


IN THE MATTER OF:-

LOWTHER GARDENS, LYTHAM,  
LANCASHIRE

---

**OPINION**

---



Fylde Borough Council  
Town Hall  
St. Annes Road West  
St. Annes  
Lancashire  
FY8 1LW

Ref: IKC

IN THE MATTER OF:- LOWTHER GARDENS, LYTHAM, LANCASHIRE

---

**OPINION**

---

1. I am asked to advise Fylde Borough Council (“the Council”) upon the use of land under its control at Lowther Gardens in Lytham St. Annes, and in particular in relation to Lowther Pavilion situated within those gardens (hereinafter referred to as “the Gardens” and “the Pavilion” respectively).
  
2. The Gardens comprise an area of roughly 12 acres in size situated near the beachfront at Lytham. The Gardens comprise a rectangular area of land bounded by Church Road to the north, Beach Parade West to the south (the A584 that runs along the beachfront), Lowther Terrace to the east, and Woodville Terrace to the west. The Pavilion, built circa 1919<sup>1</sup>, comprises an auditorium, 2 smaller function rooms, a café (operated by a private enterprise under lease), a booking office and a car parking area. It is situated in the southern part of the Gardens, nearest the shore, and is used to hold various events including concerts and theatre productions as well as some Council meetings.
  
3. The Council intends to carry out internal and external works to the Pavilion in order to improve and adapt it as a ‘multi-use arts facility’ expanding its role in both community entertainment and the Council’s civic business. I am asked to advise on these planned changes to the Pavilion in particular in light of various restrictions upon the use to which the Gardens may be put.

**The restrictions**

4. It is necessary to consider two sources of restriction on the use of the Gardens. Firstly various conditions (“the Conditions”) were included in the original gift of the Gardens to the Council’s predecessor, and secondly a leasehold

covenant (“the Leasehold Covenant”) was granted by one of the Council’s predecessors in title to the tenants of land neighbouring the Gardens (of which this predecessor in title also owned the freehold).

5. The Conditions are contained in a conveyance made for no consideration on 16<sup>th</sup> February 1905 (“the Gift”) between a John Talbot Clifton (“the Transferor”) of the one part and the Urban District Council of Lytham (“the Urban District Council”) of the other part. The Transferor, whose family had historically owned much of Lytham and the surrounding area, made a gift of the Gardens on certain provisos intended to preserve the land for the local community as recreational gardens. I have seen a copy indenture in which the Conditions are recorded. There are eleven Conditions to consider:

- (i) to hold the Gardens as a public park or public gardens;
- (ii) to keep and maintain the Gardens in good and tidy order cultivation and condition and to keep it planted with ornamental trees and shrubs;
- (iii) to keep the boundary walls and gates in good repair;
- (iv) permit the inhabitants and visitors to Lytham and the neighbourhood thereof and the public generally to have the free use and enjoyment of the Gardens as a public park or public gardens for the purposes of recreation;
- (v) not to permit or suffer any public meetings for the discussion of political religious trade or social questions or other matters of controversy to be held or religious services to be conducted or lectures addressed on any part of the Gardens;
- (vi) not to allow the Gardens or any building thereon or the walls thereof for the purpose of advertising;
- (vii) not to permit the Gardens or any part thereof to be used except as a public park or public gardens or for any other purpose than those of recreation and enjoyment;
- (viii) not to permit or suffer at any time any games other than lawn tennis croquet bowls or games of a similar character to be played on any part of the said land;
- (ix) not to erect or suffer to be erected during the said term<sup>2</sup> on or under any part of the Gardens any Swings Band stand or any building or erection of any description whatsoever either permanent or temporary without the previous license in writing of the Transferor his heirs or assigns;

---

<sup>1</sup> Although some references date it to 1916, correspondence from 1919 suggests that it had not yet been erected. One local history group dates it to 1921.

<sup>2</sup> The conveyance is a gift to hold “for ever”. Reference to ‘the said term’ is strange in the circumstances.

- (x) not to do or suffer any act which may be or grow to the annoyance damage or disturbance of the Transferor his heirs or assigns or his or their tenants or Lessees or the owners or occupiers for the time being of any adjoining or neighbouring property; and
- (xi) to keep the Gardens at all times under the control of the Urban District Council and will not let or part with possession of the Gardens or any part thereof without the previous license in writing of the Transferor his heirs or assigns.

