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Disqualification of charity trustees

Harmish Mehta

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Relevant regimes and topics

- For discussion:
 - Automatic disqualification (s.178)
 - Discretionary disqualification (s.181A)
- Related topics:
 - Governing document
 - Partial disqualification relating to remuneration
 - Company director disqualification
 - Other regimes (e.g. safeguarding regime)

Key sources

- Charities Act 2011, Part 9 (as amended by the Charities (Protection and Social Investment) Act 2016)
- Guidance (automatic disqualification)
 - [Guidance for Charities](#)
 - [Guidance for Individuals](#)
 - [Waiver Guidance](#)
- Guidance (discretionary disqualification)
 - [Explanatory Statement](#) and [Q&A](#)
 - [Operational Guidance \(OG525\)](#)

1. What is a charity trustee?



Definition: s.177

In this Act, except in so far as the context otherwise requires, "charity trustees" means the persons having the general control and management of the administration of a charity.

Corporate decision-making: s.184A

(1) For the purposes of sections 183 and 184, a person who is not a charity trustee or trustee for a charity is treated as acting as one if that person—

(a) is an officer of a body corporate which is a charity trustee or trustee for a charity, and

(b) takes part in that capacity in any decision relating to the administration of the charity.

(2) In subsection (1) "officer" includes any of the persons having general control and management of the administration of the body.

2. Automatic disqualification



Overview

- “Cases” (s.178(1))
- Pre-commencement events (s.179)
- Identifying disqualified persons

Restricted roles: s.178(1) and ss.178(3)-(4) Radcliffe Chambers

(1) A person ("P") is disqualified from being a charity trustee or trustee for a charity in the following cases...

[...]

(3) While a person is disqualified under this section in relation to a charity, the person is also disqualified from holding an office or employment in the charity with senior management functions.

(4) A function of an office or employment held by a person "(A)" is a senior management function if—

(a) it relates to the management of the charity, and A is not responsible for it to another officer or employee (other than a charity trustee or trustee for the charity), or

(b) it involves control over money and the only officer or employee (other than a charity trustee or trustee for the charity) to whom A is responsible for it is a person with senior management functions other than ones involving control over money.

Restricted roles: other materials

- [Guidance for Individuals](#)
- [Explanatory Notes to 2016 Act, paragraph 66](#)
- [Government consultation paper preceding 2016 Act, paragraph 77](#)

Waiver: the power

- Power contained in s.181
- Constrained discretion per s.181(3)
- Waiver cannot overcome governing document
- Waiver cannot overcome other restrictions (e.g. company director disqualification)
- See [Waiver Guidance](#) for decision-making process and suggested application contents

Waiver: appeals and review

- Appeal to First-tier Tribunal / review by Commission
- [Blacker v Charity Commission \(CA/2021/0026\)](#)
- [Junior Programme – Natalie Pratt – challenging Commission decisions](#)

3. Discretionary disqualification



The power

- Power contained in s.181A
- Equivalent provisions in ss.181A(3)-(4) as to senior management functions

Three conditions

1. One of sub-conditions in s.181A(7)
2. Unfitness: the person is unfit to be a charity trustee or trustee for a charity (either generally or in relation to the charities or classes of charity specified or described in the order)
3. Public interest: making the order is desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order

Sub-conditions: s.181A(7)

- A. Caution for offence in case A against charity
- B. Conviction under foreign law of offence against charity
- C. Found by HMRC not to be a fit and proper person to be a manager of a body or trust
- D. Responsibility/complicity in misconduct or mismanagement in administration of a charity (trustee, etc. of charity)
- E. Responsibility/complicity in misconduct or mismanagement in administration of a charity (officer/employee of corporate trustee)
- F. Past/continuing conduct likely to be damaging to public trust and confidence in relevant charities

Sub-conditions: additional points

- Sub-conditions A-B (ss.181A(10)-(11))
- Sub-condition B and foreign law (s.181A(12))
- Conditions D-F: see [Explanatory Statement](#)
- Case law on “misconduct” and “mismanagement”: [Junior Programme – Natalie Pratt – Commission’s protective powers](#)
- [Naik v Charity Commission \(CA/2019/0014 V\)](#) and sub-condition F

