



**IN THE FIRST TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

CA/2011/0004

**(1) ALAN GEOFFREY GROUND
(2) BARRIE POPL
(3) CLARE LEMIEUX
(4) CELESTE LAWRENCE**

Appellants

- and -

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondent

- and-

(2) THE GUILDFORD DIOCESAN BOARD OF FINANCE

Second Respondent

The Tribunal:

**Judge Alison McKenna
Carole Park, Lay Member
Susan Elizabeth, Lay Member**

Heard in public at Field House on 29 November 2011

Mark Mullen of counsel appeared for the Appellants

**James Kilby (Charity Commission Legal Department) appeared for
the First Respondent**

Andrew Westwood of counsel appeared for the Second Respondent

DECISION

The appeal is allowed and the Tribunal now makes an Order amending the Scheme of 31 March 2011 in respect of Dunsfold Church of England School Trust (4028530)

REASONS

Introduction

- 1.1 These proceedings concern a charity now known as Dunsfold Church of England School Trust, registered charity number 4028530 (“the Charity”). The Charity Commission made a scheme for the Charity pursuant to s. 16(1)(a) of the Charities Act 1993 as amended (“the Act”) on 31 March 2011, which is now the subject of an appeal to the Tribunal. The Charity Commission’s scheme (“the Scheme”) is reproduced at Annexe A to this Decision.
- 1.2 The Appellants are all either resident in or otherwise connected with Dunsfold. Mr Ground is Chairman of the Parish Council and Mr Pople is its Vice-Chairman. Ms Lemieux runs a nursery school in the village. Ms Lawrence is Clerk to the Parish Council, lives in the village and has two primary school age children who must attend school some distance away. No point was taken by the other parties as to the Appellants’ standing to bring this appeal and the Tribunal also accepts that they are persons who are or may be affected by the Scheme so as to give them the right to bring an appeal against it.
- 1.3 The Guildford Diocesan Board of Finance (“the Trustee”) is the trustee of the Charity. It is itself a charity, registered under number 248245. The Trustee applied for the Scheme in circumstances that are set out later in this Decision. The Scheme does not disturb the trusteeship provisions for the Charity and the continuing trusteeship of the Trustee was not an issue that we were asked to consider in the appeal.
- 1.4 Following the case management directions of the Tribunal dated 26 July 2011, the parties exchanged with each other and filed with the Tribunal substantial documentary evidence and legal materials. It was agreed between them that there should be no oral evidence at the hearing (and the Tribunal did not require any to be given) so that we proceeded by way of legal submissions only. The Tribunal is grateful to the legal representatives for the clarity of their presentations.

The Charity

- 2.1 The Charity consists of land and buildings known as “the former Dunsfold School Garden and Playground” and is situated in the village of Dunsfold in Surrey. The history of the school was largely undisputed in this appeal,

although the legal effect of the various historical documents to which we were referred has been the subject of much contention between the parties.

- 2.2 The school was founded in 1839 by a local benefactor, Miss Katherine Woods. The building contains a plaque which reads as follows:

“THESE SCHOOLS WERE BUILT IN 1839 AT THE COST OF MISS KATHERINA WOODS OF SHOPWICK IN SUSSEX AND BURNINGFOLD IN THIS PARISH AND ARE SUPPORTED BY VOLUNTARY SUBSCRIPTIONS FOR THE EDUCATION OF CHILDREN RESIDENT IN THE PARISH OF DUNSFOLD”.

- 2.3 Miss Woods’ Will, executed in 1839, refers to the school as follows:

‘And whereas I am now building or about to build a school in Parish of Dunsfold in the County of Surrey for the benefit of poor children now I bequeath the sum of £3106 three per centum per annum consolidated bank annuities unto the same William Leyland Woods, George Henry Woods and the Rector of the time being of the said Parish of Dunsfold to be invested or transferred into their names by my executor within six calendar months after my decease and I declare that the said William Leyland Woods, George Henry Woods and the said last mentioned Rector for the time being shall apply the dividends of the said last mentioned bank annuities from time to time in paying the salaries of the Master and Mistress of the last mentioned School and in defraying all expenses of providing the children of the said School with books and needle and other useful work and also of providing rewards to be distributed among the most deserving of such children on each anniversary of the opening of the said School And I declare that the said School shall be open to all children both male and female who shall be of the Established Church and who or whose parents or either of them living shall be resident in the said Parish of Dunsfold subject to such payments and regulations as my trustees for the time being shall think fit to prescribe...’

