[2018] UKUT 0402 (TCC)

Appeal number: UT/2017/0167

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PAULINE DENSHAM	**Appellant**
- and -	
THE CHARITY COMMISSION FOR ENGLAND AND WALES	**Respondent**

TRIBUNAL: MRS JUSTICE FALK
UPPER TRIBUNAL JUDGE McKENNA

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1 NL on 15 October 2018

Mark Herbert QC and Christopher McNall for the Appellant, instructed by Advocate (formerly known as the Bar Pro Bono Unit).

Kate Selway for the Respondent, instructed by the Charity Commission Litigation and Review Team.

DECISION

Background

1. The Appellant is an allotment-holder and local resident of Hughenden, Buckinghamshire. The Charity Commission considers that certain land held by Hughenden Parish Council for local allotments is subject to charitable trusts for the relief of the poor. The Appellant contends that the land is not so held. The allotments were originally registered as a charity known as "Allotments for the Labouring Poor" in 1966. That charity was removed from the register in 2008 for failure to file accounts. It was then restored to the register in 2011 under number 248607. Both Hughenden Parish Council and HM Attorney General were invited to be joined to these proceedings but neither wished to do so.

2. The Appellant appeals against a decision of the First-tier Tribunal (General Regulatory Chamber) (Charity) (the "FTT") dated 14 August 2017 following an oral hearing on 19 June 2017 (Appeal numbers CA/2015/0011 and CA/2017/0002) (Judge Jonathan Holbrook, Ms Helen Carter, Ms A'isha Khan).

3. The FTT by its decision dismissed the Appellant's appeals against two decisions of the Charity Commission, namely:

> (1) a decision taken on 7 October 2015, to make a fully-regulating Scheme for "*Hughenden Community Support Trust, previously known as Allotments for the Labouring Poor*" under s. 18 of the Commons Act 1899 and s. 67(2) of the Charities Act 2011; and
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> (2) a decision taken on 20 December 2016 under s. 34 of the Charities Act 2011 not to remove the Hughenden Community Support Trust from the register of charities, following the Appellant's request for its removal.

4. The dispute between the parties concerns the legal effect of two awards made under powers conferred by the Inclosure Act 1845 (awards dated 27 March 1855 and 4 August 1862). The FTT was asked to decide whether these awards had created charitable trusts over the land, and whether subsequent legislation had extinguished any such trusts. The parties' opposing interpretations of the awards in turn calls into question the Charity Commission's jurisdiction to maintain the registration of the charity and to exercise its scheme-making powers in relation to it. The FTT agreed with the Charity Commission that the awards established charitable trusts, that this was unaffected by subsequent developments such that a charity continued to exist, that the Charity Commission had jurisdiction to make the scheme, and that it was not obliged to remove the charity from the register.

5. Permission to appeal was initially refused by the FTT but was granted on renewal by the Upper Tribunal (Judge McKenna) on 22 December 2017. The grounds of appeal in respect of which she gave permission were summarised as follows:

> (i) that the FTT failed to rule on the prior question of whether a charitable trust can be established in the absence of a gift;

(ii) that the FTT misdirected itself by finding that a statutory provision concerned with the welfare of the poor created a charitable trust;

(iii) that the FTT erred in its finding of fact to the effect that there was an element of subsidy in the terms on which allotments were let;

(iv) that the FTT erred in concluding that the requirement for surplus rental income to be transferred to the Overseers of the Poor supported a conclusion that charitable trusts had been created;

(v) that the FTT erred in concluding that the Charity Commission had jurisdiction to make a scheme under s. 67 (2) of the Charities Act 2011 and/or s. 18 of the Commons Act 1899; and

(vi) that the FTT erred in failing to distinguish between the different statutory frameworks provided by ss. 5 and 14 of the Local Government Act 1894 in considering the basis on which the allotment land was transferred to the Parish Council.

As discussed further below, the submissions before us were refined to focus on the single question of whether charitable trusts were created by virtue of the two original awards.

6. By way of historical context, we were helpfully referred to extracts from the "Thorpe Report"[1] which explains that the creeping enclosure of land through private Acts of Parliament from around 1760 onwards had brought about a "*great social evil*" by excluding from the land the "*peasant cultivator*" who had for centuries exercised his ancient but ill-documented rights over common arable and pasture land. Contemporary proponents of enclosure pointed to the benefits of new methods of farming, such as crop-rotation, which were anathema to an open field system; opponents of enclosure described the "*direst poverty*" it inflicted on the rural proletariat, with the consequential mass migration to urban areas and increased costs of poor-relief. Whilst many private Inclosure Acts had made provision for land to be set aside for cultivation by the poor, many did not, and it was not until 1845 that a serious attempt was made by Parliament to regulate such provision. The Thorpe Report describes the General Inclosure Act of 1845 as follows at paragraph 8:

> *"This Act empowered the Inclosure Commissioners to specify as one of the conditions of enclosure the appropriation of such an allotment for the labouring poor as they thought necessary. It went on to permit the wardens of Inclosure Acts to set aside land as 'field gardens' (limited to a quarter of an acre in extent) for the poor, and, more important, required them to account to the [Inclosure] Commissioners for any failure to do so. Thus, the association of enclosure with allotment provision was at last ratified."*

[1] Report of the Departmental Committee of Inquiry into Allotments, presented to Parliament by the Minister for Housing and Local Government in October 1969.

