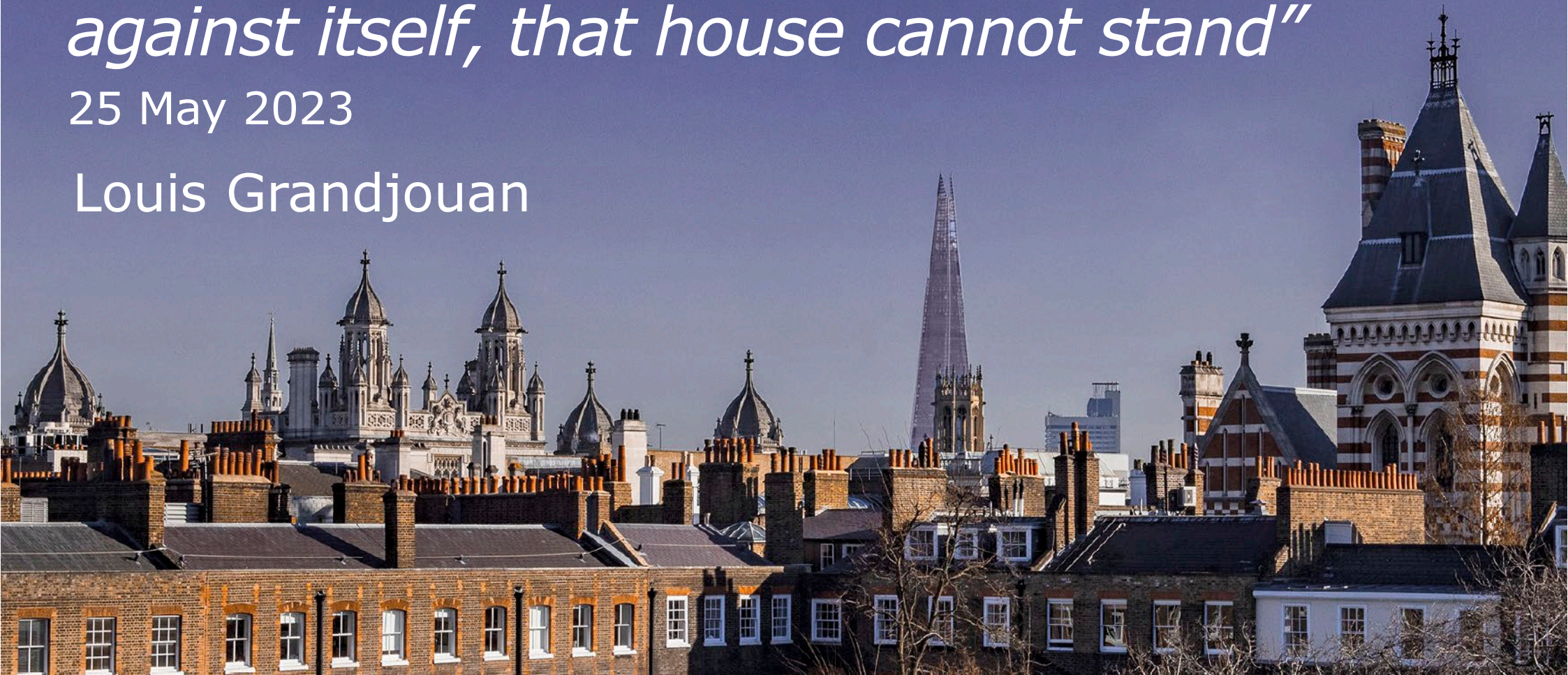


Problematic purposes and tricky
trustees: *"And if a house be divided
against itself, that house cannot stand"*

25 May 2023

Louis Grandjouan



Overview

- The dispute between Dr Martyn Percy and the Governing Body
- The charity law issues raised by the Charity Commission's Official Warning to the Governing Body
- The problem of the recalcitrant officeholder

Some preliminary background

- A two-headed charity: both college and cathedral
- The government of Christ Church
 - The Governing Body
 - The Dean
- The procedure for removing the Dean:
 - “Good cause” includes “**conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office**” and “conduct constituting failure or persistent refusal or neglect or inability to perform the duties or comply with the duties of the office”.

