

CHARITY COMMISSION
DECISION OF THE CHARITY COMMISSIONERS FOR ENGLAND AND
WALES - MADE ON 19th June 2002

THE CASTLE TRUST

**REVIEW BY THE COMMISSIONERS OF THE SCHEME
DATED 5 OCTOBER 2001**

Introduction

On 5 October 2001 the Commission made a scheme by which the Castle Trust's half share in the freehold of The Theatre Royal Margate was transferred to another charity, the Margate Theatre Royal Trust (MTRT). The scheme was made at the request of new trustees of the Castle Trust, who had been appointed by the Commission on 22 March 2001.

The previous trustees of the Castle Trust (CT), who had been suspended by an order of the Commission, asked for the scheme to be reviewed under the Commission's provisions for reviewing its decisions. This review has been undertaken by two Commissioners.

Mrs Cousens (who is one of the complainants) has supplied us with a large number of documents for the purpose of this review. We have read them all, as well as all the relevant files held by the Commission. The fact that our decision does not refer to a particular document does not mean that it has not been considered.

Background

The Theatre Royal Margate is the second oldest working theatre in the country. It was established in 1787 and is a grade 2* listed building. In 1988 Mr Jolyon Jackley bought the building, and his company (Margate Theatre Royal Limited) then spent considerable sums on refurbishment and redecoration before re-opening it as a theatre. By the following year, Mr Jackley's company was experiencing severe financial difficulties, and the building was at risk of falling into disrepair. The total amount required by Mr Jackley for a rescue package was £300,000.

CT had been formed in 1979. Its original main objects were to restore and maintain The Castle Hotel in Ramsgate and to carry out within the building "matters of a cultural nature concerned with the arts and kindred subjects". It was not at that stage a charity. In autumn 1988 The Castle Hotel had been sold, so that by 1989 CT's main asset was a substantial sum in cash. CT was approached in September 1989 to see if it would participate in a rescue package for the theatre.

Discussions about the rescue continued during 1990 and 1991. In outline, it was envisaged that the freehold would be acquired in equal shares by CT and MTRT, while the management and running of the theatre would be in the hands of another company or trust in which Mr Jackley would be involved. CT's share of the purchase price would be provided from its cash reserves. MTRT's share would be lent, free of interest, by Kent County Council and Thanet District Council. Further loan finance would be provided by the Theatres Trust (another registered charity), which would channel its funding through the Equity Trust Fund.

By late 1990 it was being suggested that CT and MTRT would grant a lease to a new charitable company, the Tristram Trust, and that Mr Jackley would be an employee of this company. But none of these arrangements for the running of the theatre was ever embodied in any concluded agreement.

CT consulted the Charity Commission. The Commission agreed that CT's objects should be amended, that it should be registered as a charity and that it could properly use its funds to pay for a half share of the freehold. Its amended objects were to restore and maintain buildings of architectural and historic interest for the benefit of the Isle of Thanet, and to promote the arts.

On 12 April 1991 CT and MTRT entered in to a contract to buy the freehold of the theatre from Mr Jackley for £225,000, and the purchase was completed on 31 May 1991. In addition, it was envisaged that a further £75,000 would be paid for fixtures and fittings, to be funded by the proposed loan from Equity Trust. Again there appears to have been no concluded agreement setting out the details of this arrangement.

By 1992, serious problems and disagreements had already started to arise. There was a dispute about the fixtures and fittings. Some items could not be accounted for, Equity Trust refused to hand over its £75,000, and Mr Jackley's company did not receive any payment for the fixtures and fittings. CT blamed MTRT, which it believed to have reneged on the terms of the rescue package and to have been responsible for the subsequent insolvency of Mr Jackley's company. In 1997 Mr Jackley's company, which was by then in liquidation, accepted a sum of £10,000 from MTRT in full and final settlement for the fixtures and fittings.

There was also an impasse about who should manage the refurbishment and restoration of the theatre and its running once it was in a position to re-open. Although the Tristram Trust had been incorporated in June 1991 and registered as a charity, it never received any lease or licence of the theatre and it is not clear whether it ever actively functioned. In 1992, Mr Wheatley Ward (who had previously been involved as a director of Mr Jackley's company) was given a temporary role of development director, and this appointment was subsequently continued. CT says that it never agreed to his appointment, and that Mr Wheatley Ward was not a fit and proper person to be running the theatre.

The upshot of these disputes was that by 1993 CT was not even prepared to meet with MTRT to discuss a way forward. CT even reported MTRT to the police, with a suggestion that MTRT had defrauded Mr Jackley. The police investigated and concluded that there was no cause for them to take any further action.