Unfitness, public interest and *Mond*

- [*Mond v Charity Commission* \(FT/CA/2024/0006\)](#)
 - Sub-condition F satisfied? ✓
 - Unfitness condition satisfied? X
 - Public interest condition satisfied? X
 - Convention rights
 - Fact-specific decision

Period of disqualification

- 15-year maximum (s.181B(2)(a))
- Proportionality (s.181B(2)(b))
- Bands of seriousness: [Explanatory Statement](#) and [*Naik*](#)
- [Operational Guidance](#): three principles

Procedure

1. Pre-notice ([Operational Guidance](#))
2. Notice (s.181C)
3. Suspension (ss.181B(4)-(10))
4. Review
5. Appeal
6. Order takes effect (s.181B(3))
7. Variation/discharge (ss.181D and 337)

[See also Flowchart in Explanatory Notes to 2016 Act](#)

4. Final points



Civil and criminal penalties

- Civil
 - No invalidity resulting from disqualification alone (s.184(1))
 - Return of remuneration, expenses and benefits (ss.184(2)-(4))
- Criminal (s.183)

Forward planning

- Automatic vs discretionary disqualification
- Planning for:
 - Governance
 - Compliance
 - Employment law consequences
- Pre-emptive application for waiver?



Radcliffe Chambers

Harmish Mehta

Radcliffe Chambers
11 New Square
Lincoln's Inn
London
WC2A 3QB

T: 020 7831 0081

F: 020 7405 2560

DX: 319 London

clerks@radcliffechambers.com

www.radcliffechambers.com

Radcliffe
Chambers

Disposing of charity land

Matthew Mills

20th February 2025



Why is this important?

1. The law and practice is changing:
 - a) Sections 17-24 Charities Act 2022 (in force June 2023, March 2024, May 2025)
 - b) Operational Guidance 528 (Jan 2025)
2. Severe consequences of getting it wrong:
 - a) Generally, the disposition is void
 - b) Trustees commit a breach of duty

1. The power to dispose



Source 1: governing document Radcliffe Chambers

- E.g. all of the Charity Commission's model governing documents give trustees a power:

"to sell, lease or otherwise dispose of all or any part of the property belonging to the charity"

- Note any restrictions in the governing document:
 1. Substantive (e.g. designated land); or
 2. Procedural (e.g. requirement to call a public meeting)
- If you do not have the power, you can try to amend the governing document

Source 2: TOLATA 1996

- Section 6(1): *"the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner"*
- Does not matter when the charity was created: section 2(5)
- Cannot be excluded but can be subject to consent: section 8
- Limits on the statutory power:
 1. Only applies to trusts in the strict sense
 2. Some lenders do not believe it gives a power to mortgage
 3. Does not apply if Universities and College Estates Act 1925 applies
 4. Subject to *"any other enactment or any rule of law or equity"*: section 6(6)

Source 3: specific statutes

1. Granting a lease to relieve the charity from liability to pay compensation for a tenant's improvements: s.14 Landlord and Tenant Act 1927
2. Granting 1 acre for specific educational, literary or scientific purposes: s.6 School Sites Act 1841 and s.6 Literary and Scientific Institutions Act 1854
3. Local authorities selling charitable land with the consent of the parish and the Secretary of State: ss. 123, 127 and 270 Local Government Act 1972

Source 4: common law?

- Re Howard Street Congregational Chapel, Sheffield [1913] 2 Ch 690, at 695:

"Prior to the Charitable Trusts Act [1853] there was no common law prohibition against a sale by trustees of charity lands vested in them although no express power of sale was given to them under their document of trust, but all such sales were liable to be upset if not for the benefit of the charity."

- It is not entirely clear if these cases have been superseded by the charity legislation
- As it is relatively straightforward to amend a governing document, it is unwise to rely on the old cases

2. The default rule



The default rule: s.117(1)

"No land held by or in trust for a charity is to be conveyed, transferred, leased or otherwise disposed of without an order of the court, or the Commission."