- 2.4 The next official record of the school to which we were referred was a House of Commons Return of Schools dated 1906, which refers to the owner of the school as a Mr Godman and includes a footnote as follows: *“It is stated that the schools were built in 1839 at the cost of Miss Catherine Woods and that she made a will appointing the Rector of Dunsfold and two others as trustees of the school but that advantage was taken of some informality in the will and her legatee sold the schools to Mr Godman”*. One of the Appellants, Mr Ground, had provided the Charity Commission with the fruits of his archive research, suggesting that there had been an unfortunate history of litigation concerning Miss Woods’ Will in the years 1848 to 1850, however the formal outcome (if any) of this litigation was not in evidence before us.
- 2.5 In 1915 Mr Godman granted a lease of the school which ran from year to year, was terminable on six months’ notice and was stated to be for a yearly rent of fifty pounds and eight shillings. The lease was to the Rector of Dunsfold and

others, and provided that *“the premises shall be used as and for a School for the education of children and adults or children only of the labouring manufacturing and other poorer classes in the Parish of Dunsfold...”*.

- 2.6 In 1951 the school site was conveyed to the Duke of Westminster (as part and parcel of a much larger transaction involving Mr Godman’s estate). The freehold interest was then apparently still subject to the 1915 lease. In 1957, the Duke of Westminster conveyed the freehold of the school property to the Trustee for nil consideration *“for the purpose of a Church of England School for the education of children and adults or children only and for no other purpose”*. The school master’s house on the site was apparently separately let to the Trustee at that time, however in 1959 the freehold of the school house was conveyed to Surrey County Council. It has now been unused for some 20 years.
- 2.7 The school was closed, in the face of local opposition, in 2004 and its remaining infants transferred to St Nicolas’s School, Cranleigh. This school also ceased to provide infant education in 2006. The Charity property has therefore been unused since 2004. The evidence before us was that it has inevitably suffered considerable dilapidation and the costs of bringing it back into use have been estimated at between £300,000 and £500,000.
- 2.8 In 2007 the Trustee applied to the Secretary of State for Education for an Order under s.554 of the Education Act 1996, permitting it to sell the property and hold the proceeds of sale on trust for certain religious educational purposes. In 2008 the Secretary of State refused to make the Order sought, writing to the Trustee to confirm his decision in January 2009 as follows: *“The Secretary of State hoped that, by working with the Council, it would be possible to satisfy the original donor’s intention to provide an educational facility for the local community”*.
- 2.9 The Trustee subsequently applied to the Charity Commission for a scheme and in 2009 the Charity Commission published a draft fully-regulating scheme which *inter alia* conferred a power of sale on the Trustee and provided an outlet for the proceeds of sale. The Commission received a number of objections to the draft scheme and consequently did not seal it. In 2010 the Commission published a second draft scheme, also fully-regulating, which also included a power of sale but modified the objects. There were further objections on publication and the draft scheme was therefore formally reviewed by Neil Robertson, the Commission’s Head of Specialist Casework on 31 March 2011. Mr Robertson decided that the draft scheme should be sealed but with certain modifications. These included deletion of the express power of sale and the substitution of a power to let the property for not more than 25 years. The Scheme (sealed on 31 March 2011) is, as noted above, the subject of this appeal.

The Powers of the Tribunal

- 3.1 Section 2A of the Act provides that

“(4) The Tribunal shall have jurisdiction to hear and determine -

(a) such appeals and applications as may be made to the Tribunal in accordance with Schedule 1C to this Act, or any other enactment, in respect of decisions, orders or directions of the Commission.”

- 3.2 The Schedule referred to in that section sets out in a table format the following matters: in column 1, which particular decisions directions or orders may be appealed to the Charity Tribunal¹; in column 2, who may bring such an appeal; and in column 3, what powers the Tribunal may exercise in determining each type of appeal. The Scheme in this case is in fact an order made under s.16 (1) (a) of the Act. The relevant entries in the table are therefore as follows:

1.	2.	3.
Order made by the Commission under section 16(1) of this Act....	The persons are – (a) in a section 16(1)(a) case, the charity trustees of the charity to which the order relates..... (b) [...] (c) any other person who is or may be affected by the order.	Power to – (a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission (b) substitute for all or part of the order any other order which could have been made by the Commission (c) add to the order anything which could have been contained in an order made by the Commission.

- 3.3 Paragraph 1 sub-paragraphs (4) and (5) of Schedule 1C to the Act set out the relevant approach and the powers of the Tribunal:

“(4) In determining such an appeal the Tribunal -

- (a) shall consider afresh the decision, direction or order appealed against, and*
- (b) may take into account evidence which was not available to the Commission.*

(5) The Tribunal may -

- (a) dismiss the appeal, or*
- (b) if it allows the appeal, exercise any power specified in the corresponding entry in column 3 of the Table”.*

¹ As it then was. The jurisdiction of the Charity Tribunal has now been transferred to the First-tier Tribunal (Charity).

- 3.4 It follows that this appeal takes the form of a substantive re-hearing, rather than a procedural review of the original decision. For the reasons that appear below, it was agreed between the parties in this case that the Tribunal, if satisfied that the appeal should be allowed and that the Scheme should be amended, should exercise its powers at (b) and (c) of column 3 in the table above, rather than quashing the Scheme and (if appropriate) remitting the matter to the Commission.