Meanwhile MTRT (assisted by Mr Wheatley Ward, among others) continued to carry out work on the theatre and to move towards reopening it. In 1994 CT opposed a licensing application for the theatre, and the Theatres Trust became so concerned about the impasse that it asked the Charity Commission to intervene. The Commission had great difficulty in getting any response from CT, but CT's stance was encapsulated in a letter of 12 October 1995:

“The Castle Trust could not under any circumstances consider coming to an accommodation with these people [MTRT] after their past conduct”

In a revealing minute of 22 February 1996 CT's Executive Committee criticised their own solicitors for showing “lack of resolve” and for advising conciliation and discussion with MTRT.

While refusing to meet with MTRT, CT continued to obstruct the theatre's activities. In March 1995 CT opposed an application for a liquor licence; in June 1995 Mrs Cousins lobbied the Arts Council to prevent a grant to MTRT; in July 1996 CT objected to the grant of a Public Entertainment and Theatre Licence. The Commission discussed with the trustees of CT possible ways of resolving the impasse, including a sale of CT's share of the freehold to MTRT. In March 1997 CT confirmed it was not prepared to sell, and the Commission took the view that it could do no more at that stage.

In 1999 and 2000, MTRT approached the Commission again. The theatre had by then been re-opened for some years and was being administered by MTRT on a tight budget, but MTRT was very concerned that a proper business plan and fundraising were needed to put the theatre on a sound financial footing and that this could not be achieved while CT, as co-owner, refused any form of cooperation.

On 12 September 2000 the Commission warned CT that it must either resolve its differences with MTRT or agree to mediation; otherwise the Commission would take further action. Mrs Cousins' response was to tell Sir Alistair Hunter (the chairman of MTRT) that CT was not prepared either to mediate or to meet with the trustees of MTRT to explore a resolution.

On 5 February 2001 the Commission opened an inquiry into the affairs of CT under section 8 of the Charities Act 1993. On 22 March 2001 it made orders under section 18 of the Act suspending the trustees of CT and appointing five new trustees to act in their place. The new trustees included the chairman of Kent Opera, a trustee of the Theatres Trust, a Kent County Councillor and trustee of the South East Arts Board, a Thanet District Councillor, and a former General Director of Scottish Opera.

On 7 August 2001 the new trustees applied for a scheme for CT, and the order making the scheme was made on 5 October 2001.

The Complainants' grounds for review

Section 89(3) of the Charities Act 1993 limits the circumstances in which the Commission can discharge an order making a scheme. The order can be discharged only if it has been made "by mistake or on misrepresentation or otherwise than in conformity with [the Charities Act 1993]". The grounds for review therefore have to be measured against this test. Four grounds are relied on, and although they overlap to some extent we shall consider them in turn.

A) Publicity given to the draft scheme was not adequate for the purposes of section 20 of the Charities Act 1993

Notice was published in the East Kent Mercury and on notice boards in the theatre and Thanet District Council offices. The complainants say that coverage of this newspaper is minimal in Thanet (its main areas of circulation being Sandwich and Deal), that the notice in the theatre was inadequate, and that it is not clear that all councillors saw the notice in the council offices.

Under section 20(1) of the Act, the Commission have to give "public notice" of a draft scheme, inviting representations. Section 20(8) gives the Commission a wide discretion as to how this public notice is to be given, providing only that it shall be given "in such manner as [the Commissioners] think sufficient and appropriate".

We are satisfied that the notices given fall within this wide discretion. There is no requirement that the notice must have been seen by all councillors.

We would add (although this is not part of the grounds of our decision) that there is no evidence that anyone who would have liked to make representations was unaware of the scheme.

B) The Commission failed to consider adequately the suspended trustees' representations against the scheme

There are two parts to this complaint. The first is that the representations were not dealt with impartially, because they were considered by David Nash-Brown, who had been involved when the Commission's assistance had been invoked earlier in 1995-6 and who (it is said) was criticised in the suspended trustees' representations.

The representations would normally have been considered by the case officer who had been dealing with the inquiry into the charity, Alex Sienkiewicz. They were dealt with by Mr Nash-Brown on this occasion because Mr Sienkiewicz was on holiday and Mr Nash-Brown was his line manager. The complainants have not identified any legal requirement that representations against a draft scheme must be considered by someone who has had no previous involvement with the case, and we do not consider that there is any such requirement.

As to the point that the representations criticised Mr Nash-Brown, we would not regard this in itself as debarring him from considering the representations. But in fact the real criticisms in the representations do not focus on Mr Nash-Brown at all; they relate to the earlier period when relations between CT and MTRT first broke down.