1. Does not apply to buying land
2. Only applies to land in England and Wales: s.129(1)
3. Only applies if all of the land is held on trust only for the charity: s.117(1A)
4. Does not apply to sales by personal representatives
5. Is not limited to sales of permanent endowment
6. Litigation will rarely be appropriate or permitted under s.115

What are 'dispositions'?

1. Sale
2. Lease
3. Easement
4. Wayleave
5. Option to purchase
6. Surrender of a lease
7. Assignment of a lease
8. Extension of a lease
9. Release of a restrictive covenant

What are not 'dispositions'?

1. Uncompleted contract for sale: Bayoumi v Women's Total Abstinence Educational Union Ltd [2003] EWCA Civ 1548
2. Licence or tenancy at will: Gray v Taylor [1998] 1 WLR 1093
3. Right of first refusal ('pre-emption') (but cf a call option)
4. Grant of consent by a charity landlord to its tenant
5. Surrender or assignment by a charity's tenant
6. Transfer from retiring trustees to new trustees

When to ask the Commission

1. Disposition to a connected person
2. Sale by auction
3. Costs of the alternative procedure are disproportionate
4. Disposition is particularly complex
5. Trustees cannot find a suitable advisor (rare)
6. Advisor does not recommend the disposition, but trustees still believe it is in the charity's best interests
7. Disposition at an undervalue (e.g. to a local authority)

Applying to the Commission

<https://www.gov.uk/guidance/sell-or-lease-property-to-someone-connected-to-your-charity>

- Operational Guidance 548, section B4
- Trustees must show that they have:
 1. The power to make the disposition
 2. Managed any conflicts of interest
 3. Considered any objections
 4. Followed any advice
 5. Ensured disposition is in the best interests of the charity

3. The exceptions



Exceptions for dispositions

1. Leases by a charity to a beneficiary at less than market rent: s.117(3)(d)
2. Releasing a rentcharge for at least 10x annual amount: s.127(1)
3. Advowsons: s.117(4)(c)
4. Mortgages: s.117(4)(b) (but see Part 5 of this talk)

Exceptions for people

1. Dispositions authorised under Universities and College Estates Act 1925: s.117(3)(b)
2. Dispositions by an exempt charity: s.117(4)(a)
3. Dispositions by an insolvency practitioner: s.117(3)(aa)
4. Dispositions authorised by legislation or scheme: s.117(3)(a)
5. Dispositions to another charity for less than market value: s.117(3)(c)
6. Dispositions to unconnected persons after following section 119 or section 120: s.117(2)

Who is a 'connected person'?

Sections 118 and 350-352 Charities Act 2011

1. Trustees
2. Donors of *any* land
3. Certain close relatives of trustees or donors
4. Officers, agents and employees of the charity (except short leases to employees: s.118(2A))
5. A spouse or civil partner of any of the above
6. Partnerships, institutions and companies linked to any of the above

4. Dispositions to an unconnected person



The alternative process

- In most cases, trustees must do 2 things (s.119(1)):
 1. Obtain and consider a written report on the proposed disposition from a 'designated advisor'; and
 2. Decide that the terms of the proposed disposition are the best that can reasonably be obtained:
 - a) Ideally, discuss the report at a meeting
 - b) It is possible to delegate these functions, but trustees should manage the process
 - c) 'best that can reasonably be obtained' does not always mean highest price: Chaston v Chaston [2018] EWHC 1672 (Ch), at [30]

Designated advisors

- Trustees must instruct someone in the following categories:
 1. A fellow or professional associate of RICS
 2. A fellow of Propertymark (formerly known as the National Association of Estate Agents)
 3. A member of the Central Association of Agricultural Valuers
 4. Anyone who the trustees reasonably believe has ability and experience of valuing land in the relevant area
- Trustees can instruct a firm rather than a person: David Roberts Art Foundation Ltd v Riedweg [2019] EWHC 1358 (Ch), at [19]
- Trustees, officers or employees can now give the advice: s.128A

