Neutral Citation Number: [2020] EWHC 2221 (Ch)

Case No: PT-2018-000964

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 14 August 2020

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

- -

Between :

RETTENDON PARISH COUNCIL	**Claimant**
- and –	
(1) MR ROY HART **(2) MRS JACKIE COPSEY** **(3) MRS KATHRYN CLARK** **(4) MRS PAT PREBBLE** **(5) MR JONATHAN HAVARD** **(6) MR THOMAS MARSHALL** **(7) HER MAJESTY'S ATTORNEY-GENERAL**	**Defendants**

Mr Joshua Winfield (instructed by **Tees Law**) for the **Claimant**
Mr Roy Hart, the First Defendant, appeared in person. None of the other defendants appeared or were formally represented

Hearing dates: 21 July 2020

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2.00 p.m. on Friday 14 August 2020.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. On 5 December 1861 by an award (the "Award"), made under the Inclosure Act 1845 (the "1845 Act"), two plots of land within the parish of Rettendon in Essex were allotted for the benefit of the local inhabitants. It is common ground that the allotments created two separate charitable trusts (the "Charities").

2. The first charity (the "Allotment for the Exercise and Recreation", charity number 271480) was established under the Award by the allotment to the "Churchwardens and Overseers of the Poor of the said parish of Rettendon" of a parcel of land (numbered lot 44) forming part of what is now known as Rettendon Bell Fields ("Bell Fields"). The land was allotted to the Churchwardens and Overseers "to be held by them and their successors in Trust as a place for Exercise and Recreation for the Inhabitants of the said Parish and Neighbourhood".

3. The second charity (the "Allotment for the Labouring Poor", charity number 271479) was established under the award by the allotment to the "said Churchwardens and Overseers of the Poor" of a second parcel of land (numbered lot 43) also forming part of Bell Fields, "to be held by them and their successors in Trust as an allotment for the Labouring Poor of the said Parish of Rettendon".

4. The claimant, Rettendon Parish Council (the "Council") was established by s.1(1) of the Local Government Act 1894 (the "1894 Act"). By s.3(9) the Council was established as a body corporate, entitled to hold land.

5. This case concerns the identity of the trustee or trustees of the Charities. The Council contends that it was appointed sole trustee of the Charities by virtue of the 1894 Act and (notwithstanding the purported appointment of various councillors as trustees in the manner I describe below) remains the sole trustee today. The defendants are, or were at one time, members of the Council. It is their contention that they (or some of them) were appointed trustees of the Charities in place of the Council, and that the power to appoint further trustees vests in them.

6. The Council sought permission from the Charity Commission to commence proceedings to obtain a declaration that it is the sole trustee of the Charities, an order preventing the defendants from holding themselves out as trustees, and various accounts and inquiries into the defendants' dealings with the Charities' property. The Charity Commission refused permission, but permission was granted by Marcus Smith J by an order dated 15 May 2019. By the same order he directed that the issue as to the identity of the current trustee(s) of the Charities be tried as a preliminary issue.

7. The trial of the preliminary issue took place by way of a hybrid hearing on 21 July 2020. The Council was represented by Mr Joshua Winfield of Counsel. Mr Hart, the first defendant, was the only one of the defendants present or represented. He said that the other defendants were content for him to speak on behalf of all of them. I was satisfied that all of the defendants had been served with, and were aware of, the proceedings. At least in relation to the preliminary issue there is no difference in interest as between the defendants: the question raised by the preliminary issue affects them only in their capacity as trustees, and affects them equally.

8. Shortly before the hearing, the defendants purported to appoint a further trustee, Mr Peter Maloney. Rather than causing further delay to the proceedings by formally joining him as a party, I made an order under CPR 19.8A, so that the order I make as a result of this judgment on the preliminary issue will be binding on him but that he may apply within 28 days of the order being served on him to set aside or vary the judgment or order. It is difficult to see what interest he could have as trustee (or potential trustee) that would be different from that of Mr Hart or the other defendants.

9. The hearing took place in public in a courtroom, with social distancing measures implemented to comply with requirements imposed during the Covid-19 pandemic. Both Mr Winfield and Mr Hart appeared in person. Other interested parties observed the hearing via a Skype for Business conference.

10. As I explain below, the preliminary issue turns on technical points of law, in particular the true interpretation of apparently conflicting provisions in the 1894 Act and the Charities Act 2011 (the "2011 Act"). I mean no disrespect to Mr Hart in saying that he was in difficulty in comprehending the details of the legal argument. That is not surprising, given that the case turns on a technical and relatively obscure corner of charities law. The case for the defendants rests, however, on legal advice given to the Council in 2016, contained in a letter and an email from solicitors then instructed by the Council. Given the importance of that advice to the defendants' case, I set it out in some detail at [29]-[37] below.

