

Radcliffe
Chambers

Permanent endowment

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The reasons for this talk

1. Limited case law and commentary
2. Financial pressures of the pandemic
3. Upcoming developments in the law

Our topics

1. Defining permanent endowment
2. Determining if a charity has permanent endowment
3. Charity trustees' duties
4. Spending permanent endowment
5. Upcoming developments in the law

1. What is permanent endowment?

What is permanent endowment?

- *"property held subject to a restriction on its being expended for the purposes of the charity": s 353(3) Charities Act 2011*
- 1. Designated land = specie land = permanent endowment: OG545-1, paragraph E1.1
- 2. The restriction does not need to be absolute, e.g.:
 - a) Restrictions on the type of investment ('only shares in listed companies')
 - b) Restrictions limited in time ('for 20 years')

What is permanent endowment?

3. One asset can be *both* permanent endowment *and* expendable capital: OG545-1, paragraph D1.6
4. Two types of permanent endowment:
 - a) Investment permanent endowment
 - b) Functional permanent endowment
5. One charity can have more than one endowment

2. Identifying permanent endowment

Identifying an endowment

- Consider 4 things:
 1. The governing document
 2. Historic evidence of how assets have been used (e.g. wills, conveyances): OG545-1, para E1.1
 3. The 'presumption' of endowment: section 353(3)
 4. The Commission will err on the side of allowing assets to be spent: OG545-1, para E1.1

3. Trustees' key duties

Trustees' duties

“it is unhelpful to assert that permanent endowment can, or cannot, always be used in a particular way. Rather, the relevant question in any particular case is whether *this specific* property, which is subject to *this specific* restriction, can be used in a particular way”

-- Law Commission, [Technical Issues in Charity Law](#) (2018), paragraph 8.22

- In general, trustees:
 1. Can sell investment endowment, but must replace it
 2. *May* be able to sell functional endowment, but must replace it

4. Spending permanent endowment

Spending an endowment

- Possible reasons:
 1. The cost of maintaining the asset outweighs the income it produces
 2. The charity may have pressing short-term cash needs: see Charity Commission Covid [guidance](#)
 3. A charity for the relief of a particular illness may wish to bulk order a new cure

Spending an endowment

- 4 main options:
 1. Statutory powers in ss 281-284 Charities Act 2011
 2. An order from the Commission
 3. A scheme
 4. A 'total return approach' to endowment investments
- 2 dead ends:
 1. Cannot use power to amend in section 280: OG519, paragraphs B5.3, B5.4, and E5.1
 2. Restrictions on social investments: section 292B(2)(b) Charities Act 2011

Statutory powers: ss281-282 Radcliffe Chambers

- Only applies to unincorporated charities: section 282(1)
- Simpler process in section 281 if:
 1. Gross income last year was £1,000 or less;
 2. Endowment is worth £10,000 or less; **or**
 3. The endowment was not "entirely given".
- *"the charity trustees [must be] satisfied that the purposes set out in the trusts to which the fund is subject could be carried out more effectively if the capital of the fund, or the relevant portion of the capital, could be expended as well as income accruing to it, rather than just such income": section 281(4)*

Statutory powers: ss281-282 Radcliffe Chambers

- Procedure for section 282:
 1. <https://forms.charitycommission.gov.uk/spend-permanent-endowment/> (application form)
 2. Attach a copy of the resolution & minutes: Commission [guidance](#)
 3. The Commission must decide within 3 months: sections 284(3) and 284(5)
 4. The Commission may ask for more information or direct the trustees to give public notice: sections 283(1) and 283(2)

Statutory powers: ss281-282 Radcliffe Chambers

- What the Commission will consider:
 1. Whether *"its implementation would accord with the spirit of the gift or gifts"*: section 284(2)(a)
 2. The Commission is unlikely to allow functional endowment to be sold under section 282: OG545-1, para E1.2
 3. Evidence of:
 - a) Charity's regulatory history: OG545-1, para E1.3
 - b) Donors' intention: section 284(1)(a)
 - c) Changes in the circumstances since the endowment was created: section 284(1)(b)

An order

- E.g. the circumstances have not changed enough for the Commission to consent under section 282: OG545-2, para E1.2
- The Commission will ask whether the order would be "*expedient in the interests of the charity*": section 105(1)
- See the 9 relevant factors in OG545-2, para B1.1
- Trustees should investigate other options before asking for an order: OG545-2, para E2.1
- In most cases, the Commission will require the spent endowment to be replaced: OG545-2, para E2.2