The dispute and its resolution

- The Smith Tribunal and the pay dispute
- The Dean's Employment Tribunal proceedings
- The allegation of sexual harassment:
 - Another tribunal is convened
 - Review by the President of Welsh Tribunals
 - Clergy Disciplinary Measure
 - Complaint to the Police
- The role of the Charity Commission
- Four mediations
- Reported settlement payment of £1.175m to the Dean on condition that he vacate and discontinue Employment Tribunal proceedings

The Official Warning

- Section 75A Charities Act 2011

(1)The Commission may issue a warning—

(a)to a charity trustee or trustee for a charity who it considers has committed a breach of trust or duty or other misconduct or mismanagement in that capacity, or

(b)to a charity in connection with which it considers a breach of trust or duty or other misconduct or mismanagement has been committed.

- Two core failures:
 - Failure of oversight
 - Failure of reporting
- The Commission’s guidance defines “**misconduct**” as including “any act (or failure to act) in the administration of the charity **which the person committing it knew (or ought to have known) was criminal, unlawful or improper**” and “**mismanagement**” as “any act (or failure to act) **in the administration of a charity that may result in significant charitable resources being misused or the people who benefit from the charity being put at risk**”.

The Recalcitrant Officeholder

- The overriding duty of charity trustees is to further the purposes of the charity. They must exercise their powers in accordance with that duty.
- Powers of removal as fiduciary powers:
 - Hillcrest (Ilford) Pty Ltd v Kingsford (Ilford) Pty Ltd (No 2) [2010] N.S.W.S.C. 285
- What if no, or no effective, power of removal?
 - The Charity Commission
 - The courts

The Recalcitrant Officeholder: The Charity Commission's powers

- Intervention is driven by regulatory issues:
 - Inquiry under s 46 CA 2011
 - Removal of trustee for protective purposes under s 79 CA 2011:
 - *"(1) ...where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied ... as mentioned in section 76(1)(a) (misconduct or mismanagement)"*
 - *(4) the Commission may of its own motion by order remove any trustee, charity trustee, officer, agent or employee of the charity—*
 - *(a) who has been responsible for the misconduct or mismanagement,*
 - *(b) who knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or*
 - *(c) whose conduct contributed to it or facilitated it."*
- Disqualification order under s.181A (where criteria under s 178 CA 2011 are met) and thereafter removal under s.79A CA 2011 (removal of disqualified trustee).
- OG 565: Disputes in Charities: the injunction to mediate

The Recalcitrant Officeholder: The Court's powers

- Appointment of a new trustee in substitution of an existing trustee: s 41(1) Trustee Act 1925
- Removal of a trustee without a replacement if sufficient trustees remain under the inherent jurisdiction
- Directing a managerial scheme to alter the administrative provisions of the charity's governing document

The Recalcitrant Officeholder: The Court's powers (cont'd)

- Removal of trustees of private trusts: *Letterstedt v Broers* (1884) L.R. 9 App. Cas. 371:

“It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

. . . **if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee**, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, **the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him**; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported.” (per Lord Blackburne)

The Recalcitrant Officeholder: Preparing the ground for removal

- With whom does the blame lie?
- The need for mediation and the likelihood that a settlement offer should be made
- The involvement of the Charity Commission:
 - Advice under s 110 Charities Act 2011 as to the terms of the settlement
 - The need for the Charity Commission's permission to bring charity proceedings under s 115 Charities Act 2011
- The unreasonable refusal of a settlement offer is likely to be the lynchpin for asking the court to remove a recalcitrant officeholder

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Our topics

1. The main types of scheme
2. Which types of charity can obtain a scheme
3. When you might and might not need a scheme
4. Cy-près schemes
5. Administrative schemes
6. Procedure