The Background

11. Until 2013, it appears that there was no dispute that the Council was the sole trustee of the Charities. The relevant history thereafter is principally to be found in the minutes of the meetings of the Council.

12. The defendants' contention that they were appointed trustees of the Charities stems initially from the annual general meeting of the Council on 20 May 2013. The minutes of that meeting, under item 13 "Representatives on Outside Bodies", state as follows:

> "The Trustees of the Upper and Lower Bell Fields Charities:
>
> (i) Allotment for the Labouring Poor. Elected on block Councillors: Mrs J Copsey, Mrs U Davies, Mr R Fallows, Mr J Havard and Mrs S Prebble.
>
> (ii) Allotment for Exercise and Recreation. Elected on block Councillors: Mrs J Copsey, Mrs U Davies, Mr R Fallows, Mr J Havard and Mrs S Prebble."

13. Of these, Mrs Copsey, Mr Havard and Mrs Prebble are defendants in this action.

14. The minutes of the following year's annual general meeting on 19 May 2014, at item 7, "Representatives on Outside Bodies", recorded the following:

> "The Trustees of the Upper and Lower Bell Fields Charities; Resolved: that all Councillors will serve as the trustees of the Upper and Lower Bell Fields Charities:
>
> (i) Allotment for the Labouring Poor.
>
> (i) Allotment for Exercise and Recreation."

15. The members of the Council at the time of the 2014 annual general meeting (and thus purportedly appointed as trustees of the Charities) were each of the first five defendants together with Mr R Fallows, Mr K Marshall (the father of the sixth defendant), Mr C Cheater and Mrs U Davies.

16. Elections to the Council took place in May 2015, resulting in many longstanding councillors losing their seats. It was at this point that concerns over the trusteeship of the charities emerged. The minutes of the annual general meeting held on 18 May 2015 record under item 25, "Upper and Lower Bell Field":

> "Agreed: professional charity law advice re: the charity status of the two above charities based on historic documentation to be received and guidance re: a governing document, trustees responsibilities and liabilities, etc etc to be sort [sic] by the Clerk."

17. On 13 May 2016, the Council received advice from Birkett Long, solicitors. The gist of this advice (which I refer to in detail at [29]-[36] below) was that as a result of the 1894 Act, it was for the Council to appoint trustees to the Charities (thus endorsing the appointments made at the annual general meetings in 2013 and 2014).

18. The minutes of the annual general meeting on 31 May 2016 recorded under item 18, "Upper and Lower Bell Field", the receipt of "Charities advice" from Birkett Long, solicitors and that it was resolved "to follow the legal advice above and agree progress."

19. Birkett Long provided further legal advice in an email to the Council dated 29 July 2016. This noted that the previous advice had been slightly misinterpreted, and re-stated the advice that, following the 1894 Act, it had been for the Council to appoint trustees to the charities. Birkett Long also advised that, once appointed, it was for the trustees themselves to resolve on further appointments, pursuant to s.36 of the Trustee Act 1925.

20. It is apparent that at least some of the councillors did not agree with the advice from Birkett Long, and sought further advice on the point. The minutes of a meeting of the Council on 25 April 2017 record, next to the item headed "To agree to instruct a solicitor to advise on the validity of Rettendon Parish Council's appointment of trustees to charities 271479 and 271480", that the item was deferred.

21. In the meantime, at an extraordinary general meeting of the Council held on 25 July 2017 a resolution was passed, by which the following members of the Council were "affirmed" in their appointment as trustees of the Charities: councillors Ride, D Fleming, Jones, M Fleming and Copsey. Mr Hart is recorded as saying that he was already an official trustee.

22. The purported trustees of the Charities have since transferred Bell Fields to the Official Custodian.

The Council's case

23. The Council's case is that it became trustee of the Charities upon its incorporation by virtue of sections 5(2)(c) and 6(1)(c)(iii) of the 1894 Act.

24. Section 5(2)(c) (since repealed) of the 1894 Act provided as follows:

> "As from the appointed day … the legal interest in all property vested either in the overseers or in the churchwardens and overseers of a rural parish, other than property connected with the affairs of the church, or held for an ecclesiastical charity, shall, if there is a parish council, vest in that council, subject to all trusts and liabilities affecting the same, and all persons connected shall make or concur in making such transfers, if any, as are requisite for giving effect to this enactment."

25. By s.6(1)(c)(iii) (which remains in force) of the 1894, Act there were transferred to the Council the powers, duties and liabilities of the churchwardens and overseers with respect to:

> "the holding or management of parish property, not being property relating to affairs of the church or held for an ecclesiastical charity, and the holding or management of village greens, or of allotments, whether for recreation grounds or for gardens or otherwise for the benefit of the inhabitants or any of them."