I shall refer to each of the Conditions by the foregoing roman numerals. Of the most important for present purposes are Conditions (i) (hereinafter referred to as "the Public Park Condition"), (iv) ("the Free Use Condition"), (v) ("the Public Meetings Condition"), (ix) ("the Buildings Condition"), (x) ("the Nuisance Condition"), and (xi) ("the Alienation Condition").

7. The Conditions are subject to the Urban District Council's right to:
- (a) make such byelaws and regulations as they shall deem necessary or convenient for securing to the public the reasonable use and enjoyment of the said public park or public gardens and for the maintenance of order and decency therein but nothing in such byelaws contained shall be inconsistent with the provisions and covenants on the part of the said Urban District Council hereinbefore contained;
  - (b) charge fees to persons playing the games authorised under Covenant (viii) above;
  - (c) close the Gardens to the public at night but not earlier than one hour after sunset; and it is also provided that
  - (d) the Gardens are not deemed to be a park or pleasure ground under section 44 of the Public Health Acts Amendment Act 1890 and the Gardens may be closed to the public no more than (unless with consent in writing from the Transferor his heir or assigns) one day a year (other than a Sunday or public holiday) and on that day(s) to use or grant the use of the Gardens (with or without charge for such use) to any public charity or for any fete or horticultural show (with or without a charge for admission).

I shall refer to the foregoing rights ("the Rights") hereinafter by the above lettering (a) to (d).

8. I do not know the details of the history of the Urban District Council, which is described as 'the Urban Sanitary Authority for the District of Lytham', but I assume that it no longer exists as a separate entity and that its role has now been subsumed within that of the Council. Unless informed otherwise I shall

assume that the Council is for all material purposes the effective continuation of the Urban District Council.

9. As to the Leasehold Covenant, I have not seen any copy of the leases for the properties adjoining the Gardens but I understand that the properties are held on long leases granted by the Transferor, or his ancestor(s). I will assume that the majority, if not the entirety, of the properties in question are those on Lowther and Woodville Terraces ("the Terraces").

10. I have seen a copy extract of a lease of 25<sup>th</sup> May 1861 between a John Talbot Clifton<sup>3</sup> and Messrs Swainson and Dickson for a property which appears to be on Woodville Terrace. Under the lease the lessor covenanted on behalf of himself and 'the person or persons for the time being entitled as aforesaid' with the lessees and 'their executors administrators and assigns' not at any time during the term to:

**"make erect or set up or permit to be made erected or set up in or upon the field on the east side of the intended new road aforesaid [presumably what is now Woodville Terrace] called "Hungry Moor" extending in an easterly direction to a road called Lowther Terrace a distance of 250 lineal yards or in or upon so much of the Beach of Lytham aforesaid as is shown in the said Plan thereupon coloured pink any buildings or other erections of any kind whatsoever (except for the purposes of protection or ornament) but shall and will at all times during the said term keep so much of the said field and the said Beach open and unbuilt upon as and for a promenade for pedestrians for the use of the said [tenants] their executors administrators and assigns and the occupiers for the time being of the said premises in common with the inhabitants and visitors of Lytham."**

I have not seen a copy of the Plan referred to therein. I am informed that 'Hungry Moor' is the previous name of the Gardens, before they were dedicated as ornamental Gardens in the 1870s. I shall assume for present purposes that the location of the land referred to in the Leasehold Covenant includes the area of the entirety of the Gardens, including the Pavilion.

---

<sup>3</sup> This may be the Transferor himself or, judging by the date, it may be his father or other relative. Amateur historical research reveals that a John Talbot Clifton became a squire in 1832, and High Sheriff of Lancashire in 1853. It seems unlikely that this was the same John Talbot Clifton who is recorded as having died in 1938. It seems there may have been a John Talbot Clifton who died in 1882, who was most likely responsible for the Leasehold Covenants, and was married to an Eleanor Lowther after whom the Gardens were named.