7. The two inclosure awards with which we are concerned each allot land to the Churchwardens and Overseers of the Poor for the parish "*to be held by them and their successors in trust as allotments for the labouring poor of the said parish…".* As discussed below, this reflects the drafting of the Inclosure Act 1845. The allotments are stated to be subject to a rent charge.

8. This is not the first time that the courts have considered the question of whether land enclosed and dedicated to potentially charitable purposes, such as the relief of the poor, is held by a local authority for its corporate public purposes or on charitable trust. We refer to the case law in detail below. We were also referred to an academic consideration of the issue *"Distinguishing Government from Charity in Australian Law"* published by Professor (as he now is) Matthew Harding of Melbourne University in (2009) 31 Sydney Law Review 559. We read with interest the conceptual distinction he draws between acts of "administration" and acts of "voluntarism" but noted his acknowledgement that this distinction has not been consistently applied in the decided cases.

Submissions

9. By the time of the hearing before us, the Appellant's broad challenge to the FTT's decision in her application for permission to appeal had been refined, as follows. Mr Herbert's submissions focused on the distinction between public (governmental) and private (charitable) provision for the poor in the mid-nineteenth century. He argued that the awards should not be understood to have created (or to have been intended to create) a charitable trust for a variety of reasons. He reminded us that the doctrine of *mortmain* had from the thirteenth to the nineteenth centuries served as an impediment to the dedication of land to charitable purposes in perpetuity, and he referred us to the founding statute for the British Museum in 1753, which expressly provided at section 14 that the Mortmain Act 1735 did not apply to the incorporated charity thereby created. He also referred us to *Trustees of British Museum v White*[2] in which the Vice-Chancellor had declared a particular gift to the British Museum to have been voided by the Statute of Mortmain. The Appellant did not, however, seek to maintain that the awards the subject of this case were themselves void under mortmain legislation, but rather that the existence of that legislation supported the conclusion that no charitable trust was intended to be created, because no provision had been made to exclude the effect of that legislation.

10. Mr Herbert submitted that the use of the word "*trust*" in the inclosure awards did not create a trust of the sort justiciable by the courts but rather denoted a form of public provision to which *mortmain* need not be dis-applied. He referred us here to *Kinloch v Secretary of State for India in Council*[3] in which a Royal Warrant granted property for distribution "*in trust*" to the Secretary of State but which was held by the Court of Appeal and House of Lords not to create a trust capable of administration by the court. That case had been relied upon by Sir Robert Megarry, V.-C. in *Tito v*

[2] (1869) 2 Sim & St 594; 57 ER 473

[3] (1880) 15 Ch D 1 (CA) (sub nom *Kinlock*); (1882) 7 App Cas 619 (HL)

Waddell (No.2)[4] to draw a distinction between a "*true trust*" (enforceable by the courts) and a "*higher trust*" (enforceable in other ways).

11. Applying those principles to the facts of this case, Mr Herbert's submission on behalf of the Appellant was that the words "*in trust*" in the inclosure awards created a "*higher trust*" but not a "*true trust*". He reminded us of the three certainties required to establish a trust in law, and submitted that there was in these inclosure awards insufficient certainty of an intention to create a charitable trust. He noted that the awards had not been enrolled in the court or, later, in the books of the Charity Commissioners. He did not suggest that the awards were void for non-compliance with any such requirement, but that the absence of such steps spoke of a lack of intention to create a charity.

12. He referred us to *Snelling v Burstow Parish Council*[5] in which the Court of Appeal had considered the power of sale applicable to land subject to an inclosure award, made under the auspices of the 1845 Act, and concerning land for the labouring poor. The relevance of that case to the matters before us was put differently by each party before the FTT, and we consider it further below. Mr Herbert drew our attention to Patten LJ's comment at paragraph [30] that the continuation of a charitable trust was inconsistent with later statutory changes, in particular the Small Holdings and Allotments Act 1908, and submitted that this showed that the statutory scheme for allotments was inconsistent with charitable status.

13. Mr Herbert's argument was that the principal distinguishing feature of charitable (as opposed to governmental) provision is that it is derived from voluntary donation. By contrast, in his submission, it is rare for government to make a charitable gift because it may achieve the same outcome by making public provision. The inclosure awards with which we are concerned were intended, in his submission, to provide for the poor by way of public provision. He drew our attention in particular to the fact that these awards made no express mention of trustees, or of charity, and that they were not expressed in terms which sought to exclude the mortmain legislation.

14. He also relied on the fact that subsequent legislation[6] had vested the land in the parish council without declaring it to be a trustee and he referred us to the Small Holdings and Allotments Act 1908, which had permitted parish councils to dispose of land which it had acquired under inclosure awards. This was, in his submission, inconsistent with the view that the land so acquired had ever been impressed with charitable trusts. It was unlikely, in his submission, that Parliament in 1908 had "lost its senses" and passed legislation which extinguished charitable trusts. The better view was that the provision of allotments to which it referred was not to be regarded as charitable.

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[4] [1977] 1 Ch 106

[5] [2013] EWCA Civ 1411

[6] The Local Government Act 1894: see further below.

15. He urged us to find that the inclosure awards in this case lacked the essential elements of voluntarism necessary to denote the creation of a charity, and thus to find that the FTT's conclusions were erroneous in law.

16. Mr Herbert also referred us to some decisions of the Commons Commissioners which, he accepted, did not bind us but which were instructive as they involved consideration of inclosure awards and the conclusion that the parish council was the beneficial owner of the land.