26. Mr Winfield submitted that these two provisions had the effect, upon the 1894 Act coming into force, first, of transferring to the Council the legal title to Bell Fields allotted to the two Charities by the Award (subject to the pre-existing charitable trusts) and, second, of transferring to the Council all the powers and duties of the churchwardens and overseers as trustees of the Charities. At all times since then, accordingly, the Council has been the sole trustee of the Charities.

27. He further submitted that the purported appointment by the Council of various parish councillors as trustees of the Charities in 2013, 2014 and 2017 were invalid and of no effect, because the above provisions of the 1894 Act are mandatory, and there is no power in the Council to transfer its rights and duties as trustee to any other person.

28. For completeness, by s.6(4) of the 1894 Act (now superseded by s.33(3) of the Small Holdings and Allotments Act 1908), the powers and duties of any allotment wardens were also transferred to the Council.

The defendants' case

29. As I have noted, the defendants' case is based on the advice received by the Council in 2016 from Birkett Long. That advice was contained, first, in a letter to the Council dated 13 May 2016.

30. Birkett Long had been asked to advise on two issues: (1) whether the existing trustees had been validly appointed; and (2) the relationship between the trustees and the Council.

31. Their advice was based on s.300(3) of the 2011 Act. That sub-section, and the following two sub-sections, provide as follows:

> "(3) Subsection (4) applies where—
> (a) overseers as such, or
> (b) except in the case of an ecclesiastical charity, churchwardens as such,
> were formerly (in 1894) charity trustees of or trustees for a parochial charity in a rural parish, either alone or jointly with other persons.
>
> (4) Instead of the former overseer or church warden trustees there are to be trustees (to a number not greater than that of the former overseer or churchwarden trustees) appointed—
> (a) by the parish council or, if there is no parish council, by the parish meeting, or
> (b) by the community council or, if there is no community council, by the county council or (as the case may be) county borough council.
>
> (5) In this section "formerly (in 1894)" relates to the period immediately before the passing of the Local Government Act 1894 and "former" is to be read accordingly."

32. Having cited parts of the Charities Act which have no relevance to the present case, the letter then cited s.302(1) of the 2011 Act, which provides that:

> "Any appointment of a charity trustee or trustee for a charity which is made by virtue of sections 299 to 301 must be for a term of 4 years, and a retiring trustee is eligible for re-appointment."

33. From the above provisions, Birkett Long drew the conclusion that, as a result of a change in the law in 1894, charity trustees were appointed by parish councils to take over from the overseers and churchwardens.

34. Birkett Long went on to note that one of the trustees, Mr Fallows, was holding the land "on behalf of the Parish Council in his capacity of trustees for both charities". It then quoted (although without identifying it as such) s.298 of the 2011 Act, which provides that trustees who hold property for the purposes of a public recreation ground or allotments for the benefit of a parish may transfer the property to the parish council or to persons appointed by the parish council. The writer assumed that had happened in the past, which was why Mr Fallows was the registered proprietor. (In fact, Mr Fallows was not the registered proprietor. The proprietorship register identifies the Council as the proprietor "care of" its chairman, Mr Fallows.)

35. The letter pointed out that there were two difficulties in determining whether the current trustees were validly appointed because it depended on: (1) how long the trustees had been appointed, and whether they had retired and been re-appointed every four years; and (2) the number of trustees, which was not supposed to exceed the original number of overseers and churchwardens.

36. Birkett Long proposed the following as a way forward:

> "We think the best way to move this matter forward is for the trustees to declare that they hold on trust the land and any funds, for each charity. As a result 2 declarations will need to be made. Each declaration will also state who the trustees are and will refer to the original Inclosure Award dated 5 December 1861. In addition each declaration should also refer to the deeds of appointment and retirement of all the trustees and detail when the Parish Council became involved with each charity. We need to go back as far as possible, ideally to 1861. As a result, we need you to provide us with the records you have of the appointment and the retirement of the trustees and the involvement of the Parish Council, so that these documents can be referred to in the declarations."