The Parties' Submissions

(i) The Appellants' Case

- 4.1 The Appellants' Notice of Appeal made a number of complaints about the Scheme, including the Commission's procedures in making it, the Trustees' application for the Scheme, the alleged lack of a *cy-près* occasion to justify a fully regulating Scheme, the length of lease permitted by the Scheme and the meaning of the term "*not inconsistent with the principles of the Church of England*", as used in the Scheme. By the time of the hearing, the original Grounds of Appeal had either been abandoned or were the subject of agreement between the parties, so that the only live issue between the parties was the appropriate *cy-près* application for the property, that is the use to which the Charity property might now be put by the Trustee given that it was agreed that the original purposes of the Charity had ceased to provide a suitable and effective method of using it.
- 4.2 The Scheme refers at clause 2 to the "*existing trusts*" of the Charity. The trusts on which the property is held have been the subject of much debate and dispute between the Appellants and the Trustee, because the Appellants take the view that the property was dedicated to charity during the life of Miss Woods (as shown by the plaque) and that her signed Will of 1839 provided the requisite written evidence of this to have validly created a charity. The Parish Council even obtained Counsel's opinion on the point in 2009. The result is that the Appellants are convinced that the "*existing trusts*" on which the property is held are those set out in the 1839 Will (see paragraph 2.3 above) and that the 1957 conveyance (which the Charity Commission and the Trustee regard as the Charity's governing document, subject to the amendments made by the Scheme) invalidly purported to declare trusts which were inconsistent with those on which the Charity property was by then already held.
- 4.3 The Tribunal explained to the Appellants at an early stage in these proceedings, and again at the hearing, that it has no power to rule on the question of whether the 1839 Will or the 1957 conveyance established the charitable trusts on which the property is held. Only the High Court has that power. The Charity Commission is specifically precluded from determining the trusts by virtue of s. 16(3) of the Act and the Tribunal, as we have seen at paragraph 3.2 above, can in determining this appeal only make an order that the Commission could have made.

- 4.4 The Appellant's case as put by Mr Mullen at the hearing was that there was a *cy-près* occasion here under s. 13(1) (e) (iii) of the Act because the original purposes have "*ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations*". He accepted that the Tribunal could not determine the question of the relevant trusts, but argued that the wording of the plaque and of the 1839 Will were of relevance in considering the appropriate *cy-près* application and the "spirit of the original gift" to which s.14 B (3) of the Act now requires the Commission to have regard in applying charity property *cy-près*. (We consider the relevant legal principles in greater detail below).
- 4.5 The Appellants contended that Mr Robertson had not had sufficient regard to the spirit of the original gift in deciding to make the Scheme and further that the use to which the Charity property could now be put under the Scheme went "too far too fast" in that it moved from the primary purpose of providing a Church of England School in Dunsfold straight to wider charitable educational purposes, without pausing to consider the appropriateness of using the property for a secular school (albeit one to be run in a manner not inconsistent with the principles of the Church of England) in the village. The Appellants' case was, in short, that the use of the property as a school for the village was closer to the original intention of the founder in making the gift than were the wider educational uses permitted by the Scheme. Mr Mullen asked the Tribunal to amend the Scheme so that there would be a hierarchy of permitted uses, with the Trustee obliged to give preferential consideration to the use of the Charity property as a school for children in the village before considering wider educational use.

(ii) *The Trustee's Case*

- 4.6 Mr Westwood, on behalf of the Trustee, was concerned to make clear to the Tribunal that his client had at all times acted in accordance with its duties, on legal advice and in accordance with the advice of the Charity Commission. The Trustee's case was that the Charity is governed by the trusts declared in the 1957 conveyance (see paragraph 2.6 above) as now amended by the Scheme. This view was based on unambiguous advice given to it by the Charity Commission. The 1957 conveyance's dedication of the Charity property "*for the purpose of a Church of England School for the education of children and adults or children only and for no other purpose*" had meant that the Trustee was under a legal duty to take steps to regularise the use of the property following the closure of the school by its Governors in 2004.
- 4.7 Mr Westwood's principal submission was that the Tribunal should direct itself to the terms of the 1957 conveyance only as the starting point for its consideration of the "spirit of the original gift" in s. 14B (3) of the Act. If, contrary to his primary submission, the Tribunal thought it appropriate to have regard to the earlier history, then he submitted that the "spirit of the original gift" discernible from the 1839 Will also pointed to educational purposes connected with the Church of England in view of its reference to the "Established Church" and the inclusion of numerous other charitable bequests of a religious nature in the Will. He characterised the Appellants' arguments as seeking to separate out the

religious from the educational aspects of the trust, however in his submission the two aspects were indivisible.