17. Ms Selway, on behalf of the Respondent, submitted that the term "*trust"* was used selectively and deliberately in the 1845 Act, and that the term had and has a settled and certain meaning in English law. She observed that there is no indication on the face of the legislation that the draftsman intended to give the word any meaning other than its ordinary one in this particular statute. She referred us to the contextual use of the word "*trust*" in sections 73 and 149 of the 1845 Act, which she described as completely consistent with the usual understanding of that term. She did not agree with Mr Herbert that it was significant that the term "*trustees*" was nowhere used in the inclosure awards, as she said it was clear that the land had vested in the Churchwardens and Overseers of the Poor as trustees.

18. Ms Selway described the holding of allotments for the labouring poor as completely different from the "*higher trusts*" described in *Kinloch* and *Tito v Waddell*, in which a person was *"entrusted"* with a task which could not be enforced by the courts. She described the context of these inclosure awards as constituting a compensatory measure for the loss of common land and the rights exercisable in relation to it and submitted that, in this context, it was clear why Parliament would have wanted to dedicate, through the mechanism of a "*true trust"*, land as allotments for the labouring poor. She submitted that Parliament could have required the land to be dedicated to the public purposes described in the 1845 Act without more, but in fact it chose the mechanism of a trust, which in cases concerning the relief of the poor took effect as a trust for charitable purposes.

19. The Respondent's case was that the legislation passed subsequent to 1845 was consistent with the proposition that the 1845 Act had empowered the creation of charitable trusts. In particular: s. 27 of the Commons Act 1876 had conferred power to sell allotment land and purchase replacement land to be held "*in trust for the purposes for which the allotment so sold was allotted, and for no others";* s. 18 of the Commons Act 1899 conferred on the Charity Commissioners[7] power to modify provisions for 'field gardens' (otherwise known as allotments for the labouring poor) and s. 5(2)(c) of the Local Government Act 1894 had vested the legal title to allotments in newly-created parish councils "*subject to all trusts and liabilities affecting the same".* Power to make schemes for allotments (whether established under Inclosure Acts or otherwise) was included in the Charities Acts 1960 and 1993. As to the 1908 Act and *Snelling*, her submission was that it does not assist us with this case because it is a case about powers of sale rather than charitable status. To the

[7] Established by the Charitable Trusts Act 1853.

extent that the Court of Appeal had referred to the possible cessation of a charitable trust, she took the view that they must have accepted that one had existed in that case.

20. The Charity Commission did not accept the Appellant's binary approach to the creation of public or charitable trusts and suggested that there was not in fact a position of mutual exclusivity between the two. Ms Selway reminded us that many local authorities hold land on charitable trusts for purposes for which they could make public provision, including recreation grounds and schools. She referred us to a number of cases in which the courts had considered such cases (for which see further below).

21. Ms Selway accepted (as did Mr Herbert) that all things are possible to Parliament and that its powers include the state-funded creation of a charitable trust. However, Ms Selway pointed out that this was not such a case because Parliament had merely created the mechanism by which inclosure awards such as those before us could be made. The 1845 Act empowered the valuer to identify land suitable to be allotted for the labouring poor in the context of the enclosure of other lands, and empowered the Inclosure Commissioners to make the award. The Act referred to the creation of a *"trust"*, as did the subsequent award and there is no indication that the word was intended to create a *"higher trust"* rather than a *"true trust"* justiciable by the courts.

22. As to the Mortmain Acts, Ms Selway submitted that the inclosure awards were of a completely different character to the mischief at which the Mortmain Acts had been directed, being an appropriation of land in exercise of a statutory power rather than the alienation of land to a corporation for charitable uses by will or voluntary disposition. She suggested that the draftsman would not therefore have had it in mind to exclude the inclosure awards from the ambit of the Mortmain Acts and that was why the awards were silent on that issue. She described the submissions about mortmain as a *"red herring"*.

The Legislative Framework

The Inclosure Act 1845

23. We have considered carefully the statutory framework created by the Inclosure Act 1845 (now repealed) which was relied upon to make the inclosure awards before us. We note that there are 169 sections and a preamble which sets out the purpose of facilitating the inclosure and the improvement of common land. Section 2 of the Act authorises the appointment of Inclosure Commissioners to oversee this process. Section 3 requires the Inclosure Commissioners to make an annual report to Parliament.

24. Section 11 describes the land which may be inclosed under the Act, being all types of land subject to any rights of common, but subject to the savings in the following sections which exclude, for example, town and village greens from inclosure.

25. Section 25 provides that persons "*interested*" in land who propose to inclose it can apply to the Commissioners. There is provision for an Assistant Commissioner to inspect the land and make a report under s. 26.

26. Section 31 provides, in summary, that where it is proposed to inclose land which is subject to certain year-round rights of common, the Commissioners may require, as one of the terms and conditions of granting an inclosure, the appropriation of such allotments for the labouring poor as they think necessary in the circumstances, subject to a rent charge payable to the person(s) (otherwise) entitled under the inclosure award (s. 78 makes further provision about rent charges). If no such appropriation is made, then reasons must be provided in the Commissioners' annual report.

27. Section 33 provides for a valuer to be appointed to divide the inclosure land among those interested, insofar as it is not set out for "*public purposes*". The land set aside for "*public purposes*" is described in s. 34 as including roads, the supply of stone and materials for road and way repair, water works, fuel, burial grounds, churches and school sites, and also allotments for the labouring poor and places of public recreation. (We note that the list bears some similarity to the purposes set out in the Preamble to the Charitable Uses Act 1601, but is not identical.) There is a right of appeal to the courts against any determination of the Commissioners (s. 56).