37. In an email dated 29 July 2016, Birkett Long reiterated and expanded upon that advice. The substance of the advice contained in the email was as follows:

i) Following a change in the law in 1894, the Council had the power to appoint trustees for both charities. Those trustees were supposed to be appointed for four years but were eligible for re-appointment.

ii) Birkett Long recommended that they execute a formal declaration of trust, which could refer to such appointments and retirements as had taken place.

iii) The email referred to s.36 of the Trustees Act 1925, noting that it confers the power to appoint trustees either on the persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, on the continuing trustees (who are listed in the Charity Commission's records). Birkett Long's advice, therefore, was that the trustees appointed by the annual general meetings (as referred to above) were the ones able to appoint new Trustees.

iv) The email noted that there was uncertainty as to what had happened, although it appeared that the current trustees were appointed when they become councillors and they would resign as trustees when they stepped down as councillors. It pointed out that there was no specific requirement for this to be the case.

v) It went on to refer to the possible mechanisms open to remove a trustee, pointing out that some governing documents gave charity trustees a specific power to do so. It also referred to the power of the Charity Commission to remove a trustee who was responsible for, or privy to, misconduct. It stated: "To date I cannot see any information on the file relating to any misconduct or mismanagement or that being an issue – but that would appear to be the only grounds on which the Parish Council could seek to remove all the current Trustees."

38. On the basis of the advice from Birkett Long, Mr Hart submitted that those (including him) who have been appointed trustees of the Charities by the Council remain the only validly appointed trustees and (by virtue of s.36 of the Trustee Act 1925) they are the only persons entitled to appoint any further or replacement trustees.

39. Mr Hart relied in support of that submission on certain communications from third parties which corroborated that conclusion. For example, he referred me to an email to him dated 26 June 2017 from Sue Sheppard, the Village Halls and Community Buildings Adviser at the Rural Community Council of Essex. Ms Sheppard referred to the fact that as an unincorporated charity "the managing trustees (i.e. you and the committee)" could not hold the title to the land, which must be held by holding, or custodian, trustees. He also referred me to a communication from the former clerk to the Council in which he said would let "the Trustees *and the Council*" know.

40. The fact that the Council acted upon legal advice in purporting to appoint councillors as trustees of the Charities does not mean that those appointments were effective. The appointments were effective only if the legal advice was

correct. Similarly, the fact that others (including the local community council) referred to Mr Hart and his fellow councillors as "trustees" does not make them trustees if, as a matter of law, the Council had no power to appoint them as such.

41. I turn, therefore, to consider the questions of law raised by this application, addressing, first, whether the legislation limits the trusteeship to the Council alone and, second, if not, whether the individual trustees have power to appoint further trustees.

Is the trusteeship limited to the Council alone?

42. As Mr Winfield pointed out, there is an apparent conflict between s.5(2)(c) and 6(1)(c)(iii) of the 1894 Act, on the one hand, and s.300(4) of the 2011 Act on the other. While the former appears to have the effect of constituting the Council the sole trustee of the Charities, the latter appears to have the effect of constituting those persons appointed by the Council as trustees of the Charities.

43. Sections 298-302 of the 2011 Act are the re-enactment of s.14 of the 1894 Act, the relevant parts of which were as follows:

> "(1) Where trustees hold any property for the purposes of a public recreation ground or of public meetings, or of allotments, whether under Inclosure Acts or otherwise, for the benefit of the inhabitants of a rural parish, or any of them, or for any public purpose connected with a rural parish, except for an ecclesiastical charity, they may, with the approval of the Charity Commissioners, transfer the property to the parish council of the parish, or to persons appointed by that council, and the parish council, if they accept the transfer, or their appointees, shall hold the property on the trusts and subject to the conditions on which the trustees held the same.
>
> (2) Where overseers of a rural parish as such are, either alone or jointly with any other persons, trustees of any parochial charity, such number of the councillors of the parish or other persons, not exceeding the number of the overseer trustees, as the council may appoint, shall be trustees in their place, and, when the charity is not an ecclesiastical charity, this enactment shall apply as if the churchwardens as such were specified therein as well as the overseers.
>
> …
>
> (7) The term of office of a trustee appointed under this section shall be four years, but of the trustees first appointed as aforesaid one half, as nearly as may be, to be determined by lot, shall go out of office at the end of two years from the date of their appointment, but shall be eligible for re-appointment."

44. While the conflict is less apparent in the case of s.14(2) of the 1894 Act (because it is not on its face a mandatory provision: the trustees shall be such number of councillors or other persons as the council "may" appoint), the requirement that the relevant persons are to be appointed "in their place" (i.e. in place of the overseers and churchwardens) is on its face inconsistent with the parish council itself having become a trustee.

45. Mr Winfield referred to two recent authorities which he submitted supported the Council's case that the operative provision is s.6(1)(c)(iii), rather than s.14(2) of the 1894 Act (or s.300(4) of the 2011 Act).

46. In *Snelling v Burstow Parish Council* [2014] 1 WLR 2388, the Court of Appeal noted, at [7], that the powers, duties and liabilities of churchwardens and overseers of the parish in relation to the holding or management of allotments were transferred to parish councils under section 6(1)(c)(iii) of the 1894 Act. The issue in that case was, however, which of two inconsistent statutory powers of sale of allotments applied. The identity of the trustee or trustees of parochial charities was not in issue.

