

CHARITY COMMISSION
THE RECREATION GROUND, BATH

DECISION REVIEW OF THE COMMISSION'S DECISION TO MAKE AN ORDER UNDER SECTION 26 CHARITIES ACT 1993 AS AMENDED BY THE CHARITIES ACT 2006 FOR THE GRANT OF A LEASE, AND TO MAKE THE ORDER IN THE PROPOSED FORM

ISSUES

1. Whether the Commission is satisfied that granting a lease to Bath Rugby Club to occupy and use 1136 square metres or thereabouts being part of the land comprising the Recreation Ground at Bath for a period from 14 August 2007 to 21 May 2008 for the purpose of erecting and maintaining a stand should be authorised as being expedient in the interests of The Recreation Ground Bath ("the Charity").

REVIEW DECISION

2. Having considered the issues and representations, and reviewed the basis for authorising the lease under Section 26 and the proposed terms of the order, the Commission determined that the decision to authorise the lease under Section 26 as being expedient in the interests of the Charity in the form of the order attached should stand.
3. This review decision on behalf of the Commission was taken by Lindsay Driscoll and John Williams, Board Members under delegated authority.

BACKGROUND

4. The Recreation Ground, Bath ("the Rec") is a large open space in the centre of Bath, used for recreational purposes by Bath residents and the public generally. The Rec was initially owned and managed by Bath and North East Somerset Council's ("BANES") as part of its corporate property until a decision of the High Court in July 2002¹ determined that the Rec was and had been held on charitable trusts, and that the trustee was charged with maintaining the Rec "as a recreational facility available for the benefit of the public at large."² The Rec was registered as a charity in November 2002. BANES is the trustee of the Charity and delegates authority to manage the Charity to a Trust Board.
5. Bath Rugby Club ("the Rugby Club") already has a lease, granted in 1995, with over 62 years remaining, over part of the Charity's land. In 2003 and 2004 the Commission gave authority for a short-term lease to the Rugby Club to erect a temporary stand without which the Rugby Club could not provide the facilities required by the Premiership. The Commission considered that this was expedient in the interest of the Charity as it would give BANES the opportunity to undertake a review of current and future activities on the Rec in light of its charitable trusts together with the needs of its current and future beneficiaries. In August 2006 the Commission authorised a further one-year lease between the Charity and the Rugby Club for the temporary stand area to enable BANES to complete the Strategic Review within that time period.

¹ Bath and North East Somerset Council v HM Attorney General [2002] EWCA 1623 (Ch).

² The Conveyance dated 1 February 1956 provides: "the corporation shall not use the property hereby conveyed otherwise than as an open space and shall so manage let or allow the use of the same for the purposes aforesaid as shall secure its use principally for or in connection with the carrying on of games and sports of all kinds and shall not show any undue preference to or in favour of any particular game or sport or any particular person club body or organisation."

FRAMEWORK

6. The Charity does not have the power to grant the lease within the power conferred by the governing document, nor under statutory powers because it would not be ancillary to its charitable purpose. Even if it had the power, the Rec has been vested in the Official Custodian for Charities³ (OCC) as a protective measure and any disposal will require the Commission's consent.
7. The Commission can give authority for this grant under section 26 of the Charities Act 1993 as amended by the Charities Act 2006 ("the Act"). This authority can be given on the ground that it is "expedient in the interests of the charity". Authority can be conferred notwithstanding that the lease cannot be justified as being in furtherance of the purposes of the charity, provided that it is not expressly prohibited by the trusts of the charity or shall extend or alter the purposes of the charity.⁴
8. In deciding whether a course of action is expedient in the interests of the Charity, the Commission is not able to substitute its decision for that of the BANES Trust Board. Section 1(4) of the Charities Act 1993 specifically prohibits the Commission from acting "in the administration of a charity". In considering whether the proposal to grant the lease is expedient in the interests of the Charity, the Commission will consider whether the BANES Trust Board had made the decision in furtherance of its objects and powers, the decision was properly taken, that it was taken in the best interests of the Charity, and that the proposal provides an advantageous means of furthering its purposes.
9. In assessing whether the decision was properly taken by the BANES Trust Board in the best interests of the Charity and whether the BANES Trust Board had properly discharged the responsibilities of the Trustee in making such a decision, the following criteria should be considered:
 - (1) *To act within the powers conferred upon them and the established rules and procedures for dealing with issues of the kind under consideration*⁵.
 - (2) *To act in good faith*⁶
 - (3) *To adequately inform themselves in order to make the decision in question*⁷
 - (4) *Not to take into consideration any factors which it was not proper for them to take into account*⁸
 - (5) *To consider any factors which they should take into account*⁹
 - (6) *To act reasonably (i.e. the decision should be within the range of decisions which a reasonable body of trustees could have made)*¹⁰

3 Section 18(1)(iii) of the Act

4 Section 26(1) of the Act

5 *re Hastings-Bass dec'd* (CA)[1975] Ch 25

6 *re Hastings-Bass (supra)*; *Armitage v Nurse* [1997] 2 ALL ER 705

7 *R v Charity Commissioners ex parte Baldwin* (2001) 33 HLR 48, QBD; *Scott v National Trust (supra)*

8 *Mettoy Pension Trustees v Evans* (Ch.D.) [1990] 1 WLR 1587; *Dundee General Hospitals Board of Management v Walker and another*[1952] 1 ALL ER 680

9 *Mettoy Pension Trustees v Evans supra*; *Dundee General Hospitals Board of Management*

10. The BANES Trust Board provided the following arguments in support of the grant of the lease:

(1) Granting of the temporary lease is in the best interests of the Charity because a final resolution of the problem posed by the occupation of the Rec by the Rugby Club cannot realistically be achieved before the commencement of the next playing season.