The report

- Regulation 4 Charities (Dispositions of Land: Designated Advisers and Reports) Regulations 2023:
 1. Confirm the advisor is suitably qualified and unconflicted
 2. Value the land and describe steps which could enhance its value
 3. Discuss whether the land should be marketed
 4. Give any other suggestions for improving the terms of the disposition
- Trustees are no longer required to advertise the proposed disposition, but it is good practice to do so if the advisor suggests it
- Obtain the report before the disposition (but cf David Roberts Art Foundation Ltd v Riedweg [2019] EWHC 1358 (Ch), at [101])

Relaxed rules: leases

- No need to seek advice for a lease which is for 7 years or less and does not involve an upfront premium: s.119(2) and s.120(1)
- If the lease is for more than 7 years and/or involves a premium, the trustees are only required to (s.120(2)):
 1. Obtain advice from someone the trustees reasonably believe has the appropriate ability and experience; and
 2. Decide that the terms of the proposed disposition are the best that can reasonably be obtained
- The advice does not need to comply with the 2023 Regulations
- Best practice: seek written advice from a member of one of the professional bodies for designated advisors

Stricter rules: designated land Radcliffe Chambers

- Land which the governing document requires the trustees to use for a particular purpose of the charity (e.g. almshouse)
- If trustees want to sell designated land they must, in addition to getting advice from a designated advisor (s.121):
 1. Give notice of the proposed disposition for at least one month
 2. Take into consideration any responses received in time
- No prescribed form of notice, but see OG548, section B5.3
- No prescribed method of notice, but see OG548, section B5.3

Stricter rules: designated land ^{Radcliffe Chambers}

- The stricter rules do not apply to a disposition of designated land (i.e. there is no need to give public notice) if:
 1. Trustees intend to replace the designated land: s.121(5)(a)
 2. Disposition is a lease for 2 years or less: s.121(5)(b)
 3. Charity Commission has given a waiver: s.121(6) and s.121(7)
 - a) Waivers are rare: OG548, section B5.4

5. Mortgages



The default rule: s.124(1)

- Section 124(1): *"... no mortgage of land held by or in trust for a charity is to be granted without an order of the court, or the Commission."*
- No statutory requirement to obtain the Commission's approval for mortgage loans from a connected person
- The default rule also applies when:
 1. Trustees borrow further sums (e.g. under an 'all monies' charge)
 2. Substantive terms of the mortgage change

Exceptions to the default rule

- Shorter list of exceptions:
 1. Mortgage is authorised by legislation or scheme: s.124(9)(a)
 2. Mortgage is made by a liquidator, receiver, mortgagee or administrator: s.124(9)(aa)
 3. Mortgage is authorised by the Secretary of State under the Universities and College Estates Act 1925: s.124(9)(b)
 4. Trustees obtain and consider proper written advice from someone who has no interest in the mortgage and who the trustees reasonably believe is qualified: s.124(2)

Advice on mortgages

- The advice must cover (ss.124(3), (4)):
 1. Whether the loan is necessary for the charity to pursue the particular course of action for which it seeks a loan
 2. Whether the terms of the mortgage are reasonable
 3. The ability of the charity to repay
 4. If the mortgage will secure a non-monetary obligation, whether it is reasonable for the trustees to undertake to discharge that obligation
- Trustees, officers or employees can now give the advice:
s.128A

6. Prescribed contents of a disposition



Five key tips on content

1. Sections 122 and 123 deal with most dispositions, sections 125 and 126 deal with mortgages. They are materially similar.
2. Previous requirement to certify the disposition has been replaced with a duty to include 'prescribed statements': s.122(2)(d), s.125(1)(c), Land Registry Practice Guides 14 and 14a
3. If the recipient of the disposition is also a charity, include the information in subsections 122(7) and 122(8)
4. If you vary an existing contract for a disposition, it is sensible to include all of the information in the new contract
5. If prescribed information is not included, the disposition will only be valid if the recipient acted in good faith: s.122(5), s.125(5)



Radcliffe Chambers

Matthew Mills

Radcliffe Chambers
11 New Square
Lincoln's Inn
London
WC2A 3QB

T: 020 7831 0081

F: 020 7405 2560

DX: 319 London

clerks@radcliffechambers.com

www.radcliffechambers.com