28. Section 73 is a key provision which deals with the terms on which allotments for "public purposes" may be made. It expressly extends to the making of allotments for the labouring poor, as well as allotments for exercise and recreation and other "*public purposes*" (the reference to public purposes seems to cover the same purposes as set out in s. 34). It provides:

> *"…all Allotments which shall be made to the Churchwardens and Overseers under this Act shall be held by the Churchwardens and Overseers of the Poor for the Time being in the same Manner and with the same legal Powers and Incidents as if the same Allotments were Lands belonging to the Parish, but in trust nevertheless for the purposes for which the same shall be allotted…".*

29. Sections 87 and 88 notably adopt the language of trusts and trustees in providing for decisions to be made about the manner in which allotted land is to be enjoyed by those entitled to use it, and in dealing with proceeds of sale. However, these provisions do not regulate the use of land allotted for the labouring poor, which is separately regulated by the appointment of "*allotment wardens*" under s. 108 of the Act. Section 109 permits the letting of such allotments at full value but provides that the letting shall be free of any rent charge, tithes, rates or other taxes. Section 112 provides for the application of the rental income for the payment of rates, tithes, rent charge and other expenses incurred by the Allotment Wardens "*in the execution of their Trusts and Powers under this Act*", with the residue, if any, to be paid to the Overseers of the Poor in aid of the poor rates of the parish, applicable in the same manner as other money for the relief of the poor.

30. Section 149 provides the ability to exchange land held *"in trust"*, whether for the labouring poor, exercise and recreation or other public purposes. Finally, we note that the interpretation clause at s. 167 provides that the word "inclosure" shall extend to and include Division or Allotment.

Subsequent Enactments

31. We note the creation of the Charity Commissioners by the Charitable Trusts Act 1853 (a date falling in-between the two inclosure awards with which we are concerned).

32. The Poor Allotments Management Act 1873 provided for streamlined administration of lands allotted for the benefit of the poor under local Inclosure Acts, referring to unwieldy numbers of "*allotment wardens, trustees or other functionaries"* and allowing the Inclosure Commissioners to appoint committees for the administration of such land. Section 16 provides that "*Nothing in this Act shall prejudice or affect any scheme made by the Charity Commissioners…in respect of any allotment being a charity…".*

33. The Commons Act 1876 (which adopted the name "field gardens" instead of allotments for the labouring poor) provided at s. 26 that allotments must be offered to the poor at a fair agricultural rent but, if it was not possible to let the land to poor inhabitants, they could be let to other persons at the best annual rent obtainable. The section is said to apply to *"all land allotted to the poor for the purpose of cultivation under an Inclosure Act…whether under the management of allotment wardens, feoffees, trustees, rector, or vicar and churchwardens, overseers, managers, or any other person…".* Section 27 of this Act amends s.112 of the 1845 Act by providing that surplus rental income was to be used for improvements to the allotments, and confers an express power of sale, with the proceeds being reinvested in replacement land *"in trust"* (see paragraph 19 above).

34. The Allotments Extension Act 1882 conferred on the Charity Commissioners the power to regulate the management of certain allotments for the poor. The Allotments Act 1887 provided for sanitary authorities to acquire land for allotments for the labouring population if there was insufficient provision, to manage them and to sell surplus land so acquired. Section 13 contained a power allowing allotment wardens under the 1845 Act to transfer the management of their land to the sanitary authority upon such terms and conditions as may be agreed. We note the lack of reference here to land held on trust.

35. Under s. 5(2)(c) of the Local Government Act 1894, the legal interest in all land vested in churchwardens and overseers of rural parishes, other than property connected with the affairs of the church, was vested in the parish council "*subject to all trusts and liabilities affecting the same*". Section 6(1)(c)(iii) provided that the powers, duties and liabilities of churchwardens and overseers with respect to the holding or management of allotments were transferred to the parish council, and s. 6(4) similarly transferred the powers and duties of allotment wardens. Section 14 contained a separate provision which allowed for the transfer to a parish council of

land held by trustees for public purposes, including allotments, subject to obtaining the consent of the Charity Commissioners.

36. Section 18 of the Commons Act 1899 conferred on the Charity Commissioners (now the Charity Commission) the power to modify *"provisions with respect to allotments for…field gardens"* contained in any Act or inclosure award, and any provisions in respect of their management. The Charity Commissioners' scheme-making powers in this respect were described as "*the exercise of their ordinary jurisdiction"* as if those provisions had been established by the founder in the case of a charity having a founder. This power was relied upon by the Charity Commission, as it now is (concurrently with the Charities Act 2011) to make the scheme which was challenged by the Appellant in this case.

37. Section 23 of the Small Holdings and Allotment Act 1908 imposed a duty on councils to provide allotments to meet the demands of the *"labouring population".* Section 32 contained a power of sale. It permitted surplus proceeds of sale, after amounts needed to improve or acquire allotments, to be applied for any purposes approved by the Local Government Board. The Charity Commission's internal guidance from 1972 comments that:

> "*9. Where a parish council is trustee of charitable allotments for the poor, or field gardens, and decides to deal with the land under the provisions of the Smallholdings and Allotments Act 1908, the Commissioners cannot intervene even if this will result in funds which might have been regarded as subject to overriding charitable trusts being applied for other purposes which will not be charitable. But if we are asked to advise a parish council of its power to deal with such land it should be explained that the parish council is a charity trustee and that there is a way of dealing with land which would preserve the charitable trusts – that is by applying to the commissioners for a Scheme under the powers vested in them to authorise the proposed sale or letting …and to give directions for the charitable application of the net proceeds of sale which will be capital monies."*

38. The Land Settlement (Facilities) Act 1919 was not in our bundle but we note that it was referred to in *Snelling* by the Court of Appeal at [28][8] and High Court at [37][9] as having finally removed all statutory references to the "labouring poor".