1. What is a scheme?

- A document which amends a charity's constitution
- 2 main types:
 1. Cy-près scheme
 2. Administrative scheme
- "Cy-près" means "*as near as possible*"
- "*a cy-pres scheme involves altering a charity's purposes. An administrative scheme enables changes to be made to the administrative provisions governing a charity*":
Lehitmaki v Children's Investment Fund Foundation (UK)
[2018] EWCA Civ 1605, at [54]

2. Which charities can obtain a scheme?

1. Unincorporated charities
2. Incorporated charities: s.75ZA Charities Act 2011
 - a) Only in "*exceptional circumstances*": OG500, section B1
3. Charities established by Act of Parliament: s.73 Charities Act 2011 (as amended by s.5 Charities Act 2022)
4. Charities established by royal charter: s.68 Charities Act 2011

3a. When might you need a scheme?

- See generally *Halsbury's Laws of England* (volume 8, Charities, 2019), paragraph 178
 1. To alter clauses relating to designated land
 2. To alter a dissolution clause
 3. To remove the rights of a third party in the governing document against their wishes
 4. To save a charitable gift for which the original purposes have failed or become frustrated

3b. When might you not need a scheme?

- See generally *Halsbury's Laws of England* (volume 8, Charities, 2019), paragraph 179
 1. A gift to charitable purposes outside the jurisdiction
 2. A dispute over the ownership of property or the existence of a trust
 3. The trustees have lost the governing document
 4. There is a simpler or quicker method for making the proposed change
 5. If a 'cy-près occasion' has not yet occurred, but the Commission makes an interim order: s. 75 Charities Act 2011

4. Cy-près: introduction

- The law was amended on 31st October 2022 by sections 6, 7 and 8 Charities Act 2022
- If a cy-près occasion occurs, trustees are under a **duty** to secure the effective use of assets: s.61 Charities Act 2011
- 2 broad situations in which cy-près may be appropriate:
 1. A charitable gift 'initially fails'; **or**
 2. Certain subsequent events frustrate the current purposes

4a. Cy-près: 'initial failure'

- You need to show 2 things:
 1. The gift has 'initially failed'; **and**
 2. The donor had a 'general' or 'paramount' charitable intention

4a. Cy-près: 'initial failure'

- A gift 'initially fails' if there is no reasonable prospect of the object being carried into effect, even in the future
 1. Make this assessment at the time the gift is made
- Examples of initial failure:
 1. Money is donated to a specific, illegal purpose
 2. A gift to an institution which never existed (but not an institution which only later ceases to exist)
 3. Money is donated to build something, but no suitable site can be found
 4. The gift is conditional on particular trustees accepting office

4a. Cy-près: 'general charitable intention'

- Are the words which cause the gift to fail merely the machinery for achieving the gift or the substance of the gift itself?
- You do **not** need an intention to benefit *any* type of charity; just an intention wider than the wording of the gift
 1. E.g. an intention to benefit educational charities, rather than one specific school which never existed
- To decide this, look at:
 1. The entire document (e.g. will or gift)
 2. The nature of the proposed charity
 3. What is involved in the donor's plan or project
 4. The fact that the donor made other charitable gifts at the same time is relevant but **not** conclusive

4a. Cy-près: 'general charitable intention'

- s.63A Charities Act 2011 (as amended): a donor is deemed to have made the gift for "*charitable purposes generally*" if:
 1. The Commission makes an order that it would be unreasonable for (a) the charity to incur the expense of trying to return the gift **or** (b) the donor to expect the gift to be returned;
 2. The gift was for £120 or less, the trustees reasonably believe the donor gave £120 or less to the charity that year, **and** the gift was not conditional;
 3. The donor cannot be located; or
 4. The property is (a) cash which was collected in a way which does not distinguish individual donations (e.g. collection boxes) **or** (b) prize winnings