### The legal status of the restrictions

11. The instructions to me envisage consideration of the effect of the Conditions and Leasehold Covenants in terms simply of the enforceability of covenants in respect of freehold and leasehold land respectively. However in my opinion a different question looms largest in this matter, namely whether the Gift of the Gardens created a charitable trust.
12. Under a charitable trust the Council's administration of the Gardens would be subject to the jurisdiction of the courts and the supervision of the Charity Commissioners for England and Wales. In the event that the Council were found to be in breach of trust, proceedings could be brought at the instigation of either the Charity Commission, the Attorney General or two or more inhabitants of Lytham St. Annes<sup>4</sup> and may lead, for example, to a finding of liability upon the Council to account, the imposition of a scheme to administer the trust, and/or even the removal of the Council as trustee. Even if no breach of trust is alleged, charitable trust status will inevitably lead to greater outside scrutiny of the Council's control of the Gardens.
13. On a more positive note, the Council as a charity trustee may seek guidance from the Charity Commission. Under the Charities Act 1993 ("the 1993 Act") the Charity Commission can provide advice to trustees in respect of various proposed administrative actions (section 29 of the 1993 Act), confer by Order various powers upon charity trustees that they would not otherwise have under the terms of the trust instrument (section 26) or, more drastically, alter the very terms of the trust itself in certain, limited circumstances by imposition of a Scheme for the administration of the trust (section 16).
14. As will be seen from the following discussion, in my opinion the Gift most likely does create a charitable trust and I will focus upon that issue primarily

---

<sup>4</sup> By virtue of s.33 of the Charities Act 1993 proceedings may be brought by any two or more inhabitants of the area of the charity if it is a local charity (defined as a charity which by its nature is directed wholly or mainly for the benefit of a particular area). By this route the various local groups interested in the future of the Pavilion and the Gardens might be able to bring charity proceedings against the Council.

although I shall also consider the position under the law relating to the enforceability of freehold and leasehold covenants which still has some bearing on this case, in particular with regard to the erection and extension of the Pavilion.

**A charitable trust?**

15. There is no requisite form of words necessary for the creation of a trust. In this case the Gift has the essential ingredients of a trust: it transfers legal title to the Gardens to the Council, not for the Council's benefit but rather imposing upon the Council obligations to hold the Garden for certain purposes to the benefit of third parties, namely the public.
  
16. The trust in the instant case is one in the nature of a permanent endowment, in other words one where the trust asset cannot be sold. A useful illustration of a similar permanent endowment of land for recreational purposes is provided in *Brisbane City Council v A-G for Queensland* [1979] AC 411. On the question of sufficient intention to create a trust, the Privy Council held that where land is conveyed with a condition that it should be set aside permanently for specified purposes then, prima facie, a sufficient intention to create a trust was shown. In that case land was conveyed 'to be set apart permanently for a showground' which was to be made available for the use of a particular society for two weeks in every year. The Privy Council held that a charitable trust had been created, which defeated the intention to develop the land as a shopping centre. I provide a copy of the said authority herewith.
  
17. For a trust to be charitable it must be of a certain altruistic character (consistent with the Charitable Uses Act 1601), must exist for the benefit of the public and must be exclusively charitable. Charitable purposes were classified famously under four heads by Lord Macnaghten in the case of *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, namely: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community and not falling under any of the preceding heads.

18. It is the fourth head in *Pemsel's* case which is relevant here. It has been held that the promotion of public health and recreation is a charitable purpose within this fourth head. The doubt cast upon the position by the House of Lords decision in *IRC v Baddeley* [1955] AC 572, was removed by the Recreational Charities Act 1958 ("the 1958 Act"). Section 1(1) of the 1958 Act provides that "*it shall be and deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare.*" The meaning of social welfare is explained although not defined. By virtue of section 1(2) of the 1958 Act, the requirement of social welfare will not be satisfied unless:

*"(a) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and*

*(b) either-*

*(i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty and economic circumstances; or*

*(ii) the facilities are to be available to the members or the female members of the public at large."*

In the instant case, in my opinion, the Gift qualifies as a recreational charity on account of its being for the improvement of the conditions of life (tested objectively) and being available for the public at large. To put the matter beyond reasonable doubt it is to be noted that section 1(3) lists various facilities which fall within the ambit of recreational charities, and this includes "*the provision and maintenance of grounds ... to be used for the purposes of recreation and or leisure-time occupation.*" Furthermore the Gift envisages that the Gardens should be used for a variety of sports, such as tennis and bowls, and indeed I can see that tennis courts and a bowling green are marked on the plan of the Gardens provided. Trusts for multi-use sports facilities are



considered charitable by the Charity Commission because they promote community participation in healthy recreation<sup>5</sup>.