Case Law

39. In *Tito v Waddell (No.2)*, the Vice-Chancellor considered whether certain royalty arrangements in relation to phosphate mined on a Pacific island gave rise to a trust in favour of the local community. He considered the *Kinloch* case and commented at page 216 that it supported a number of principles, including that references to a trust, even in a formal document, did not necessarily create a trust enforceable by the

[8] [2013] EWCA Civ 1411.

[9] [2013] EWHC 46 (Ch)

courts, and that it could cover *"other relationships such as the discharge, under the direction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown"*, describing the latter as *"trusts in the higher sense"*. The question was one of construction, looking at the whole instrument in question and its context. He also commented that one material factor may be the form of the description given by the instrument to the person alleged to be the trustee, saying that an impersonal description of a person as the holder of a particular office for the time being may give an indication that what is intended is a trust in the higher sense.

40. *Kinloch* itself related to a Royal Warrant which granted booty of war to the Secretary of State for India in Council "in trust" for the officers and men of certain forces, to be distributed by him or by any other person he might appoint in a certain manner. The House of Lords, upholding the Court of Appeal, held that the warrant did not create an enforceable trust, and the Secretary of State was merely an agent of the Crown to distribute the fund. In reaching this conclusion, it was regarded as important that it was clear from the wording of the instrument that the Secretary of State or his delegate was given the final power to determine disputes. This was regarded as inconsistent with the involvement of the courts (see the Lord Chancellor's judgment at pages 626 to 627).

41. As noted above, the *Snelling* case was relied upon by both parties to support differing conclusions. We note that the issue before the courts in that case, and the *ratio* of the decision, was a point of construction relating to the statutes governing the disposal of allotments (s. 32 of the 1908 Act and s 27 of the Commons Act 1876). Rose J (then sitting as a Deputy High Court Judge) set out an extremely helpful table and analysis of the *"tangled"* statutory provisions enabling the sale of allotments for the labouring poor. She commented at [37] that "*the reason why the trust under the Inclosure Act 1845 may have been treated as a charitable trust was because it was for the benefit of the labouring poor – the relief of poverty-being a well-established charitable purpose"*, although she went on to suggest that that purpose was *"diluted"* by s. 26 of the Commons Act 1876. (We do not understand her in so commenting to have decided that the trust in the matter before her *was* a charitable trust.) She concluded that the land in question was capable of disposal under s. 32 of the 1908 Act (see paragraph 37 above).

42. The case went on appeal to the Court of Appeal, where it was dismissed. The Court stated (see paragraphs [28] to [30] of the leading judgment of Patten LJ) that no trust attached to the proceeds of sale where a disposal was effected under s. 32 of the 1908 Act. The Court observed that the "*continuation*" of a charitable trust was "*inconsistent*" with the statutory scheme of the 1908 Act. We read that comment as relating to its context, namely proceeds of sale under s. 32. It was not necessary for the court to decide whether the Act extinguished existing charitable trusts. The Court also made no finding as to the correctness or otherwise of the earlier treatment of the allotment in question as charitable.

43. We were also referred to *AG v Heelis*[10] which concerned a private Inclosure Act under which Bolton Moor was enclosed on terms that the land was let at a rent, and the residue after expenses was to be used in making improvements to Bolton. The question was whether the funds generated were subject to a charitable trust in respect of which the court could require an account. The Vice-Chancellor said this at page 274:

> *"I am of opinion that funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift, for any legal, public, or general purpose, are charitable funds to be administered by Courts of Equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public, or general purposes being within the equity of that statute…*
>
> *I am of opinion that it is the source from whence the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable; and that funds derived from the gift of the Crown, or the gift of the Legislature, or from private gift, for paving, lighting, cleansing and improving a town, are, within the equity of the statute of Elizabeth, charitable funds to be administered by this Court. But where an Act of Parliament passes for paving, lighting, cleansing and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised, being in no sense derived from bounty or charity, in the most extensive sense of that word, are not charitable funds to be administered by this Court."*

The Vice-Chancellor concluded that the relevant Act, passed with the consent of the owners and those holding rights of common, was effectively a gift by them for the public purpose of improving the town, and was charitable.

44. The Charity Commission relied before the Upper Tribunal on a number of cases which we understand were not cited to the FTT, as follows. Mr Herbert complained that they had been produced at the last minute, but he responded ably to the issues raised.

45. In *Richmond-Upon-Thames London Borough Council v Attorney General*[11] Mr Justice Warner considered whether land given to a local authority in 1888 and subject to a covenant restricting its use for municipal offices, public buildings, a public recreation ground and a road was held subject to charitable trusts. The need for clarification of the status of the land arose, as it so often does, in the context of a plan to develop it. Warner J, after a careful analysis of the historical context and the documentary evidence, concluded that the land was held beneficially for the statutory purposes of the then urban sanitary authority and not on charitable trusts (of an uncertain nature which he left undetermined). The Judge's approach was clearly to regard the issue before him as a question of construction rather than one of conceptual distinction. He relied on an express reference in the transfer to the council in its

[10] (1824) 2 Sim. & St. 67; 57 ER 270

[11] (1982) 81 LGR 156

capacity as an urban sanitary authority under the Public Health Act 1875, by virtue of which it had statutory power to hold lands for the purposes of the Act, and placed weight on the fact that the words "trust" and "charity" were not used in the transfer or deed of covenant (see page 166 in particular). He also considered (at pages 164-165) that, although there were instances of local authorities holding assets on charitable trusts in the older case law, this may have been the only way at that time to ensure that local authorities were accountable for their use of the assets. He also observed that the council was required to incur additional costs and that the obligations contained in the deed of covenant were negative rather than positive in form (see page 167), commenting that a positive expression of obligation would have been more appropriate for a document creating a charitable trust.

