. 76 to 79 of the Act); (iii) whilst the decision to open the inquiry was subject only to a review by the FTT, the exercise of the powers consequent upon the opening of an inquiry was capable of appeal *de novo* in the FTT, so that Parliament's intention was clearly that the more rigorous testing of the Respondent's decisions in the Tribunal was reserved for those cases where the opening of the inquiry had led on to the use of further powers.

27. With regard to the nature of the FTT's jurisdiction in a reviewable matter, the Respondent's written response to the UT appeal referred us to the "classic statement" of the three grounds for judicial review: illegality, irrationality and procedural impropriety, as described by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374. In the context of a Tribunal with analogous review powers to those of the FTT (Charity), it referred us to the comments of Carnwath LJ (as he then was) in *OFT v IBA Health Ltd* [2004] EWCA Civ 142, to the effect that, notwithstanding the Tribunal's specialised composition, a review was not to take the form of an appeal on the merits but was limited to the ordinary principles applied in the Administrative Court, which could be ascertained from the leading textbooks on the subject. We were also referred to the Court of Appeal's rejection of the argument that the Competition Appeal Tribunal was entitled to apply a greater intensity of review than would the Administrative Court in view of its specialist composition in *BSkyB v Competition Commission* [2010] EWCA Civ 2.

28. Mr Jaffey submitted that there was a danger for the FTT, when required to conduct a review, of being too prescriptive. The danger, in both the Intervener's and the Respondent's submission, of requiring the FTT to apply a "classical" judicial review formula to the decision to open an inquiry was that the basis for judicial review in the Administrative Court was a rapidly evolving area of law and the FTT could therefore rapidly find itself out of step with the approach of the higher courts. Mr Jaffey submitted that the approach to be taken by the FTT was one of whether the Respondent had abused its powers in making the decision under review. As Lord Bingham had put it in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 at [41]:

> "*the issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to take"*.

29. It was clear from the FTT's decision, Mr Jaffey submitted, that the Appellant had raised before the FTT no proper public law basis for challenging the Respondent's decision to open the inquiry and had really relied on a disguised merits challenge. In other cases, where the decision to open an inquiry was challenged on the basis that the Respondent had taken into account irrelevant considerations in making its decision, a different approach by the FTT would be required. Mr Jaffey referred to the FTT's decision in *Mountstar PTC Ltd v Charity Commission* (CA/2013/0001) as an example of this type of case, where it had been alleged that the decision to open the inquiry had taken into account irrelevant considerations of public and political opinion about the case and where the FTT had heard cross-examination of the Respondent's witnesses before reaching its conclusion on that challenge. It was accepted by the Respondent that there are certain considerations

which it must take into account in making its decision to open an inquiry, for example, those in ss.14 to 16 of the Act. It was also accepted that that there would be certain considerations which would always be irrelevant for a decision maker, for example, ones based on unlawful discrimination. However, it was submitted that the vast majority of likely factors which the Respondent would take into account in deciding whether to open an inquiry are matters which are properly within the Respondent's discretion, as Parliament has left it up to the Respondent to decide what factors to take into account in making the decision to open an inquiry under s. 46 of the Act. Mr Jaffey submitted that there would generally be no error of law by the Respondent in taking into account or failing to take into account factors which properly fell into the remit of the Respondent's discretion in this area.

30. It was submitted that in an "irrationality" challenge, the FTT should be slow to interfere with the judgment of the Respondent, but that in a case where "illegality" or "procedural impropriety" was alleged, the FTT might undertake a more searching examination of the basis for the challenge. Where it was alleged that there had been a mistake of fact, as in this case, the Respondent submitted that the proper test was whether no decision maker could reasonably have reached its decision on the evidence before it. It was submitted that, when reviewing a decision to open an inquiry, the FTT's role was inevitably limited because it was reviewing a decision taken in a situation where the decision maker would have incomplete evidence and needed more in order to establish the facts. It was submitted that the relevant question in those circumstances was whether a regulator, on the basis of the material before it, could reasonably have held the concerns on which it relied to open the inquiry.

31. The Respondent therefore opposed this appeal on the basis that the FTT had applied the correct approach to the matter before it. Mr Jaffey noted that at [10] the FTT had expressed some surprise that the Respondent had not opened an inquiry sooner. He submitted that it was implicit in the FTT's decision at [29] that the FTT had concluded that the Respondent's decision to open the inquiry was not one that no reasonable regulator could have taken. In short, the Respondent's case was that the FTT had made the correct decision having applied the correct test and that there was no defect in the FTT's decision as a result of its failure to rehearse the precise public law formula against which it was to test the Respondent's decision.