47. In *Densham v Charity Commissioners for England and Wales* [2018] UKUT 402 (TCC), the Upper Tribunal (Falk J and Judge McKenna) (the "UT") was faced with the question whether awards made under powers conferred by the Inclosure Act 1845 had created charitable trusts. The allotments had been registered as a charity known as "Allotments for the Labouring Poor" in 1966, but the charity had been removed from the register in 2008 for failure to file accounts. The argument of the allotment holder, Ms Densham (who contended that no charitable trust had been created) focused on the distinction between public (governmental) and private (charitable) provision for the poor in the mid-nineteenth century. She contended that, notwithstanding the use of the word "trust" in both the awards themselves and the empowering legislation in s.73 of the Inclosure Act 1845, the intention had been to make public provision otherwise than by way of a trust of the sort justiciable by the courts.

48. The UT rejected that argument, concluding that a charitable trust had been established by the awards in that case. The focus of the decision was on the language of the Inclosure Act 1845 and of the awards themselves. At [53] and [55] the UT noted:

> "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."
>
> "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."

49. The only reference to the 1894 Act was in the context of a discussion as to whether subsequent enactments supported an argument that a charity was

never created. Having set out (at [35]) the provisions of s.5(2)(c) and s.6(1)(c)(iii), the UT referred (at [68]) to one of the grounds of appeal, which was that the first tier tribunal (the "FTT") had erred in failing to distinguish between the two different statutory frameworks provided by ss. 5 and 14 of the 1894 Act. The UT disagreed, stating:

> "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."

50. I note that the part of s.14 referred to in that passage was s.14(1). The identity of the trustees was not in issue in the UT in *Densham*. The argument addressed, and rejected, was that because s.14(1) specifically made provision for transfer of land to a parish council by trustees, whereas the parish council had acquired the land under s.5, that indicated that it was not subject to a charitable trust. Given the express approval by the UT of paragraph 45 of the FTT decision, it is worth setting out in full:

> "In our view, however, Miss Densham's view is incorrect. It fails to take account of the fact that, whereas the power in section 14(1) of the 1894 Act was conferred on "trustees" generally, sections 5 and 6 applied exclusively to property held by "the churchwardens and overseers" of a parish. Sections 5 and 6 thus applied to property held subject to charitable trusts if that property was held by the churchwardens and overseers. Moreover, where section 5 applied, the property in question vested in the parish council automatically, by operation of law: the churchwardens and overseers could not choose to rely on section 14 instead, because the property concerned had already vested in the parish council as soon as it came into existence. For the same reason, the Commission had no role to play in approving the acquisition by the parish council."

51. Before the FTT (but not before the UT) there had been discussion about the identity of the trustees of the charity. Ms Densham had also contended that the continued existence of the charity depended on there being some means of appointing trustees and that, whereas s.14 did make such provision, sections 5 and 6 did not. In fact, in 2006 (with the Charity Commissioners' encouragement) the parish council had sought to appoint trustees, pursuant to the power contained in s.79 of the Charities Act 1993. This was a re-enactment of s.14 of the 1894 Act and was repealed by the 2011 Act. Ms

Densham argued that the purported appointments were invalid because s.14 of the 1894 Act (and thus s.79 of the Charities Act 1993 and also the power of appointment now to be found in s.300 of the 2011 Act) did not apply in respect of the charity in that case.

52. The FTT rejected the argument that the charity could not continue to exist because sections 5 and 6 made no provision for the appointment of a trustee, noting (at paragraph 47) that Ms Densham's argument overlooked the fact that the parish council "necessarily acquired such property as holding trustee … [and] continues as trustee unless and until new and different trustees are appointed."

53. As to the argument that the 2006 trustee appointments were invalid (because s.14 of the 1894 Act, and thus s.79 of the 1993 Act and s.300 of the 2011 Act did not apply), the FTT concluded (at paragraph 48) that it had insufficient evidence to decide that question. It was unnecessary to do so because it was clear that the charity had at no time been without trustees of some sort, whether corporate or individual.

54. Accordingly, while the UT in *Densham* confirmed that where, prior to 1894, overseers and churchwardens held property on a charitable trust (other than an ecclesiastical charity), then the property so held was automatically transferred to the parish council and the rights, duties and liabilities of the overseers and churchwardens were transferred to the parish council, the UT did not consider whether a parish council would have power, under s.14 of the 1894 Act and the later equivalent statutory provisions, to appoint trustees in place of the parish council.