An order

- But trustees may not be asked to replace funds if:
 1. The endowment will be spent on something which will last for 75+ years: OG545-2, para E2.4
 2. Spending endowment is the only way to keep the charity afloat : OG545-2, para E2.5
- The Commission will not make an order if:
 1. The charity has a poor financial history: OG545-2, para B1.3
 2. The order would override an express provision: OG545-2, para E1.1
 3. The order would change the charity's purposes: *ibid*

A scheme

- Most likely if the trustees want to spend functional endowment: Oldham LBC v AG [1993] Ch 210, at 219
- The Commission will make a scheme if there are “good grounds” and it is “expedient in the interests of the charity”: OG545-2, para E1.3; OG500, para B4.1
 1. Selling one property to refurbish others: OG545-2, para E1.3
 2. Selling one property to fund the charity’s wider charitable activities: OG545-2, para E1.3
 3. To lift outdated spending restrictions: e.g. Re Robinson [1923] 2 Ch 332
 4. To change impractical purposes: e.g. Re Colonial Bishoprics Funds 1841 [1935] Ch 148

Total return investments

- Charities (Total Return) Regulations 2013
- *"Put simply, this approach allows any increase in the value of an investment to be used as income": [guidance](#), section A2*
- 5 key steps:
 1. Resolve to adopt a total return investment policy
 - a) Can apply to all or part of an endowment: s 104A(5)
 - b) *"the charity trustees [must be] satisfied that it is in the interests of the charity"*: s 104A(3)
 - c) Resolution must record the date, value of endowment, and amount of unapplied income: reg 3(2)
 - d) No need to notify the Commission: [guidance](#), section D7

Total return investments

2. Trustees can add up income *and* increase in the capital value of the endowment: the 'total return'
 - a) Unless it is "*unnecessary or inappropriate*", seek professional advice: reg 6(3)
3. Trustees may allocate up to 10% the of value of the endowment to current assets ('income fund'): reg 4
 - a) Exercise reasonable skill and care: reg 5(1)
 - a) Do "*not... prejudice the ability of the charity to further its purposes now and in the future*": reg 5(2)
4. Any sums taken must be repaid "*over a period to be reasonably determined by the trustees*": reg 4
5. Record each decision, with reasons, in annual reports or returns: reg 6(4)

5. Upcoming changes

Upcoming changes in the law

- <https://www.gov.uk/government/consultations/charity-responsible-investment-guidance>
- 'More information: legal underpinning', paragraph 4.6.2, suggests that *Harries v Church Commissioners for England* [1992] 1 WLR 1241 will still apply to permanent endowment
- Cf *Butler-Sloss v Charity Commission* [2021] EWHC 1104 (Ch), at [11] per Michael Green J

Upcoming changes in the law

- *Butler-Sloss v Charity Commission* [2021] EWHC 1104 (Ch)
 1. Michael Green J gave permission to two environmental charities to issue proceedings for judicial directions on ethical investments
 2. Final judgment would revisit *Harries v Church Commissioners for England* [1992] 1 WLR 1241

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- Clauses 9-13 Charities Bill 2021 (available [here](#)):
 1. 'New' definition of permanent endowment: *"property is 'permanent endowment' if it is subject to a restriction on being expended which distinguishes between income and capital"* (clause 9)
 2. Amendments to the section 282 procedure:
 - a) Incorporated charities can use it: clause 10(2)(a)
 - b) 'Entirely given' requirement deleted: clause 10(3)(a)
 - c) Financial threshold now >£25,000: clause 10(3)(b)
 - d) Deadline for Commission reply now 60 days: clause 11(2)
 3. Trustees will be able to make social investments in a 'total return investment' approach: clause 13

Upcoming changes in the law Radcliffe Chambers

4. New power to borrow from endowment in new ss 284A-D:

- a) Trustees may borrow up to 25% of the endowment if "*expedient*" in light of the purposes: s 284A(2)(a)
- b) Once borrowed, the money is free from the spending restrictions: s 284A(3)
- c) Money must be repaid within 20 years: s 284A(2)(b)
- d) Trustees can choose to repay the estimated increase in capital value as well: s 284A(5) and s 284C
- e) Cannot use one loan to pay off another: s 284A(4)
- f) Governing document can exclude the power: s 284A(7)
- g) If trustees cannot repay, they must notify the Commission: s 284D(1)



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