(iii) The Charity Commission's Case

- 4.8 Mr Kilby on behalf of the Charity Commission broadly endorsed the Trustee's submissions. He explained how the Commission had approached the exercise contemplated by s. 14 B (3) of the Act (considered below) and explained that the Commission had been satisfied that a Church of England ethos should be a prominent feature in the Scheme, having regard to the terms of the 1957 conveyance and the spirit of the original gift. The Charity Commission's view continued to be that the property was held on the trusts of the 1957 conveyance. However, Mr Kilby submitted, even if one were to look back at the Will for the spirit of the original gift, one came to essentially the same conclusion because it would be wrong to ignore the reference to the "Established Church" in the Will.
- 4.9 The Charity Commission did not seek to defend the Scheme and was content for it to be amended by the Tribunal. It had hoped that the Trustee and the Appellants would reach a compromise that it could endorse. In the circumstances it broadly supported the amended draft Scheme now suggested by the Trustee and asked the Tribunal to use its powers to amend the Scheme accordingly.

The Tribunal's Conclusions

(i) The Scheme of 30 March 2011

- 5.1 It is only if the Tribunal decides to allow the appeal that it may exercise its power to amend the Scheme (see paragraph 3.3 above). The Tribunal must therefore consider whether the Scheme is deficient (on the basis contended for by the Appellants or otherwise) so as to make it appropriate to allow the appeal.
- 5.2 We have considered carefully the terms of the Scheme and the reasons given by Mr Robertson, on behalf of the Commission, for deciding to make it in those terms. Firstly, we agree with the parties that the *cy-près* occasion which provided the foundation for the making of the Scheme was in fact s. 13(1)(e)(iii) of the Act in this case (see paragraph 4.4 above), rather than the other provisions of that section to which Mr Robertson refers in his decision. Secondly, we note that Mr Robertson did not in his decision specifically direct himself to the matters set out s. 14B(3) of the Act and we cannot in those circumstances be satisfied that he had all the relevant considerations in mind in making his decision. Finally, we consider that, although Mr Robertson refers at paragraph 29 of his decision to the need to consider the spirit of the gift, he then gave insufficient consideration to the history of the Charity property in deciding to make the Scheme in the terms that he did. In all these circumstances we conclude that the appeal should be allowed. As stated above, this was not really in dispute between the parties by the time of the hearing.

- 5.3 Next, we must consider which of the alternative powers in column 3 of the table in Schedule 1C to the Act we should exercise. Having considered the parties' submissions, we accept that it would be inappropriate in this case merely to quash the Scheme and remit the matter to the Charity Commission. The Commission would, we were told, in those circumstances be obliged to re-publish a draft scheme and consider representations on it. There would doubtless be further dispute between the parties over its terms, and all the while the Charity property would remain unused and its condition would deteriorate further. In the circumstances of this appeal, we are satisfied that we should exercise the powers described in (b) and (c) of column 3 of the table in order to amend the Scheme.

(ii) Cy-près Application and s. 14B of the Act

- 5.4 The Tribunal heard submissions as to the legal requirements for applying property *cy-près* and the effect of s. 14B of the Act. "*Cy-près*" is a Norman French word, meaning "as near as" and is used to describe an ancient common law doctrine whereby assets dedicated to charity (which can exist in perpetuity) may be re-directed to alternative (similar) charitable purposes if they cannot be used for their original purpose. S. 14B was inserted into the Act by s. 18 of the Charities Act 2006, the relevant parts of which provide as follows:

"14B Cy-près schemes

(1) The power of the court or the Commission to make schemes for the application of property *cy-près* shall be exercised in accordance with this section.

(2) Where any property given for charitable purposes is applicable *cy-près*, the court or the Commission may make a scheme providing for the property to be applied—

(a) for such charitable purposes, and

(b) (if the scheme provides for the property to be transferred to another charity) by or on trust for such other charity,

as it considers appropriate, having regard to the matters set out in subsection (3).

(3) The matters are—

(a) the spirit of the original gift,

(b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and

(c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

The "relevant charity" means the charity by or on behalf of which the property is to be applied under the scheme.

(4).....

(5) In this section references to property given include the property for the time being representing the property originally given or property derived from it.

(6)....."

- 5.5 The Tribunal is bound to exercise its powers under column 3 of the table in accordance with this section, not least because it can only make an order that the Commission itself could have made. We have considered carefully the submissions made to us as to the correct approach to exercising this power and, in particular, as to the correct approach to s. 14B(3). We note, before

turning to the submissions, that s. 14B confers wide discretion on the Commission (and consequently the Tribunal) in permitting it to make a scheme providing for the property to be applied “as it considers appropriate”, having regard to the matters in subsection (3). We also note that the matters to which it must have regard in s. 14 B (3) are not set out in any particular order of priority.

5.6 Mr Mullen, on behalf of the Appellants, submitted that in having regard to the “spirit of the original gift” in s. 14B (3) (a), the Tribunal should consider the gift referred to or made in the 1839 Will and which is later reflected in the 1957 conveyance, namely a school for the residents of Dunsfold. He further submitted that the reference to “close to the original purposes” in s. 14B (3)(b) should be interpreted as “closest to” the original purposes, and that this, once again, takes you to the provision of a school for the residents of Dunsfold. He argued that the considerations in s.14B(3)(c) had the effect of “softening” the “closest to” test, in order to make sure that there was good use of the charity property. In the circumstances of this case, he argued that the Tribunal should have particular regard to the impact on (c) of the potential availability of funding for a Free School for the village in the light of recent education reforms.