46. In *Liverpool City Council v Attorney General*[12], Mr Justice Morritt (as he then was) considered a transfer of the Allerton Hall Estate to the Council in 1926, subject to a covenant for its use as a public recreation ground. Adopting Warner J's approach to the construction of the documentation, (referring at page 9 to *"…whether there is an imperative dedication of the land to purposes which are charitable…")*, he decided that the land was not held subject to charitable trusts. Factors influencing his decision (see pages 15 to 16) were the apparent contemplation by the transferor that the land could be used for other statutory purposes; that there was no endowment so that expenditure of rate-payers' money was envisaged on upkeep; and the draftsman's use of a covenant rather than a trust.

47. In *Hampshire County Council v AG*[13], the pendulum swung in the other direction and Morritt J (as he still then was) found charitable trusts to have been declared in conveyances of land in Liss in 1872 and Netley in 1884 to a school board *"…for ever upon trust for the purposes of a public elementary school…"* and *"…upon trust for the purposes of a site for an elementary school…"*. It is clear from his judgment that the conveyances could have been made either for statutory purposes (free from a trust) or on the basis that they were subject to an (educational) charitable trust. However, on a proper construction of the documents (construing them as at the time they were executed) charitable trusts had been created. Factors taken into account in reaching this conclusion were the language used; the fact that the land was in one case a gift and in the other a transfer at an undervalue; and that in instances of "bounty" the creation of a charitable trust was presumed to have been intended in accordance with the donors' intentions. In respect of some uncertainty as to the capacity of the Schools Board to concur in the declaration of charitable trusts, he commented that *"At this time, 122 years after the events in question, I think that it is right to apply the presumption of regularity*".

48. In *Bath and North East Somerset Council v Attorney General*[14] Mr Justice Hart considered the conveyance (for value) of land to the Council for a public recreation ground and found that, whilst it could have been transferred to the local authority for

[12] (unreported) 15 May 1992

[13] (unreported) 4 April 1994

[14] [2002] EWCA 1623 (Ch)

statutory purposes, it was held subject to charitable trusts[15]. At paragraph [22] Hart J notes that *"...the words 'upon trust' cannot, in my judgment, simply be ignored".* He goes on (at paragraph [25]) to note that *"...the word 'trust' is a protean one. Nevertheless, in the context of a conveyance of English land in fee simple, albeit to a local authority, its normal meaning is in my judgment its technical one".*

Consideration

49. It was common ground between the parties that the 1845 Act permitted the dedication of land to "public purposes" without more, but that it also permitted the insertion of a trust mechanism to achieve the dedication of the land to that purpose. The Act refers at s. 73 to land held *"in trust".* Mr Herbert submits that, given the context, this must have been intended to refer to a *"higher trust".* Ms Selway responds that there is no indication on the face of the Act that it is not a reference to a "*true trust*", and the Act should be given its ordinary meaning in the conventional approach to statutory interpretation.

50. If a *"higher trust"* was intended as the Appellant contends, it is clear from *Kinloch* and *Tito v Waddell* that the courts have no role in enforcing it. Ms Selway asks why, given that the dedication to public purposes could have been achieved without relying on the mechanism of a trust, it would have been thought expedient to create an unenforceable trust. The case law to which we were latterly referred (*Richmond, Liverpool, Hampshire and Bath)* considered only whether the land was held beneficially by the council for its corporate purposes or on charitable trusts. The concept of a *"higher trust"* has not apparently troubled the courts in the present context.

51. If a *"true trust"* were to be created, then as it was a purpose trust, it could only be valid under general principles if it were a trust for charitable purposes. The list of *"public purposes"* in the 1845 Act has many similarities to the Preamble to the Statute of Elizabeth from which modern charity law is drawn. It includes purposes clearly directed at the relief of poverty and so, if a trust was created by the awards, the Charity Commission views it as charitable either through the functional use of the land by those who rented it (on market terms but free from rates) or through the application of the surplus rental income to maintenance of the land and poor relief.

52. Mr Herbert's assessment of the 1845 Act was that s. 88 contained the only reference to a trustee or trustees (although we noted one or two other references, such as in s. 87). Ms Selway reminds us that equity does not want for a trustee and submits that the transfer of land to the Churchwardens and Overseers of the Poor to hold *"in trust"* has the effect of appointing them as trustees of the land held for charitable purposes.

[15] This charity was considered further by the Upper Tribunal in 2015 https://www.gov.uk/tax-and-chancery-tribunal-decisions/the-trustees-of-the-bath-recreation-ground-trust-v-jack-sparrow-and-others-and-the-charity-commission-for-england-and-wales-2015-ukut-0420-tcc.

53. It is of course the inclosure awards themselves which will have operated to create any trust, rather than the Act itself, although the correct interpretation of the Act is clearly highly material. These awards were made in the context of private individuals giving up part of their claim to inclosure in favour of a dedication of certain lands to *"public purposes".* As Ms Selway described it, this is a compensatory mechanism approved by Parliament. *AG v Heelis* (see paragraph 43 above) suggests that governmental action can provide the requisite element of bounty to create a charity.