(2) The temporary stand represents the Charity's largest source of income accounting for some 75% of its total income. Without this income the Charity will effectively be insolvent and notwithstanding the moral obligations of the local authority, there are no financial ones to provide an alternative income stream.

(3) Granting the lease has no impact on implementing the Strategic Review outcome, whichever option is agreed with the Commission. At the time the decision was taken by the Trust Board it was expedient not only financially, but also strategically to ensure that none of the options considered within the Strategic Review was prejudicially affected. Not granting the lease would in effect remove 2 of 3 options as realistic outcomes from the Strategic Review.

(4) Not granting the lease will make it far more difficult in negotiating a new lease on significantly more favourable terms to the Charity with the Rugby Club, particularly if the Charity's financial position is significantly weakened. The Rugby Club have strongly indicated no intention of relinquishing the remaining 62 years of their main lease it seems tactically prudent to ensure that no obstacles prevent the Charity from implementing its preferred outcome from the Strategic Review.

(5) A valuation assessment undertaken in April 2007 by an independent professional Valuer stated that, "We are satisfied that the rent now proposed is the best that can reasonably be obtained and is significantly in excess of the Market Rent for the Property".

11. The Commission considered the arguments made by BANES Trust Board and determined that it had properly discharged the responsibilities of a charity trustee in making the decision to grant the lease. Consequently a decision was made by the Commission in principle on 14 June 2007 to authorise the proposed lease on the basis that this was expedient in the interests of the Charity. The Commission has agreed to review the decision following a request for a review by Mr Worthy Gilson.

12. In carrying out the review the Board Members were satisfied that the arguments set out in paragraph 10 were reasonable based on evidence and were also satisfied on the following points:

(1) The decision had been taken by the BANES Trust Board to whom fulfilment of the functions, powers and duties of the Council as trustee had been delegated. The decision was therefore taken within the rules and procedures established for taking decisions in connection with the management of the Charity.

(2) In considering whether the trustees had acted in good faith, there is a presumption of good faith. There was no evidence to refute this presumption.

(3) The BANES Trust Board had properly informed themselves in relation to the decision. The test to be applied by the courts is not one of the trustees having

¹⁰ *Lee v Showmen's Guild of Great Britain* [1952] 1 ALL ER 1175; *Scott v National Trust* [1998] ALL ER 705; *Sieff v Fox* [2005] 3 ALL ER 693

complete information forming the basis of a full analysis and discussion¹¹, but instead is of a lower level. In particular, Board Members are aware that the BANES Trust Board has sought appropriate independent professional advice (legal and valuation) in order to inform itself on matters in which it was not expert. Having taken this advice and informed itself by way of the Strategic Review (which involved public consultation) the BANES Trust Board made the decision (for the reasons given above) that the proposed lease would be of advantage to the Charity.

(4) There was no evidence that the BANES Trust Board had taken into consideration any factors it was not proper for them to take into consideration.

13. The Board Members then considered the various representations made to the Commission in relation to the proposed order and, in general, objecting to the on-going occupation of part of the Rec by the Rugby Club. The Board noted that it was difficult to extrapolate a succinct series of grounds why the objection should be upheld. In summary, these were:

- Maladministration by BANES in its management of the Rec.
- Occupation by the Rugby Club and other ventures in breach of trust
- Inappropriate benefit by the Rugby Club through commercial misuse.
- Abuse of powers and failure to regulate by the Commission.
- Lack of transparency by BANES and the Commission.
- Deprivation of use of car parking through unlawful traffic and car parking abuses.
- Inadequate and manipulated accounts.

14. The Board Members recognised the representations about the Charity were important factors for the trustees to take into account before implementing decisions from the Strategic Review. However the Board Members were satisfied that in light of the arguments for expediency, it was expedient to make the order at this stage to authorise a lease for one year. In light of the complex issues surrounding the future of this charity and the various stakeholders, any more permanent decisions about the future use of the Rec needed to be taken in compliance with trustees' duties in relation to decision making and in accordance with best practice. It was decided that directions for BANES should be contained in the order including:

- to ensure that the Rec is managed properly as the property of the Charity for the benefit of the public now and in the future;
- to satisfy the Commission that BANES continues to discharge its legal duties and responsibilities as trustee of the Charity;
- to address and make decisions arising from the Strategic Review as an urgent priority, taking account and giving due consideration to relevant representations received;
- to report to the Commission on its progress in the Strategic Review and other relevant matters.

15. The Board Members considered whether the proposed order could be justified as an act not expressly prohibited by the trusts of the charity.¹² The Commission concluded that despite the restrictions outlined in the 1956 conveyance², when viewed as a whole, the order was consistent with the trusts of the charity and the Commission had the power to authorise the proposed lease.

¹¹ In *Scott v National Trust*, the Judge recognised that complete information and full analysis is not the appropriate standard and that "too stringent a test may impose intolerable burdens".

¹² Section 26(5) of the Act

CONCLUSIONS

16. Having considered the issues and representations the Board members concluded they were satisfied that:
 - a) the proposed lease can be authorised by the Commission;
 - b) the BANES Trust Board has exercised its discretion properly in deciding to enter into the proposed lease agreement; and
 - c) the proposed lease is beneficial and in the interests of the charity.

17. The decision to grant the lease should be authorised as being expedient in the interests of the charity, in the terms set out in the annexed order.

Lindsay Driscoll

John Williams

19 July 2007