19. The question of a charitable trust is, however, not without some element of doubt. In particular the Buildings, Nuisance and Alienation Conditions of the Gift could be said to benefit the Transferor, his heirs and assigns and (in the case of the Nuisance Condition) the occupiers of land neighbouring the Gardens. In so far as the Gift is for the benefit of the above specified persons, rather than the public at large, it could be said not to be charitable. Similarly the same reasoning might cast doubt upon whether the Gift was provided in the interests of 'social welfare' as required under the 1958 Act.
20. In spite of these elements of doubt I consider it most likely that the Gift will nevertheless be found to be a charitable trust. The requirement for the consent of the Transferor, his heirs and assigns could be treated as a peripheral aspect of the Gift that does not infringe its essential character, or else merely as a convenient mechanism for protecting its public purpose. The involvement of individuals in the execution of the trust is therefore not necessarily fatal to the existence of a trust. Perhaps the most attractive analysis is that Buildings Condition should properly be treated as a freehold covenant, and quite separate from the terms of the charitable trust (see the discussion in paragraphs 31-34 below). The same could be said to apply to the Nuisance Condition, or else that it does no more than remind the trustees of their existing duties under the common law not to create a nuisance to their neighbours.
21. The alternative to finding a valid charitable trust, it might be considered, would be very unattractive: the Gift, being a private purpose trust intended for perpetuity and purporting to make the land in question inalienable would be void as a matter of law. A court would be very unwilling to conclude that the trust should fail. As Lord Loreburn put in *Weir v Crum-Brown* [1908] AC 162

---

<sup>5</sup> The Charity Commission publication 'the Recreational Charities Act 1958', available at [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk), provides a useful synopsis of the Commission's interpretation of s.1 of the 1958 Act.

at 167: *"There is no better rule than that a benignant construction will be placed upon charitable bequests."*

22. Lastly it is worth observing that, historically, the creation of public parks by means of charitable bequest has not been uncommon. For example, section 5 of the Open Spaces Act 1906 contemplates that an owner of any open space subject to rights of use by neighbours (as was the position of the Transferor after 1861, following the Leasehold Covenant) might, by consent of the neighbours, transfer such land and its obligations to the local authority in trust for the enjoyment of the public. More recently Charity Commission publication CC29 'Charities and Local Authorities', at paragraphs 22 and 23, acknowledges that local authorities may commonly hold recreation grounds or open spaces under charitable trusts and discusses the right of local authorities to make bye-laws for the regulation of such land either under statute or under the terms of the trust itself.
23. In short it is my view that the Gift creates a charitable trust of the Gardens for the purposes of public recreation.

#### **Potential breaches of trust**

24. There are a number of actions which have been taken in respect of the Gardens, or are proposed to be taken, which require consideration.
25. I should state at this juncture that I have been instructed in the context of the Council having encountered some local opposition to its plans for the use of the Gardens and in particular the Pavilion. Much of this appears to stem from a belief, which I am instructed is mistaken but might have been encouraged by news that the former town hall requires demolition through structural failure, that the Council intends to extend the Pavilion and/or use it as a new town hall. An advertisement for a public meeting on 15<sup>th</sup> April 2005 called by the 'Lytham St. Annes Civic Society' informs me of this perceived concern as well as what is perceived to be an intention to increase the amount of car parking in the Gardens. I am also instructed that the owner of Nos. 8 and 9

Lowther Terrace objects to the current and future use of the Pavilion by the Council for municipal business.

26. Five main points of possible contention can be identified.

(1) the erection and extension of the Pavilion

27. Although I should state at the outset that there is no indication of any party seeking the entire removal of the Pavilion, its erection is prima facie the most obvious potential breach of the Conditions, in particular the Buildings Condition, unless the requisite written consents had been obtained for it. Nonetheless in my opinion, and in spite of the unfortunate lack of evidence of written consent being granted, a court would be extremely reluctant to hold that the Pavilion (which has been used, as far as I am aware, for the better recreation of the public and without objection for over 80 years) ought to be removed or that the Council acted in breach of trust in having it erected. I reach this conclusion for a number of reasons.