5.7 In adopting this approach, the Appellants suggested that the Scheme should be amended in the following manner:

- (i) to amend the name of the Charity to “*Dunsfold School Trust*”;
- (ii) to amend clause 5 to read as follows:

“5. Use of Property

- (1) The property shall be used as a Church of England School for the education of children and adults or children only.*
- (2) If the property is not used in accordance with clause 5(1) above the property shall be used as a school for the education of children who are resident or whose parents are resident in and around the parish of Dunsfold, providing that any such use is not inconsistent with the principles of the Church of England.*
- (3) The trustee may for consideration or otherwise let the property to, or otherwise make the property available for the use of, a charity carrying on a school in accordance with clauses 5(1) and 5(2) above. The term of any such lease must not exceed 125 years.*
- (4) If the property cannot be used in accordance with 5(1) or 5(2) above the trustee may let the property on such terms as it thinks fit for charitable educational purposes. The trustee must be satisfied that any such use is not inconsistent with the principles of the Church of England. The term of any such lease must not exceed 25 years”.*

- (iii) to amend clause 6 to read as follows:

“6. Use of Unapplied Income

- (1) This clause applies only to the extent that any income of the charity cannot be applied in accordance with the existing trusts, including the*

cost of administering the charity and of managing its assets ("the unapplied income").

- (2) The trustee may apply the unapplied income in advancing education for the public benefit by:
 - (a) defraying the costs of the carrying on of a school at the property or elsewhere in Dunsfold by a charity in accordance with clause 5(3).*
 - (b) Making grants of money to persons resident in Dunsfold or by providing or paying for goods, services or facilities for them; and*
 - (c) Providing items, services or facilities for any Church of England School in the Diocese of Guildford attended by children resident in the parish of Dunsfold.**
- (3) In applying the unapplied income under sub-clause 2(b) above, the trustee can give preference to children and young people under 19 years of age.*
- (4) Before applying the unapplied income of the charity under sub-clauses 2(b) or 2(c) above, the trustee must have regard to any representations or suggestions for the use of the unapplied income made by the Parochial Church Council of the ecclesiastical parish of St Mary and All Saints, Dunsfold".*

5.8 In responding on behalf of the Trustee, Mr Westwood submitted that the "*original gift*" to which the Tribunal must have regard under s. 14B (3) (a) was the 1957 conveyance, which was a gift of the property on trust for use as a Church of England School. He argued that it would have been inconceivable for the Diocesan Board of Education to have accepted the trusteeship of a wholly secular school and that the Charity was clearly concerned with Anglican faith-based education. He submitted that if the Tribunal thought it appropriate to have regard to the 1839 Will then this also pointed to a Church of England School in view of the reference to the "Established Church". In relation to s.14B (3)(b), he submitted that the statutory reference to "*close to the original purposes*" represented a significant departure from the "closest to" approach so that the Tribunal did not have to look for the "closest" purpose.

5.9 Mr Westwood explained that the Trustee was in agreement with the idea that the Charity property should, if possible, be used as another type of school in the absence of a Church of England school, however it considered that this should be one of a range of possible uses for the property, rather than imposing an obligation on the Trustee to use it for this purpose. The Trustee viewed the mandatory terms of the Appellants' proposed amended scheme as inappropriate. He submitted that the uses for the property permitted by an amended scheme should give proper weight to both the religious and educational aspects of the trust and that neither should be provided for at the expense of the other. He told the Tribunal that his client was concerned about the scope for further complaint by the Appellants if their proposed amendments were made, although he accepted that his clients could seek formal advice from the Commission in respect of any particular proposed use. He proposed the inclusion of a power for the Trustee to appoint an independent adviser to evaluate any proposal from the Appellants.

5.10 Mr Westwood argued that the Trustee's proposed amended scheme would give effect to the principles he had espoused. He suggested amendments to the Appellants' proposed scheme, as follows:

- (i) to retain the name given to the Charity in the Scheme;
- (ii) to amend clause 5 to read as follows (the Trustee's amendments are underlined):

"5. Use of Property

(1) The property shall be used as a Church of England School for the education of children and adults or children only.

(2) If the property is not used in accordance with clause 5(1) above the property may be used

(a) as a school for the education of children who are resident or whose parents are resident in and around the parish of Dunsfold, providing that any such use is not inconsistent with the principles of the Church of England.

(b) for other charitable educational purposes

(c) for other charitable community uses in the parish of Dunsfold

(d) for any combination of the above

providing that any such use is consistent with the principles of the Church of England.

(3) The trustee may for consideration or otherwise let the property to, or otherwise make the property available for the use of, a charity carrying on a school in accordance with clauses 5(1) and 5(2) above. The term of any such lease must not exceed 125 years.