54. It is difficult to determine the relevance of subsequent statutory interventions in determining the question before us. Given the significant variety of ways in which allotments came into existence, it is not surprising that later legislation recognised the possibility that they had been created either by the mechanism of a charitable trust or through other means, including reliance on administrative powers (for example, pursuant to the Allotments Act 1887). The power of sale in the 1908 Act is the most surprising intervention, in apparently ignoring the distinctions. Mr Herbert argues that the subsequent legislative framework is inconsistent with the view that these inclosure awards were ever intended to create charitable trusts. Ms Selway submits that it is the awards themselves which must be our focus in determining the issue of charitable status.

55. The approach of the courts in the twentieth century cases (*Richmond*, *Liverpool, Hampshire and Bath)* suggests that the answer to the question of whether these inclosure awards created a charitable trust or not lies in a close textual analysis of the instruments themselves. Whilst Mr Herbert's binary approach to voluntarism/administration is conceptually attractive, he accepts that the decided cases do not fit neatly within the twin concepts. The decided cases unravel the documents by reference to a range of determinative factors including: (i) whether a trust or covenant mechanism is deployed to impose obligations as to the use of the land; (ii) whether these obligations are described as positive or negative in nature; (iii) whether there is an element of bounty present in the dedication of the asset to charity; (iv) whether there is found to be an "imperative dedication" to charitable purposes; and (v) the principle that the word "trust" used in its technical sense cannot simply be ignored.

Discussion

Historical context

56. Our consideration of the 1845 statutory scheme pursuant to which these inclosure awards were made leads us to the view that Parliament placed particular importance upon the allotment of land for the labouring poor in the social and economic circumstances prevailing at the time. We note that, if no allotment for the poor was to be made in the context of an inclosure award, the Commissioners were under an obligation to explain publicly why this had not been done (see paragraph 26 above). In these circumstances, in the absence of a machinery for the enforcement of rights to land for the labouring poor within the 1845 Act itself, and about a century in advance of effective public law enforcement mechanisms, we can see why the legislative scheme may have permitted reliance on the enforcement of fiduciary obligations

through the courts of equity to guarantee the continued availability of the land to those otherwise dispossessed by enclosure.

57. Such a policy would have to rely upon the creation of a charitable trust, because a non-charitable purpose trust would of course have been void. As to Mr Herbert's *higher trust*, we fail to see why an unenforceable trust would have been an attractive option in the historical context with which we are concerned.

"Bounty"

58. We have considered carefully the terms of awards with which we are concerned. We note that these were made in the context of private individuals agreeing to give up a claim to inclosure of certain lands in favour of their dedication to *"public purposes"*. We found Ms Selway's description of this as a compensatory mechanism approved by Parliament persuasive. We consider that such an arrangement denotes beneficence of a kind sufficient to found a charity so that no *gift*, in a more conventional sense, is required.

59. Whilst not a straightforward case to apply, we consider that overall *AG v Heelis* supports this conclusion. It focused on the source of the funds in question, and drew a distinction between sums raised by rates or other taxation (which are not derived from bounty in any sense), and "gifts" (which may include "gifts" from the Crown or legislature) for public purposes, the latter being charitable. The awards in this case were compensatory in nature. The land was derived from owners who would otherwise have benefited from the inclosure, and whilst not obviously a "gift" in the conventional sense either from the Crown (because it was not Crown land) or from the owners (who may not have felt inclined to bounty, and also received at least some level of rent charge, albeit it seems not equivalent to a full rent), in a broad sense it is a case of Parliament requiring the owners to exhibit generosity in return for being permitted to enclose land. What it was not was a form of rates or taxation in any conventionally recognisable sense.

Interpretation of the Inclosure Act 1845

60. Turning to the interpretation of the 1845 Act, in our view the use of trust language in s. 73 was careful and deliberate. It refers to allotments being held *"as if"* they were land belonging to the parish, *"…, but in trust nevertheless…"*. So a clear distinction is drawn between this land, which must be held on trust, and other land belonging to the parish. We are not convinced by Mr Herbert's submission that the draftsman simply meant a trust in the higher sense. The draftsman would clearly have understood what a trust was, in the legal sense. If it was intended that there should just be a trust in that higher sense then it is hard to see what the express reference to a trust achieves, beyond saying that the land is to be treated as land owned by the parish.

61. Essentially the effect of Mr Herbert's argument must be that the language adds nothing, or at least that it is no more than an unenforceable request that the land is used in a particular way. However, it is well accepted that there is a presumption that

words in an enactment should be given meaning rather than disregarded (see *Bennion* on Statutory Interpretation, seventh edition, at [21.2], and cases cited there).

62. We are also somewhat doubtful of whether the concept of a trust in the higher sense had developed as a generally recognisable concept in 1845, such that the draftsman might have had it in mind. *Kinloch* was decided over 30 years after the 1845 Act was passed. The earlier cases referred to in the House of Lords decision in *Kinloch* either relate to "true" trusts or, like *Kinloch*, specifically to the distribution of prize money. Each case turned very much on the construction of the document in question.

63. Mr Herbert appeared to submit that the only way of "enforcing" the requirement to use the land as allotments for the labouring poor would have been some form of political process. As already touched on, it is hard to see that that would have been Parliament's intention, bearing in mind the background to the Act. It is also hard to see how at that time any likely beneficiaries (as opposed to those who might want to deprive the beneficiaries of use of allotments for labouring poor) are likely to have been able to participate effectively in any political process.