28. The burden would be upon those alleging a breach to prove that no consent was obtained. I am aware of no evidence to show that consent was refused. It would be an unduly onerous reversal of the burden of proof to require the Council to show consent after all these years, albeit that a charity trustee should keep accurate records. There is at least some evidence that consent was sought. In a letter dated 14<sup>th</sup> November 1919 between the Estates and District Council Offices of Lytham, it was noted as necessary to obtain the consent of two potentially dissenting local residents in particular: a Mr Yates and a Miss Gordon (the latter is reported to have objected to the erection of lavatories in 1907). A letter of 5<sup>th</sup> December 1919 confirms Mr Yates' approval to the erection of a Pavilion and café, subject to certain conditions. There is no record of Miss Gordon's response, although it was planned to visit her personally and make the plans available to her. I am not aware of any legal challenge or even any informal objection being made following the erection of the Pavilion, which can hardly have been a secret to Miss Gordon and other local inhabitants. Accordingly a court may infer that consent was granted.

29. The position may be a little more precarious in respect of the extension of the Pavilion which I am told took place in the 1950s, but I still consider it unlikely that removal of the extension would be ordered (and again, as far as I am aware, no one is arguing for such removal). Much will depend upon the size of the extension and whether any evidence of consent can be found. The only evidence so far obtained in respect of post-war works is a note of the Deputy Town Clerk dated 22<sup>nd</sup> February 1968 in respect of the planned replacement of conveniences in the Gardens. The Opinion of Counsel dated 20<sup>th</sup> February 1968 (but which I have not seen) was obtained, but that the Parks Committee' considered it "excessively cautious to seek any consent from the people who might be entitled to restrictions on building at Lowther Gardens" and accordingly agreed that the works ought to go ahead.
30. A further extension of the Pavilion in the future, without consent of the Transferor's heirs or assigns, would breach the Buildings Condition. However I am informed that in fact it is not intended to make any, or any significant, enlargement to the footprint of the Pavilion nor to add any additional level to it.
31. Whilst the above analysis is appropriate to the question of breach of the Buildings Condition, the more important question to the present analysis is whether a breach of the Buildings Condition amounts to a breach of trust or merely a breach of covenant.
32. It could be argued that the requirement for the written consent of the Transferor, his heirs or assigns ought not to be unreasonably withheld where the building work was inoffensive to the neighbouring properties and in the best interests of the promotion of the Gardens as a public park. It is, after all, the retention by the Transferor of a personal veto of intended use of the Gardens that most contradicts the spirit of a charitable trust to the point that Gift may even fail (as discussed above). It is consideration of this point that leads to identification of a crucial tension between those Conditions which create a trust for the public benefit (and under which it could reasonably be

argued that the Pavilion is an allowable, or even desirable, to the public park) and those which seems to benefit neighbouring landowners (by the power of veto they are given) above the public at large.

33. One solution to resolve this apparent tension is to analyse the Gift as containing a mixture of trust terms and restrictive covenants. In other words it may be possible to argue that those Conditions which are connected to particular adjoining property (in particular the Buildings Condition and Nuisance Condition) are not to be treated as trust terms, of which contravention would amount to a breach of trust, but rather as restrictive covenants attached to the land and enforceable as any other covenants in freehold in accordance with the law of real property. It may be argued that the Transferor himself took this approach when making his consent to the erection of the Pavilion dependent upon the consent of those to whom he had sold the land adjoining the Gardens (hence the involvement of Mr Yates and Miss Gordon as discussed above).
34. In my opinion by the foregoing reasoning there is a good argument that a breach of the Buildings Condition does not necessarily amount to a breach of trust but rather should be considered in terms of a breach of freehold covenant. I shall discuss the position under the law relating to freehold covenants below. This does not mean, as a matter of trust law, that there is no limit to the amount of construction that can take place in the Gardens. Only as much as is reasonably ancillary to its use as a park would be permitted. However by the same token the Council would not be able to build on the land without limitation merely because the heirs and assigns of the Transferor give consent to do so (as unlikely as that may be) but rather would be limited by their duties as trustees to preserve the Gardens as a public park.
35. It should be noted that in the absence of the Buildings Condition, a court would most likely hold that the building of a Pavilion on part of the Gardens (leaving the majority of the Gardens as open space) was an unobjectionable use of the Gardens for the better enjoyment of it as a park. In the case of *A-G v Corporation of Sunderland* [1876] 2 Ch D. 634, it was held that a trust of a