(4) If the property cannot be used in accordance with 5(1) or 5(2) above the trustee may let the property on such terms as it thinks fit for charitable educational purposes. The trustee must be satisfied that any such use is not inconsistent with the principles of the Church of England. The term of any such lease must not exceed 25 years".

- (iii) to amend clause 6 to read as follows (the Trustee's amendments are underlined):

"6. Use of Unapplied Income

(1) This clause applies only to the extent that any income of the charity cannot be applied in accordance with the existing trusts, including the cost of administering the charity and of managing its assets ("the unapplied income").

(2) The trustee may apply the unapplied income in advancing education for the public benefit in accordance with the principles of the Church of England by:

(a) defraying the costs of the carrying on of a school at the property or elsewhere in Dunsfold by a charity in accordance with clause 5(3).

- (b) *Making grants of money to persons resident in Dunsfold or by providing or paying for goods, services or facilities for them; and*
 - (c) *Providing items, services or facilities for any Church of England School in the Diocese of Guildford attended by children resident in the parish of Dunsfold.*
 - (d) *Supporting the work of the Guildford Diocesan Board of Finance*
- (3) *In applying the unapplied income under sub-clause 2(b) above, the trustee can give preference to children and young people under 19 years of age.*
- (4) *Before applying the unapplied income of the charity under sub-clauses 2(b) or 2(c) above, the trustee must have regard to any representations or suggestions for the use of the unapplied income made by the Parochial Church Council of the ecclesiastical parish of St Mary and All Saints, Dunsfold”.*

5.11 As noted above, the Charity Commission broadly supported the Trustee’s proposed amendments to the Appellants’ scheme, save that in his skeleton argument, Mr Kilby commented that the Commission would be reluctant to see the Charity’s unapplied income being applied Diocese-wide unless the other outlets for it had already been exhausted. The Commission had therefore suggested a re-configuration of clause 6(2) and the inclusion of the words “(subject thereto)” at the beginning of the Trustee’s proposed sub-clause (d), so that clause 6(2) would now read as follows:

“The trustee may apply the unapplied income in advancing education for the public benefit in accordance with the principles of the Church of England by:

- (a) *(i) defraying the costs of the carrying on of a school at the property or elsewhere in Dunsfold by a charity in accordance with clause 5(3).*
- (ii) making grants of money to persons resident in Dunsfold or by providing or paying for goods, services or facilities for them;*
- (iii) providing items, services or facilities for any Church of England School in the Diocese of Guildford attended by children resident in the parish of Dunsfold; and*
- (b) *(subject thereto)* *supporting the work of the Guildford Diocesan Board of Finance”.*

5.12 Mr Kilby helpfully directed the Tribunal’s attention to Mr Justice Briggs’ decision in *White v Williams* [2010] EWHC 940 (Ch), in which he had considered the question of the *cy-près* application of charitable assets. Briggs J had, in that case, considered the meaning of s. 14 B (3) and concluded that it was “self-explanatory”. He had also, however, expressly agreed with the Court of Appeal’s approach to the “spirit of the gift” adopted (albeit under the pre-2006 Act test) in *Varsani v Jesani* [1999] Ch 219, in which Chadwick LJ at p. 238 had said:

“the need to have regard to the spirit of the gift requires the court to look beyond the original purposes as defined by the objects specified in the declaration of trust and to seek to identify the spirit in which the donors gave the property upon trust for those purposes. That can be done as it seems to me, with the existence of the document as a whole and any relevant evidence as to the circumstances in which the gift was made”.

- 5.13 Mr Kilby explained to the Tribunal that the Commission’s approach to s. 14B(3) in this case was that the “spirit of the gift” was a school connected with the Church of England, whether one looked at the 1839 Will or the 1957 conveyance. His contention was that, all things being equal, one should still look for the application of assets closest to the original purpose and work outwards. The Scheme had attempted partially to reflect the original purpose in order to provide a suitable and effective use for the Charity property. The approach of the Scheme was therefore to give the Trustee discretion - within certain parameters - for the use of the property. Mr Kilby commented that the Commission would be content to see the Tribunal amend the Scheme so as to give greater direction to the Trustee, for example to require the maximisation of certain usage, but he was concerned about the Commission’s ability to enforce any more rigid requirements on the Trustee. He recommended the combined proposed amendments of the Trustee and the Commission (as shown at paragraphs 5.10 and 5.11 above) to the Tribunal.