55. Mr Winfield's primary argument was that, when faced with two inconsistent statutory provisions, the court should apply the well-known rule of construction that "wherever there is a particular enactment and a general enactment within the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative": *Pretty v Solly* (1859) 26 Beavan 606 (Ch), per Romilly MR at p.610.

56. Mr Winfield accepted that section 14(2) of the 1894 "taken in its most comprehensive sense" applies to the Charities. In particular, he accepted that they are "parochial charities" within the meaning of s.14(2) and that the overseers and churchwardens of the parish were trustees of those parochial charities immediately prior to the 1894 Act. (Since the Charities were not ecclesiastical charities, by the last sentence of s.14(2) the reference in the subsection to "overseers" is to be understood as a reference to churchwardens as well.)

57. He submitted that s.6(1)(c)(iii) was a "particular enactment", because it made specific provision for allotments granted by the Inclosure Acts, whereas s.14(2) was a "general enactment", because it was not limited to parochial charities in relation to such statutory allotments.

58. I do not accept this submission. It is not clear, to my mind, that either of the provisions is properly to be characterised in relation to the other as either specific or general. If anything, s.14(2) is the more specific of the provisions, because while s.6(1)(c)(iii) deals with the transfer of all powers, duties and liabilities of overseers and churchwardens with respect to the holding of all parish property (save only that related to ecclesiastical charities), and the holding or management of all village greens or allotments, s.14(2) is concerned only with those cases where the overseers and churchwardens were trustees of parochial charities.

59. In answer to my question whether the Inclosure Acts provided for an award of allotments to overseers and churchwardens otherwise than by using the language of "trust" as in s.73 of the Inclosure Act 1845, Mr Winfield said that he had been unable to find any such provision in the Inclosure Acts. Assuming, however, that "allotments" in s.6(1)(c)(iii) referred only to allotments granted under the Inclosure Acts and that each statutory provision under the Inclosure Acts contained wording equivalent to that in s.73 of the Inclosure Act 1845 (to the effect that the allotments would be held on trust), it nevertheless follows from the decision of the UT in *Densham* that not all such statutory allotments were held on trusts in the legal sense. As I have noted above, the UT held that the question whether a charitable trust of the sort justiciable by the courts had been created "lies in a close textual analysis of the instruments themselves." Accordingly, s.14(2) addressed only a subset of the matters dealt with by s.6(1)(c)(iii).

60. Moreover, in light of the following provisions of s.14 (and their equivalents in the 2011 Act), it is difficult so see what policy reason there would have been for s.14(2) *not* applying to parochial charities in respect of allotments awarded under the Inclosure Acts.

i) Section 14(1) (now s.298 of the 2011 Act) applied to (among other things) allotments awarded under the Inclosure Acts, where the relevant property was voluntarily transferred to the parish council (as opposed to where it was held exclusively by overseers and churchwardens, in which case it was compulsorily transferred, as found in *Densham*, above). In such a case, the parish council may appoint others to hold the property and to act as trustees.

ii) Section 14(3) (now s.299 of the 2011 Act) applied in the case of a parochial charity where the trustees do not include members of the council (or persons elected by the local government electors or inhabitants of the parish). In that case, the parish council may appoint additional trustees.

iii) Section 14(4) (now s.300(1) and (2) of the 2011 Act) applied in the case of a charity (other than an ecclesiastical charity) where the vestry had the power to appoint trustees. In that case, again, the power to appoint trustees vests in the parish council.

61. It is difficult to see why Parliament would have intended the parish council to have the power to appoint trustees to charities or parochial charities (including in relation to allotments under the Inclosure Acts) in each of the circumstances referred to in the preceding paragraph, as well as in the case of parochial charities generally where the overseers and churchwardens were trustees prior to the 1894 Act (under s.14(2)), but not in a case where the overseers and churchwardens were trustees of a parochial charity relating to an award under the Inclosure Acts.

62. Mr Winfield suggested that Parliament excluded the latter because in the case of statutory allotments the equivalent of the "overseers and churchwardens" (prior to the 1894 Act) was the parish council as a whole (after the 1894 Act), so there was a policy that the parish council alone would be trustee. That ignores, however, the fact that s.14(2) expressly applies whether the overseers and churchwardens of a parochial charity act as trustees alone (such that their role was passed to the parish council as a whole) or jointly with other persons.

63. In my judgment, the preferable reading of sections 5 and 6 together with s.14(2) is as follows. The former were once-in-time provisions that dealt with the position immediately upon coming into force of the 1894 Act (or the coming into office of a parish council if later), transferring all property held by overseers and churchwardens (including that subject to a trust) to the parish council and all powers, duties and liabilities of the overseers and churchwardens in respect of all such property, and village greens and allotments, to the parish council. This necessarily had the effect of appointing the parish council trustee.