public garden which permitted the erection of a museum and/or summer-house only was not breached by the erection of a free library "*into which people may turn if the weather becomes objectionable*" and which "*will tend to promote the convenient use of the grounds*" and "*may induce more persons to frequent the grounds*". The court was most concerned to consider whether the contemplated building was a bona fide action in pursuit of the essential object of the trust which was "*to provide a place for enjoyment and recreation*".<sup>6</sup> It was also stressed that the planned building development only occupied a ¼ acre within 25 acres of park. In the instant case the proportion of developed land to open gardens may be similar. I provide a copy of the authority referred to herewith.

36. The argument for keeping the Pavilion would also be strengthened if it could be shown that the income generated from it was essential to the upkeep and maintenance of the Gardens as a public park. As a matter of last resort an Order or even a Scheme from the Charity Commission could be sought for approval of this use.
37. Even if a breach of the requirement for consent under the Buildings Condition was a breach of trust and even if the lack of such consent could be proved (both of which are doubtful), it is difficult to see in whose interests an action for the removal of the Pavilion might be brought. As I have already stated above, as far as I am aware there is no local objection to the Pavilion *per se* - only to its enlargement. The Council may be able to demonstrate overwhelming public support for the Pavilion. Furthermore a claimant would have to overcome the further hurdle of delay since the construction and extension of the Pavilion took place. The primary limitation period for an action for non-fraudulent breach of trust is six years (section 21(3) of the Limitation Act 1980). It does not appear that any limitation period applies to actions by the Charity Commission and there is a risk that no limitation will

---

<sup>6</sup> Similarly in the Australian case of *A-G for NSW v Cooma Municipal Council* [1963] NSW 1657, Brereton J commented that the dedication of land for public recreation did not necessarily require that the public must have access to all parts of the land at all times, but that any restriction on access of any part of the land could "be justified only on the basis that it is in the interest of the public and to provide for their recreation *within the area* that they are so excluded from part of it."

apply to a claim by local inhabitants either<sup>7</sup> although this may be more open to question. It is considered doubtful whether a defence of laches is available in actions involving trusts for the public benefit (see *Brisbane CC v A-G* at p. 425), but a mandatory injunction to remove the Pavilion (which is an equitable and discretionary remedy) is unlikely to be granted given the passage of time and expenditure incurred.

38. If I am correct regarding the above, and it is unlikely that any challenge or any successful challenge will be mounted to the existence of the Pavilion, it is fair to state that there would be little controversy in carrying out relatively minor renovation works to the interior or exterior of the Pavilion. Much will depend upon the nature and degree of such works and I am unable to advise further without precise details of the proposed works before me. Suffice it to state that if the proposed works are primarily works of renovation rather than extension, it is difficult to envisage to whom such works might be objectionable. On the contrary it stands to reason that if the continued existence of the Pavilion is lawful, any improvements to it are not only lawful but ought to be welcomed.

(2) charging for admission to the Pavilion

39. A number of events are currently advertised as being held at the Pavilion. They include a range of exhibitions, shows, concerts and craft fairs. These sorts of uses do not in themselves represent a breach of any of the Conditions, even if the erection of the building in which they take place might do.
40. Where the use of the Pavilion becomes controversial is in the selling of tickets for admission to these events. I do not know for how long admission charges have been raised at the Pavilion, but it may be for some time. This may amount to a breach of the Free Use Condition. It is apparent from Right (b)

---

<sup>7</sup> Section 21 of the Limitation Act 1980 does not apply to actions brought by the Attorney-General to enforce a charitable trust: *A-G v Cocke* [1988] Ch 414, there being no identifiable individual 'beneficiary' (in whom the trust property can vest) within the meaning of s.21 where the trust is for the public. Under section 32 of the 1993 Act, the Charity Commission has the same powers as the Attorney General with regard to charity proceedings. It might also be said that an action brought by local inhabitants under s.33 of the 1993 Act might also not be time-barred in keeping with the reasoning that there is no true 'beneficiary' of a trust for the public benefit.

that it was only envisaged that entrance fees could be charged for those playing games in the Gardens under Condition (viii). It should be noted that the permitted construction in the public park in the case of *A-G v Corporation of Sunderland* was a free library.