(iii) The Tribunal's Amendments to the Scheme

- 5.14 The Tribunal has considered all the arguments carefully. It notes that there was, by the time of the hearing, comparatively little difference between the parties in terms of the proposed *permitted* uses for the Charity property, but a fundamental difference of opinion as to how the Trustee should approach the task of deciding upon any *actual* use.
- 5.15 In considering the correct approach to the exercise of the s. 14B power, the Tribunal considers the following approach appropriate, having regard to the matters in s. 14B (3).
- 5.16 Firstly, in (a) considering the spirit of the original gift, we follow Mr Justice Briggs and Lord Justice Chadwick in looking beyond the terms of the 1957 conveyance and taking into account the entire history of the Charity, including the plaque, the Will and the dealings with the property thereafter. We conclude that these provide for a Church of England School *in the village of Dunsfold*. We do not accept the Appellants’ contention that there is essentially a secular school trust, because Miss Woods in her Will clearly had in mind a connection with the Church of England in her reference to the “Established Church” and her involvement of the Rector in the operation of the school. That said, there seems to us also to be a clear intention (evidenced in the combined effect of the plaque, the Will and the conveyance) that the school should benefit *the people of Dunsfold* in particular and that this is also a significant factor in the spirit of the gift which should be considered in providing for an appropriate cy-

près application. This village school use may be balanced, appropriately in our view, with the Church of England history of the property through the inclusion of a provision that any such use must be consistent with the principles of the Church of England. It was accepted at the hearing that a standard school curriculum could be expected to fall within this provision.

- 5.17 Secondly, we note that (b) refers to “*close*” but not “*closest*” to the original purposes. We can see the sense in Mr Kilby’s argument that, all things being equal, one should start with the closest purpose and then expand the permitted uses outwards, although this is clearly not an express statutory requirement. We note that, in principle, this approach would lend itself to a hierarchy of uses rather than a completely discretionary approach and that this would tend to support the Appellants’ proposals for amending the Scheme.
- 5.18 However, in the particular circumstances of this case we are also mindful of (c) and the need for the Charity to have purposes which are suitable and effective in the light of current social and economic circumstances. This has equal weight to the other considerations in s. 14 B (3), however it seems right to give it more prominence than one otherwise might in circumstances where the Charity property has stood empty for some years, its condition continues to deteriorate, and any proposed occupier of the property will doubtless be required to expend a considerable capital sum in bringing it back into use. We consider that in such a case it is appropriate for the scheme we make to provide as much flexibility as possible in seeking to bring the property back into charitable use for the people of Dunsfold, whilst having regard to the other considerations.
- 5.19 In the particular circumstances of this case then, we consider that the correct approach is for there to be more discretion afforded to the Trustee than the Appellants have suggested, but somewhat less discretion than the Trustee has suggested. We consider that there should be a positive obligation on the Trustee to give preferential *consideration* to the provision of a school in Dunsfold (to be run in a manner consistent with the principles of the Church of England) before moving on to consider the wider permitted uses provided for in the Scheme. There should remain discretion for the Trustee to consider the other options in the absence of a formal, viable and timely proposal for use of the property as a school for the village. We also consider it appropriate, in view of the acrimonious history of this matter, to provide a power for the Trustee to appoint an independent person to evaluate any proposal from a third party, including the Appellants. This suggestion is intended to assist in the re-establishment of a relationship of trust between the Appellants and the Trustee and we express the hope that they can move forward in a new spirit of co-operation now that the Tribunal has ruled on the appeal. We agree with the parties that the length of a lease for school-use should be 125 years (with a view to the occupier being able to obtain loan finance towards the capital costs) but for any non-school use to be limited to 25 years in the hope that the property might be returned to use as a school in the not-too-distant future, if not immediately.

- 5.20 We consider that, in view of the connection between the Charity and the people of Dunsfold, a Diocese-wide provision for the application of unapplied income goes too far, so we have restricted this power to the assistance of schools attended by pupils resident in Dunsfold. Finally, we see no reason to change the name of the Charity, which accurately describes its history.
- 5.21 For all those reasons, we now amend the Scheme in the terms of the Order at Annexe B to this decision.

Dated: 6 December 2011

Signed:
Alison McKenna
Principal Judge

Carole Park
Member

Susan Elizabeth
Member

Annexe A :The Scheme

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Under the power given in the Charities Act 1993

Orders that from today

31 March 2011

this

SCHEME

will alter or affect the charity formerly known as

DUNSFOLD CHURCH OF ENGLAND SCHOOL (4028530)

and now to be known as

DUNSFOLD CHURCH OF ENGLAND SCHOOL TRUST

at

Dunsfold, Surrey

Authorised Officer

SCHEME

1. Definitions

In this scheme:

“the charity” means the charity identified at the beginning of this scheme.

“the property” means the property identified in the schedule to this scheme.

“the trustee” means the trustee of the charity acting under this scheme.

2. Administration

The charity is to be administered in accordance with its existing trusts as altered by this scheme.

3. Name of the charity

The name of the charity is Dunsfold Church of England School Trust.

4. Trustee

The Guildford Diocesan Board of Finance (charity number 248245) will continue to be the trustee of the charity, and will manage and administer the charity in accordance with its usual procedures.

5. Use of property

- (1) Subject to the provisions of this clause, the trustee may let the property on such terms as it thinks fit for use for charitable educational purposes. The trustee must be satisfied that any such use is not inconsistent with the principles of the Church of England.
- (2) The trustee may only let the property if and insofar as it cannot be used in accordance with the existing trusts.
- (3) The term of any such lease must not exceed 25 years.
- (4) The trustee must comply with the requirements of Part V of the Charities Act 1993.