64. Section 14(2), on the other hand, is intended to deal with the position from time to time thereafter (specifically each subsequent four-year period), conferring a power on the parish council to appoint a person or persons other than itself to be trustees of parochial charities. As the FTT in *Densham* recognised, there is always a trustee of the charities because in the absence of the appointment of anyone else, the fact that legal title to the relevant property is vested in the parish council subject to all trusts affecting it means that the council is necessarily a trustee.

65. Accordingly, I conclude that s.14(2) is to be construed as having conferred on the Council the power to appoint other trustees in its place. I see no reason to construe s.300 of the 2011 Act any differently.

66. Mr Winfield argued, in the alternative, that because the power in s.300(4) applied in the case of former "overseer *or* churchwarden trustees", whereas s.6(1)(c)(iii) transferred the power, duties and liabilities of "churchwardens *and* overseers", and because the Award itself had used the term "churchwardens *and* overseers", it followed that s.6(1)(c)(iii) was the operative provision. I do not think, however, that the very slight difference in wording as between the two statutory provisions can bear the weight Mr Winfield seeks to put on it. That is particularly so when the equivalent

provision in the 1894 Act to s.300(4) in the 2011 Act, s.14(2), provided that – in the case of a non-ecclesiastical charity – the reference to overseers in the first line was to be to churchwardens "as well" (i.e. implying "*and*" rather than "*or*"). Mr Winfield did not point to any reason to suppose that Parliament's intention (as to the scope of the provision formerly in s.14(2) of the 1894 Act) would have changed as between the 1894 Act and the 2011 Act.

Can the individual trustees appoint further trustees?

67. The Council contends that, even if it has power to appoint trustees, such appointment is for a maximum of four years and that only the Council can either re-appoint existing trustees or appoint further trustees.

68. Mr Hart's contention, based upon the advice of Birkett Long, is that once trustees are appointed, they and they alone have the power to appoint further trustees. As I have noted above, Birkett Long's advice was based on s.36(1) of the Trustee Act 1925, which provides as follows:

> "(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,—
>
> (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
>
> (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;
>
> may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid."

69. Mr Winfield submitted that s.36(1) can have no application to trustees appointed under s.300 of the 2011 Act. In the first place, by s.302(1), the appointments "must be" for a fixed term of 4 years and, by s.302(3), in the case of a retiring trustee any re-appointment could only be for the remainder of the existing 4-year term. The expiry of a fixed term is not, however, one of the circumstances in which the power under s.36 arises. Moreover, the power to fill any vacancy is reserved to the Council by s.302(3). Mr Winfield submitted that the reference to "an appointment" under s.302(3) must be to an appointment by the Council pursuant to sections 299 to 301.

70. I accept these submissions. The expiry of a trustee's term is not expressly identified within s.36 and I do not think that it can be equated with the death, absence from the United Kingdom or desire to be discharged from duties as a trustee.

71. Moreover, the argument that s.36(1) enables the trustees appointed by the Council to appoint further trustees is based on the absence from the instrument creating the trust of a power to appoint further trustees. In fact, the Award appointed the churchwardens and overseers *and their successors* as trustees. The necessary inference is that the power to appoint further or replacement trustees vested in whoever had the power to appoint (or elect) churchwardens and overseers.

72. Upon the change implemented by the 1894 Act, the power to appoint trustees vested in the Council, under s.14. Although the 1894 Act is not "the instrument" creating the trust, in circumstances where the terms of the trusts set out in the Award are altered by statute, it follows that for the purposes of s.36 of the 1925 Act (assuming that it applied) the Award must be read together with the 1894 Act.

73. The only power to appoint trustees under s.14 of the 1894 Act vested in the Council. The power to appoint trustees for four years could not possibly be construed as a power to be exercised only once. Thus, on the expiry of a four-year term, it is the Council and the Council alone that has the power to appoint for a further four years.

74. The position under the 2011 Act is the same. Under each of ss.299 to 301 it is the Council that has the power to appoint the relevant trustees. It follows in my judgment that the power to make an appointment to fill a casual vacancy, under s.302(3), must also be a power exercisable only by the Council.

75. Even on the assumption that s.36 of the Trustee Act 1925 applies to fixed term trustees, any inconsistency between it and the provisions of ss.299-302 of the 2011 Act must in my view be resolved in favour of the latter. Where Parliament has specifically vested in a parish council the power to appoint trustees to parochial charities, for a series of fixed terms, it would be absurd to think that Parliament intended to confer on the trustees once appointed the power to extend their term and to appoint others pursuant to the general power provided in s.36 of the 1925 Act.

Who are the trustees?

76. On the basis of the legal conclusion I have reached above, the following appointments have taken place according to the minutes of the Council's meetings referred to above.