41. However the construction of "free" in Condition (iv) to mean 'without payment ever being required' or 'without ever being obstructed' is too restrictive. It could be said that as the tickets are available for purchase by the public at large, or that the area of the Gardens for which ticket-holding is required is small (and possibly *de minimis*) relative to the whole, this activity does not breach the Free Use Condition. The Charity Commission ought to take a pragmatic approach to the situation, noting that a permanent endowment of the type in question in this case does not provide with it the means of generating the income necessary for maintenance.
42. In *Burnell v Downham Market U.D.C.* [1952] 2 QB 55, a case which concerned whether playing fields held for the perpetual use of the public under the Open Spaces Act 1906 were rateable, the Court of Appeal held that "free and unobstructed use" of a playing field for the public did not mean that the public should have access at all times over all parts of the playing field and without ever being charged (in that case for admission to sports events). Some degree of exclusion and charging was deemed to be ancillary to the good management of the playing fields, although it should be noted that in that case (in contrast to the instant one) the exclusion was only for a limited number of days within the year. In the instant case the Council can point to the fact that admission to the Pavilion only affects a very small area of the Gardens relative to the whole.
43. There is a reasonable prospect, therefore, that admission charges will be permissible in principle or, insofar as is necessary, that the Charity Commission will extend the power to charge under Right (b) to include entrance to the Pavilion. The question is more complicated in terms of the amounts that can be charged and the use to which any profit is put. The Council will be able to justify charging as much as is required for the



maintenance of the Gardens as a public park and also for the administration and other overheads involved in bringing to the Pavilion certain events that are thought to benefit the public. What the Council will not be able to justify is any income which is not recycled into the Pavilion or the Gardens. Trust monies ought to have been kept separate rather than mixed with the Council's other revenue. Whilst it may be able to justify some retention of income insofar as it represents a balancing payment to recoup any expenditure on maintenance<sup>8</sup> of the Gardens by the Council out of its own funds before the Pavilion generated any income (presuming there was such a period), care must be taken to account for this income past, present and future.

*There will  
any - also  
not - written*

44. On balance, and assuming that events at the Pavilion are popular in the locality, in my opinion the court will be reluctant to prohibit all ticket sales as some admission charge is presumably essential to staging such events - events which might otherwise not be staged in the locality. Again I should add that I am not aware of any opposition to the use of the Pavilion for recreational events, nor to the right to charge therefor.
45. It may be that the Charity Commission can be persuaded to provide an Order or even a Scheme, should it be necessary to do so, to ratify this use and extend the power to charge admission fees under Right (b) to the events held in the Pavilion. This will depend to a large extent upon the popularity of such events and the use to which the income generated by ticket sales is put. It will be especially persuasive if it can be shown that some of this income is essential to the ability of the Council to maintain and improve the Gardens and the Pavilion.

(3) use of the Pavilion for Council business

46. It is intended to renovate the Pavilion not only as an arts facility but also to hold Council meetings and a mayor's parlour. Since 2004 some Council business has been conducted from the Pavilion, namely Council meetings and

---

<sup>8</sup> I am envisaging, for example, expenditure on gardening, planting of trees, flowers and shrubs and

events such as the installation of the mayor, and I have also discovered from an internet search, for example, that at least one meeting of the Lancashire Probation Board has been held at the Pavilion. In my opinion both this present and intended use of the Pavilion for meetings of the Council and its committees and other Council business is prohibited under the Public Meetings Condition and, assuming that some of these meetings take place behind closed doors, arguably the Free Use Condition too. More fundamentally such use contravenes the essence of the Gift, which is recreational - as encapsulated in the Public Park and Free Use Conditions.