32. Mr Henderson, on behalf of the Attorney General, submitted that there was no single point at which it became reasonable to open an inquiry because there will always be a wide range of highly fact-sensitive circumstances in which the decision to open an inquiry would be taken. The decision should only be subject to review if, having taken into account matters which it ought not to have taken into account or not having taken into account matters which it should have taken into account, the Charity Commission could not reasonably have decided to open the formal inquiry when it did. Mr Henderson acknowledged that the opening of an inquiry may involve a reputational risk for a charity, but noted that this was not such a case and he submitted that in any event the possible effect on the reputation of a charity should be of little concern to the Respondent if there are otherwise grounds for opening an inquiry. He also acknowledged that the opening of an inquiry would involve the dedication of time and resources by the charity

concerned, but pointed out that these would also be expended in dealing with informal enquiries by the charity's regulator.

33. Mr Henderson acknowledged at the hearing before us that the FTT had not dealt with the Appellant's written submission that the Respondent had relied on factually incorrect information when deciding to open its inquiry. However, he submitted that it was unclear whether this amounted to an error of law in the circumstances, because the Appellant had raised objections to Emma Cardwell's memorandum which was not in fact the report (to use the Appellant's word) on which the formal decision to open the inquiry was based (and preceded that decision by 1 ½ months). The Appellant had submitted that Emma Cardwell's memorandum had been copied "verbatim" by Tamsin Long but Mr Henderson submitted that a comparison of the documents shows this not to be the case. If the FTT had erred in law in not deciding the Appellant's submission about inaccuracy of the report, then he submitted that it was not a material error because the effect of it was neutralised by the following factors: (i) the FTT had noted that the Respondent had not as yet made any final findings of fact; (ii) in order to mount a successful challenge of this nature the Appellant would have needed to establish the alleged inaccuracy before the FTT by the production of objective and non-contentious evidence, which it had not done; and (iii) the alleged inaccuracies did not impact upon all of the areas of concern identified by the Respondent so it was unlikely that, even if made out, they would have altered the decision to open an inquiry.

34. In relation to the Appellant's submission that the Tribunal had erred in assuming that the Respondent had already reviewed its decision to open the inquiry, Mr Henderson submitted that this was a question of fact rather than of law and so not capable of appeal to the UT. In any event, this submission did not go to the heart of the decision to open the inquiry but only to the question of whether the FTT hearing should have been adjourned and there has been no suggestion that the Appellant was prejudiced by the lack of an adjournment. Finally, if this submission is to be read as alleging a procedural error, then even if correct, that error would be immaterial to the outcome of the FTT hearing.

35. Mr Henderson submitted that the circumstances in which the FTT might be asked to conduct a review of a decision by the Respondent to open an inquiry were so varied that any general guidance to the FTT should be limited to the following four principles. Firstly, that the FTT must apply the principles which would be applied by the High Court on an application for judicial review. Secondly, that the application of those principles involves an examination of whether the decision to open the inquiry was made having regard to all the relevant and to no irrelevant considerations and to consideration of whether the decision was unreasonable in the circumstances as they existed at the time it was made. Mr Henderson agreed here with the Respondent's submission that there are three classes of consideration for the Respondent in making its decision: (i) those to which the Commission must have regard; (ii) those to which it must not; and (iii) those which it may or may not take into account at its discretion. He submitted that it is for the FTT to decide which category any particular consideration falls into. Thirdly, that if the Respondent had taken into account a consideration that it should not have taken into account, there will be no ground for setting the decision aside unless it was found that not taking it into account would have made a

difference to the decision it made. Fourthly, that even if the FTT decided that the application for review should be allowed, it would then have to decide whether to exercise its discretion to direct the Respondent to close the inquiry. In doing so, if the circumstances which existed (or as they had developed by the time of the FTT hearing) were such as to justify the opening of an inquiry, it would be generally be inappropriate for the FTT to direct the Respondent to close its inquiry.

36. In concluding his submissions, Mr Henderson submitted that several major concerns about the Appellant were outstanding at the time of the FTT hearing. In particular, the FTT was aware that payments from the charity's bank account remained unaccounted for; that there was no evidence of what had happened to the money raised by the mortgage on the charity's property; there were concerns about trustee benefits and conflicts of interest in relation to the refurbishment works which remained (and still remain) to be addressed; and there were (and still are) no charity accounts. He commented that the causes for concern could be seen to have multiplied further during these proceedings, as the Appellant had submitted in its skeleton argument for the UT that the money lost in the American investments was not in fact charity money, whereas Anthony Markovic's correspondence with the Respondent in April 2013 had referred to a decision to invest *"the charities funds in dollar based assets"* and to the selection of the "*charity's American Stock broker"* and the letter he had produced from the American stockbroker refers to the establishment of a "*charity account"* on Mr Markovic's instructions. In these circumstances, Mr Henderson submitted, the FTT's robust approach in dismissing the appeal was correct and its decision should not be set aside by the UT.