64. In our view the 1845 Act established the necessary conditions for the creation of a charitable trust in an inclosure award made pursuant to its authority. Firstly, we note the element of beneficence referred to above. Secondly, we note the dedication of land to the relief of poverty, then being an accepted first-head charitable purpose. Thirdly, we note the express reference to a "*trust"* in the Act and awards and consider that the draftsman used that word in its technical sense. Finally, as equity does not want for a trustee, it seems to us that the transfer of land to the Churchwardens and Overseers of the Poor to hold *"in trust"* had the effect of appointing them as trustees. We were not persuaded by Mr Herbert's analysis of the 1845 statutory scheme as defective in failing to identify a trustee for the land subject to the inclosure awards. We conclude that there was no requirement for the Churchwardens and Overseers of the Poor, in whom the land vested, to be labelled as trustees in order to constitute a valid trust. We also do not consider that the reference to Churchwardens and Overseers, rather than particular individuals, indicates that there was no true trust (despite it being noted as a relevant factor in *Tito v Waddell (No.2)*). Clearly the Act could not name individuals and the awards simply followed the approach in the Act, which was intended to provide a uniform approach to the grant of allotments.

65. We also consider that the approach taken in the cases relied on by Ms Selway, and summarised at paragraphs 44 to 48 above, supports the Charity Commission's position. In each case the question was treated as one of construction, and the use of the language of a "trust" was considered significant. In particular, we agree with Hart J's observation in *Bath and North East Somerset Council* that where that term is used in a conveyance (or, we would add, in an Act which contemplates a conveyance), it is generally used in a technical manner. In addition, in this case the obligation to use the land as allotments for the labouring poor was positive in nature rather than a negative restriction that might allow the land to be used for other purposes, and it was clearly contemplated that expenses relating to the land could be discharged out of the rent received, rather than having to be met from other sources. We also note Warner J's

comments in the *Richmond-upon-Thames* case about older case law treating local authorities as holding assets on charitable trust, because it may have been the only way at that time to ensure that they were accountable for their use of the assets.

66. We have already referred to the element of bounty we find in a compensatory mechanism approved by Parliament. We remind ourselves that the word "*trust"* used (as we find) in its technical sense cannot simply be ignored, and we conclude that there is here an "imperative dedication" to the charitable purpose of the relief of poverty.

Subsequent legislation

67. We have heard much about subsequent legislation, but we find it difficult to determine its relevance to the question of whether charitable trusts were established under the awards. We refer to the Charity Commission's tactful internal guidance in respect of the troubling 1908 Act. We also note that the Appellant did not seek to argue that any charitable trust had ceased as a result of later legislation, but rather that none had been created in the first place. We are not persuaded that the content of statutory provisions subsequent to the inclosure awards materially supports an argument that a charity was never created in this case.

68. One of the grounds of appeal related specifically to an alleged error of the FTT in failing to distinguish between the different statutory frameworks provided by ss. 5 and 14 of the Local Government Act 1894. We disagree. As explained by the FTT at paragraph 45 of its decision, s. 5 provided for an automatic transfer of land vested in churchwardens and overseers of rural parishes to parish councils, expressly subject to any existing trusts. Section 14 contained a permissive regime allowing transfers of land held on trust. Section 14 could have no operation in relation to land falling within section 5, because that was transferred automatically. It tells us nothing about whether land to which s. 5 applied could in fact be subject to a trust.

Other grounds of appeal

69. As summarised at paragraph 5 above, a number of separate grounds of appeal were raised. We have addressed most of these in substance, but to respond to each:

(i) Whether a charitable trust can be established in the absence of a gift: we do not consider that it is necessary to determine this point as a matter of principle. Mr Herbert rightly accepted that all things are possible to Parliament, and we have already concluded that there was an element of beneficence in the arrangements.

(ii) Whether the FTT misdirected itself by finding that a statutory provision concerned with the welfare of the poor created a charitable trust: we have concluded that there was no error of law.

(iii) Whether the FTT erred in its finding of fact to the effect that there was an element of subsidy in the terms on which allotments were let: the Appellant did not

pursue this ground, accepting that there was an element of bounty in the terms of the letting.

(iv) Whether the FTT erred in concluding that the requirement for surplus rental income to be transferred to the Overseers of the Poor supported a conclusion that charitable trusts had been created: we have concluded that there was no error of law in this respect, and that the purposes were exclusively charitable, being the relief of poverty.

(v) Whether the FTT erred in concluding that the Charity Commission had jurisdiction to make a scheme under s. 67(2) of the Charities Act 2011 and/or s. 18 of the Commons Act 1899: we agree with the FTT that, to the extent that s. 67(2) does not directly apply (since it and s. 62, dealing with cy-près schemes, refer to "charitable gifts" or to property "given" for charitable purposes), then the broad drafting of s. 18 provides the necessary authority. See in particular paragraphs 62 to 69 of the FTT decision.

(vi) Whether the FTT erred in failing to distinguish between the different statutory frameworks provided by ss. 5 and 14 of the Local Government Act 1894: we have addressed this above.

Conclusion

70. In summary, we discern no material error of law in the FTT's conclusion that the land allotted by the inclosure awards in this case is held subject to valid charitable trusts. It follows that, in our view, the Charity Commission was correct to maintain the charity on the register of charities and was entitled to exercise its scheme-making powers in relation to it.

71. In the light of our conclusions we dismiss this appeal.

MRS JUSTICE FALK **JUDGE McKENNA**

RELEASE DATE: 3 December 2018