The second part of this complaint is that the representations referred to 60 documents which had been delivered to the Commission in 1995 but not retained by the Commission. It is said that if the Commission had fully considered these documents, it would not have concluded that the trustees should be suspended or that the Commission should proceed with the scheme.

We have now seen and considered all of these 60 documents. Most of them relate to the events between 1990 and 1993, and the complainants rely on them to argue that MTRT defaulted on contractual obligations which it had undertaken as part of the rescue plan, that MTRT was responsible for the breakdown of cooperation and communication between the two trusts, and that CT was therefore justified in adopting an uncooperative stance.

We do not consider that the 60 documents (or any of the other material supplied by the complainants) justify this argument. As regards the fixtures and fittings, the contractual position remains obscure. But the grievance, so far as there was one, belonged to Mr Jackley and his company. Neither of them has ever made any complaint to the Commission. The company's claim for payment from MTRT was settled in 1997, and Mr Jackley confirmed to the Commission in 2001 that as far as he was concerned the matter was closed.

As regards the role of the Tristram Trust, again the contractual position is obscure. But we have seen no evidence of any concluded contract for it to occupy the theatre under any form of lease or licence. The Tristram Trust has never made any complaint to the Commission or pursued any form of claim against MTRT.

In any event, and most importantly, the Commission had to deal with the *current* position in 2001. The theatre was a charitable asset whose future was being put in jeopardy by the fact that CT (for whatever historical reasons) was not prepared to enter into any form of dialogue or cooperation with MTRT as co-owner. All attempts to persuade CT to resolve the position by discussion or mediation had failed, both in 1995-6 and in 2000-1.

C) In establishing the scheme the Commission failed to exercise its powers and discretions properly under section 16 of the Charities Act 1993

The suspended trustees claim that their actions were justified and reasonable and should not have led to their suspension or the establishment of the scheme.

They rely on two particular points under this heading. First, they say that their actions were based on guidance published by the Commission, and in particular the general principle that trustees should be in control of their trust property. They say that they should not have been locked out of the building.

The “lockout” incident occurred in March 1993. The locks had been changed on the theatre building and CT had not immediately been supplied with a key. This seems to have been simply an oversight. As soon as CT complained, MTRT promised that keys would be sent. Indeed the fact that the complainants, nine years later, still rely on this apparently trivial incident is an indication of how they have lost a sense of proportion.

The more general point about retaining control of trust assets is of course correct as a broad principle. But such control is required so that the assets can be effectively deployed in pursuit of the charity’s primary purposes. Where an asset is jointly owned, control requires cooperation between the two owners. Over the past 10 years MTRT has consistently asked for dialogue and cooperation, while CT has consistently refused it. If CT has not been in effective joint control of the theatre, it has largely itself to blame. We do not doubt the sincerity with which the complainants held their views. But their rigid pursuit of those views has been misguided.

Secondly, the complainants try to justify their refusal to cooperate with MTRT by arguing that Mr Wheatley Ward was “an unfit person” with whom they “could not and should not cooperate”. They object to him because he had been involved in previous ventures which had incurred excessive debts “which prevented him from acting as a charity trustee”.

Mr Wheatley Ward had been a director of Mr Jackley’s company in 1988-9 which (as we have mentioned above) later went into insolvent liquidation. He had also been a director of a company called Award Leisure Limited in Basildon, which had also gone into liquidation with substantial debts.

There was nothing in this past history which prevented Mr Wheatley Ward from carrying out the role which MTRT wished him to fill. He was *not* a charity trustee, and part of the job of the CT and MTRT trustees would have been to ensure that proper financial controls were in place and that there were appropriate arrangements for his reporting and supervision. But if the CT trustees were really adamant that he was the wrong man for the job, the solution was for them to discuss the problem with their co-owners; not to refuse all contact and cooperation.

D) The Commission raised and encouraged an expectation that a particular course of action would be followed which it subsequently and unjustifiably broke.

The complainants say that the Commission originally agreed to the proposal in 1991 that the Tristram Trust would manage the theatre, and that the Commission has now acted unreasonably “in departing from whatever assurances were originally given”.

This argument misunderstands and misstates the Commission’s role. It was up to the two trusts to decide how the theatre should be administered and run. In 1991 MTRT and CT were envisaging that the Tristram Trust would take on a management role, and the Commission was content for them to proceed in that way. But the Commission never *required* them to engage the Tristram Trust. Nor did the Commission ever give any “assurances” about how the theatre would be managed in future. There is nothing in this ground of complaint.

Conclusion

The complainants have not established any grounds for discharging the scheme.