Conclusion

37. We accept the submissions of the Respondent and the Intervener that, when exercising its review jurisdiction, the FTT is not required in every case to test, in a formulaic manner, the Charity Commission's decision against the "classic" grounds for judcial review. We agree that the FTT's role is to consider whether the decision to open the inquiry was one that no reasonable decision maker could have made at the time it did so, and that this will include consideration of a range of fact-sensitive issues, depending on the facts in the case and the nature of the challenge made to the Charity Commission's decision. From that standpoint, we conclude that there was no error of law in the FTT's failure to expound the precise basis of its review in this case, although we would regard it as good practice in future cases for the FTT to make clear in its decisions on reviewable matters that it had asked itself the relevant questions.

38. We reject the Appellant's submission that the decision to open the inquiry was invalidated by a failure to engage for longer in informal corresondence with the charity so as to clear up the alleged factual inaccuracies before opening the formal inquiry. We accept Mr Henderson's submission that there is no way to identify in advance the "tipping point" at which it becomes reasonable to open a statutory inquiry, and that this question is one of the wide areas of discretion which Parliament has conferred on the Charity Commission in s. 46 of the Act. The Appellant is correct, in our view, to assert that the Respondent must take care to consider and evaluate all the material provided to it before making its decision, but unless it strays into the arena of ignoring considerations which are mandatory

(which include the matters in ss. 14 to 16 of the Act, but may also extend to others depending on the case) or including irrelevant considerations, the extent to which it needs to verify any areas of legitimate concern before deciding to operate under the auspices of the statutory framework is, we find, properly a matter for its discretion.

39. The Appellant has argued that the FTT erred in law by failing to deal with an important part of the case before it, namely that it had been alleged that there were factual errors in the Respondent's case on which it had relied to open a statutory inquiry. We are satisfied that the FTT did fail to consider this point but consider it a finely balanced question whether that faiulure constitutes an error of law, for the reasons given by Mr Henderson at [33] above. We note that under s. 12 of the Tribunals, Courts and Enforcement Act 2007, if we find that there was an error of law in the decision of the FTT we may (but need not) set it aside and so we have considered whether, if there was an error of law in this respect, it is one which would cause us to set aside the FTT's decision.

40. In order to decide whether the FTT decision should be set aside, we have considered whether the factual errors alleged by the Appellant would, if correct, have led the FTT to decide that the Respondent's decision to open the inquiry was not a reasonable one. We have to that end reviewed the memorandum written by Emma Cardwell which was, we accept, substantially relied upon by Tamsin Long. We have concluded that, even if the Respondent had accepted the facts to be as the Appellant now tells us they are, it would still have been reasonable for it to have opened an inquiry at the time that it did. In particular, we note that:

    (a) the Respondent was aware at the time it opened the inquiry that the share in Quain Limited was said to have been held on trust by Anthony Markovic for the Appellant but the trust documentation provided was unsatisfactory (see paragraph 9 (b) above). Anthony Markovic was known to have been the sole shareholder in Quain Limited at the time when the leases were granted, so even though it was said that he had at that time held the share in Quain Limited as bare trustee for the Appellant and it later became apparent that a formal share transfer had been made (see paragraph 11 above), there was, at the time it decided to open the inquiry, a legitimate area of concern for the Respondent about the relationship and management of conflicts of interest between Mr Markovic, the Appellant and Quain Limited;

    (b) even if Quain Limited had held the leasehold interest on trust for the Appellant as claimed, it seems to us that the Charities Act provisions should have been complied with as s. 36 of the 1993 Act (replicated in s. 117 of the Act) refers to "property held by or in trust for a charity".

    (c) There were additional areas of concern in relation to the charity's financial transactions at the relevant time and the failure to produce accounts. These concerns are unaffected by the Appellant's submission as to error of fact.

41. We have concluded that the decision to open the inquiry was a reasonable one in the circumstances and that the FTT was correct to dismiss the application before it. We agree with the Intervener's submissions at [35] above and conclude that it would generally be inappropriate for the FTT to directed the Respondent to end an inquiry in circumstances where there are significant causes for concern about a charity. We conclude that we should not set aside the FTT's decision in this case.

42. Finally, we note that the FTT's decision about the requested adjournment of the hearing may have relied on certain assumptions. However, we also note that in asking for an adjornment at that stage, the Appellant may also have misunderstood the nature of the internal review offered by the Respondent. We note that the Respondent's internal review process has no statutory relationship to the right of appeal to the FTT, and that the time limits for making an application to the FTT would in many cases have expired if an internal review was pursued. In these circumstances, it is difficult to see how the internal review process could be viewed as an alternative remedy which must be exhausted before applying for a review by the FTT. In the circumstances of this case, the FTT's decision not to adjourn in order to allow for an internal review seems to have had no adverse impact on the Appellant's ablility to present its case to the FTT or consequently on the FTT's final decision. We find no error of law in this regard.

43. For the reasons above, this appeal is dismissed.

Mr Justice Warren
President

Alison McKenna
Upper Tribunal Judge

Release Date: 8 August 2014