6. Use of unapplied income

- (1) This clause applies only to the extent that any income of the charity cannot be applied in accordance with the existing trusts, including the cost of administering the charity and of managing its assets (“the unapplied income”).
- (2) The trustee may apply the unapplied income in advancing education for the public benefit in accordance with the doctrines of the Church of England by:
 - (a) making grants of money to persons resident in Dunsfold, or by providing or paying for goods, services or facilities for them; and

- (b) providing items, services and facilities for any Church of England School in the Diocese of Guildford attended by children resident in the parish of Dunsfold.
- (3) In applying the unapplied income under sub-clause (2)(a) above, the trustee can give preference to children and young people under 19 years of age.
- (4) Before applying the unapplied income of the charity under sub-clause (2)(a) above, the trustee must have regard to any representations or suggestions for the use of the unapplied income made by the Parochial Church Council of the ecclesiastical parish of St Mary & All Saints, Dunsfold.

7. Questions relating to the Scheme

The Commission may decide any question put to it concerning:

- (1) the interpretation of this scheme; or
- (2) the propriety or validity of anything done or intended to be done under it.

SCHEDULE

Land and buildings known as the former Dunsfold School, Garden and Playground, Dunsfold, Surrey described in a conveyance of 1 March 1957 which was made between Major (Retired) Basil Kerr D.S.C., George Kershaw Ridley and Sir William Charles Crocker of the one part and the Guildford Diocesan Board of Finance of the other part.

ANNEXE B: THE TRIBUNAL'S ORDER



**IN THE FIRST TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

CA/2011/0004

**(1) ALAN GEOFFREY GROUND
(2) BARRIE POPL
(3) CLARE LEMIEUX
(4) CELESTE LAWRENCE**

Appellants

- and -

(1) THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Respondent

- and-

(2) THE GUILDFORD DIOCESAN BOARD OF FINANCE

Second Respondent

ORDER

Upon the Tribunal issuing its Decision dated 6 December 2011

And pursuant to the power contained in s.2A(4) of the Charities Act 1993 and the table in schedule 1C to that Act in connection with an Order made under under s. 16(1) (a) of that Act

IT IS ORDERED THAT:

1. The following provisions are substituted for those in the Charity Commission's scheme dated 31 March 2011 in respect of the charity known as Dunsfold Church of England School Trust (4028530):

Clause 5

"5. Use of Property

- (1) The property shall be used as a Church of England School for the education of children and adults or children only.*
- (2) If the property is not used in accordance with clause 5(1) above the property may be used as a school for the education of children who are resident or whose parents are resident in and around the parish of Dunsfold, providing that any such use is consistent with the principles of the Church of England.*
- (3) Subject thereto, the property may be used:*
 - (a) for other charitable educational purposes in the parish of Dunsfold*
 - (b) for other charitable community uses in the parish of Dunsfold*
 - (c) for any combination of the above**providing that any such use is consistent with the principles of the Church of England.*
- (4) The trustee may for consideration or otherwise let the property to, or otherwise make the property available for the use of, a charity carrying on a school in accordance with clauses 5(1) or 5(2) above. The term of any such lease must not exceed 125 years.*
- (5) If the property is not used in accordance with clauses 5(1) or 5(2) above the trustee may let the property on such terms as it thinks fit for charitable purposes falling under 5(3) above. The trustee must be satisfied that any such use is consistent with the principles of the Church of England. The term of any such lease must not exceed 25 years.*
- (6) In addition to its other powers for the administration of the charity the trustee may appoint an independent person to evaluate and advise it on any proposal for the use of the property under this clause or for the application of its unapplied income under clause 6".*

Clause 6

"6. Use of Unapplied Income

- (1) This clause applies only to the extent that any income of the charity cannot be applied in accordance with the existing trusts, including the cost of administering the charity and of managing its assets ("the unapplied income").*
- (2) The trustee may apply the unapplied income in advancing education for the public benefit in accordance with the principles of the Church of England by:*

- (i) defraying the costs of the carrying on of a school at the property or elsewhere in Dunsfold by a charity in accordance with clause 5(2).*
 - (ii) making grants of money to persons resident in Dunsfold or by providing or paying for goods, services or facilities for them.*
 - (iii) providing items, services or facilities for any Church of England School in the Diocese of Guildford attended by children resident in the parish of Dunsfold.*
- (3) In applying the unapplied income under sub-clause 2(ii) above, the trustee can give preference to children and young people under 19 years of age.*
- (4) Before applying the unapplied income of the charity under sub-clauses (2)(ii) or (2)(iii) above, the trustee must have regard to any representations or suggestions for the use of the unapplied income made by the Parochial Church Council of the ecclesiastical parish of St Mary and All Saints, Dunsfold".*

Dated: 6 December 2011

Signed:

**Alison McKenna
Principal Judge**

**Carole Park
Member**

**Susan Elizabeth
Member**