4b. Cy-près: subsequent events

- This type of scheme will decrease in importance when ss.280A and 280B Charities Act 2011 come into force in autumn 2023
- To obtain this type of scheme, you must show 2 things:
 1. One of the 'cy-près occasions' in s62(1) Charities Act 2011 has occurred; **and**
 2. The original gift was not limited (i.e. was unconditional).
 1. You do not need to show general charitable intention

4b. Cy-près occasions: s.62 ChA 2011

1. The charity's purposes have been fulfilled as far as possible in whole or in part
 - a) E.g. a gift to pay off a charity's debt which has already been partly cleared: Corbyn v French (1799) 4 Ves Jr 418
2. The charity's purposes cannot be carried out at all or in accordance with (a) the donor's directions and (b) the spirit of the gift
 - a) 'Spirit of the gift' is the basic intention underlying the gift (ie substance, not form): Varsani v Jesani [1999] Ch 219
 - b) Infer from the terms of the gift, the charity's records, and how the charity operated over time: OG2, section A1.1.1
 - c) E.g. a gift to pay a preacher a stipend of £3 a year: Re Lepton's Charity [1972] Ch 276

4b. Cy-près occasions: s.62 ChA 2011

3. Charity's purposes only provide for a use of part of the money
 - a) E.g. surplus funds raised from a fundraising appeal
4. Charity's property can be used more effectively in conjunction with the property of another charity with similar purposes
 - a) E.g. consolidating two charities
 - b) To decide this, you must consider "*the appropriate considerations*": (i) the spirit of the gift; **and** (ii) the current social and economic circumstances
 - c) The 'spirit of the gift' is discussed above
 - d) Take a broad view of economic and social circumstances (e.g. environmental, legal, scientific or technological factors): *Aliss v Charity Commission* CA/2011/0007

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5. The charity's purposes were laid down with reference to an area which has ceased to be a unit for some purpose
 - a) E.g. local authority reorganisation
6. The boundaries of a local authority in which a local charity operates are expanded (see schedule 4 Charities Act 2011)
7. The charity's purposes were laid down by reference to a class of persons or an area which has ceased to be suitable
 - a) Consider "*the appropriate considerations*" (see above)
 - b) E.g. number of potential beneficiaries in an area drops dramatically: *Peggs v Lamb* [1994] Ch 72
8. The charity's purposes have been adequately provided for by other means
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9. The charity's purposes cease to be charitable as a matter of law, e.g. because they have become useless or harmful to the community

a) E.g. rifle or pistol clubs

10. The charity's purposes ceased in any other way to provide a suitable and effective method of using the charity's property

a) Means not suitable or effective *at all*, **not** just *less* suitable

b) But this is **not** a test of impossibility

c) Consider "*the appropriate considerations*" (see above)

d) 'Ceased' does **not** cover situations in which the purposes *never* provided a suitable and effective method

e) E.g. a religious schism develops between groups of members in a religious charity: *Varsani v Jesani* [1999] Ch 219

4c. Cy-près: the Commission's decision Radcliffe Chambers

- s.67(1) Charities Act 2011 gives the Commission a discretion whether or not to make a scheme: it *may* do so
- The Commission will consider 3 specific things:
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- Commission's general policy: "*be flexible and imaginative in applying the cy-près doctrine, balancing usefulness and practicality with respect for the existing purposes and beneficiaries*": OG2, section A1.3.2

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- Administrative scheme may be made if it is "*expedient in the interests of the charity*": Re J W Laing Trust [1984] Ch 143
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6. Procedure

- Unless the case is particularly contentious, or involves a difficult question of law or fact, the Commission and the court have equal powers: ss.69(1), 70(1) and 70(8) Charities Act 2011
- Before applying for a scheme, trustees should usually carry out a "*genuine and appropriate consultation exercise*" with people who would be affected or who have an interest: OG500, section B4.2
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- The Commission will almost always draft the scheme:
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