77. First, on 20 May 2013, Councillors Copsey, Davies, fallows, Havard and Prebble were appointed trustees to both Charities. Those appointments were necessarily for a four-year term, by reason of s.302(1) of the 2011 Act. The appointments therefore expired on 19 May 2017.

78. The conclusion that their appointment expired on 19 May 2017 remains notwithstanding the purported appointments of all Councillors as trustees of both Charities on 19 May 2014. So far as the Councillors appointed in May 2013 are concerned, I do not think that the purported appointment in May 2014 was of any effect. Insofar as any additional or replacement trustees were appointed in May 2014, then such appointment could not be for longer than the remainder of the existing four-year term, pursuant to s.302(3) of the 2011 Act.

79. By July 2017, therefore, there were formally no remaining trustees. It was thus open to the Council to appoint trustees for a further four-year term. That, in my judgment, was the effect of the resolution passed at the extraordinary general meeting of 25 July 2017 which "affirmed in their appointment as trustees" Councillors Ride, D Fleming, M Fleming, Jones and Copsey. Those Councillors therefore remain (subject to any retirement in the meantime) the trustees of both Charities.

80. A question remains over Mr Hart, however. He was not formally appointed, re-appointed or affirmed as trustee by the resolution passed at the meeting on 25 July 2017. The only evidence I have as to what took place at the meeting is the minute itself. The minute merely states that "Cllr Hart said he was already an official trustee." It seems to me that this raises two possibilities: either the meeting implicitly acquiesced in Mr Hart's statement that he was already a trustee, or the meeting merely noted his statement but chose not to re-appoint him as trustee.

81. I raised with the parties during the hearing the possibility that evidence as to what took place at that meeting might shed light on the question whether the meeting had nevertheless intended that Mr Hart should continue to be a trustee of the Charities. Both parties indicated in writing after the hearing, however, that they were content that the court should reach a decision on the position of Mr Hart solely on the basis of the inferences to be drawn from the minute.

82. I have otherwise received no submissions on this issue, for example as to whether an informal acquiescence in the continuation of Mr Hart's tenure as trustee could amount to a re-appointment as trustee. In circumstances where the issue concerns only one of the trustees, where the appointment will in any event last only until July 2021, and where the costs of seeking either further evidence or submissions on this point would be disproportionate, I am content to proceed on the basis that the question whether Mr Hart is a trustee of the Charities turns on whether the meeting acquiesced in him continuing in that role.

83. In my judgment, the following factors point to the conclusion that the meeting did so acquiesce. First, the appointment made was of all the Councillors at the meeting, save only for Mr Cheater who is expressly recorded as saying that he did not wish to continue. Second, it would appear that the only reason there was not a formal vote in respect of Mr Hart was because of his comment that he was already a trustee. Third, there is nothing in the minute to suggest that the Councillors present were opposed to Mr Hart continuing as a trustee. I

note, for example, that Mr Hart expressed a (non-pecuniary) interest in relation to certain items on the agenda "as a trustee of the Bell Field Charities" without any adverse comment being recorded.

84. Accordingly, I conclude that the Council implicitly approved, at the meeting on 25 July 2017, Mr Hart continuing as a trustee of the Charities.

Conclusion

85. For the above reasons, I conclude that the Council has the power, pursuant to s.300(3) and (4) of the 2011 Act, to appoint others to be trustees of the Charities, but that any such appointment is limited to a period of four years and it is the Council alone that has the power to appoint further trustees, whether at the end of the relevant four year term or to fill any vacancies in the interim.

86. Mr Hart expressed the wish that I should come up with some solution or scheme that was fair in all the circumstances. There is clearly a substantial degree of mistrust between the present body of councillors on the Council and Mr Hart and at least some of his fellow trustees. Mr Hart, in particular, does not trust the Council's intentions in relation to Bell Fields. The Council, for its part, has accused Mr Hart and the other defendants of misconduct in relation to their stewardship of the Charities.

87. My powers, however, are limited to resolving this dispute (that is the dispute raised by the preliminary issue) as between the parties. The Council's concerns over the past conduct of the trustees is a matter, if pursued at all, to be dealt with on another occasion.

88. As to Mr Hart's concerns over the Council's plans for Bell Fields, subject to the limitations imposed on the holders of land subject to charitable trusts by the law generally, that is largely a local government issue. In particular, it is not within the power of this court to order (as Mr Hart suggested in an email sent after the hearing) that the situation be resolved by a full parish referendum. The conclusion I have reached in this judgment simply means that the solution preferred by Mr Hart and the other defendants – namely that the management of Bell Fields and the Charities has been permanently taken away from the Council by their appointment as trustees – is wrong in law.