47. To argue that the Council business is not political in the sense of contentious, party-political business (such as hustings) strikes me as too fine a distinction. Council business is certainly different to the recreational purposes which are at the heart of the Gift. It should be noted, for example, that in the case of *A-G v Corporation of Sunderland* whilst it was held that a free library would not contravene the terms of the trust, the erection of a town hall or other municipal buildings would have done so. The aforementioned case in fact involved land appropriated as a public park under statute (in that case the Public Health Act 1844) which was vested in the corporation subject to covenants in the deed of conveyance restricting its use. The Court of Appeal clearly considered that a trust had been created. Applying this line of authority<sup>9</sup> to the instant case, the Council may note that statutory authority to regulate parks and open spaces does not provide a route by which the Conditions in this case can be overridden: indeed public pleasure grounds provided by a local authority cannot be used for purposes other than for public recreation (see for example *Halsbury's Laws* Volume 34 paragraph 310 in respect of pleasure grounds held under the Public Health Acts).
48. Therefore whilst infrequent Council events held in the Pavilion (especially if they were open to the public)<sup>10</sup> might not be particularly objectionable<sup>11</sup>, the

---

maintenance of boundary features etc.

<sup>9</sup> See also *Lambeth Overseers v London County Council* [1897] AC 625.

<sup>10</sup> Of which the ceremony of installation of the mayor might be an example?

<sup>11</sup> I understand that the freehold owner of nos. 8 and 9 Lowther Gardens is one person who is known to object to the current use of the Pavilion for Council meetings.

other current and contemplated uses of the Pavilion for frequent Council business amount to breaches of trust. The only 'business' use that occurs to me would be permissible are such Council meetings as relate to the Gardens themselves. These meetings, which I imagine would be infrequent and small in terms of the numbers of people attending, could be justified on the basis that they were necessary for the public's better enjoyment of the Gardens and the discharge of the Council's trust obligations in relation thereto.

(4) car-parking charges

49. Following the analysis given above in relation to charging for admission to the Pavilion, there is a danger that charging for car parking facilities might amount to a breach of the Free Use Condition. On balance, however, there are reasonable prospects of being able to justify some degree of charges. This will depend upon being able to justify the level of charges in terms of meeting the costs of administration and maintenance of the car park (e.g. attendants, barriers, line-painting etc.). The retention of excess profit for the benefit of the Council's other uses outside the Gardens will not be justifiable.
  
50. Local opponents to the Council's plans in respect of the Gardens fear a possible extension of the area of the car park. I am instructed that no such extension is contemplated, but for the sake of completeness I ought to add that such an extension would have to be approached delicately. Assuming that no objection is taken to the current level of parking, it may be that an objection would be made if the amount of parking were significantly increased. The point at which the dedication of part of the Gardens for car parking ceases to be for the better access and enjoyment of the Gardens by the public and begins to threaten the character of the Gardens as a public park is a matter of degree and impression. Suffice it to state that any extra car parking that cannot be justified purely in terms of demand for access to the Gardens for recreation may not be considered a bona fide exercise by the Council of its trust powers and therefore amount to a breach of trust. Additional parking spaces for Council business will almost certainly be considered objectionable, as discussed above. Additional parking spaces for those attending the Pavilion

for events may be justified (assuming that the current use of the Pavilion is approved) depending upon whether it will be to a degree that threatens the character of the Gardens as a public park.

(5) the café

51. I am informed that there is a café on the premises leased to a private operator. This amounts to a breach of the Alienation Condition unless it can be shown that the consent of the heirs/assigns of the Transferor has been obtained. Whilst there is some evidence, as discussed above, that consent was obtained for the erection of the Pavilion which did originally include a café, unfortunately there is no specific mention of a separate lease of the café to a private enterprise. Depending on how long the café has in operation in private hands, the court may be willing to infer that consent was granted at the same time as consent for the Pavilion.

I think the  
word "take"  
is not  
in the  
text

52. Furthermore it remains open to obtain the requisite consent now, but if that consent should be unreasonably refused (or if the relevant heirs and assigns of the Transferor cannot be clearly identified) the Council may invite the Charity Commission to ratify this use by Order or Scheme. It strikes me that the provision of refreshments is a welcome feature of a public park and, adopting the analysis of the Court of Appeal in the case of *A-G v Corporation of Sunderland*, more likely to encourage, facilitate and enhance the public's recreational enjoyment of the Gardens.

**The enforceability of the covenants**

53. I shall also consider, as I have been requested to do, the question of the enforceability of the Leasehold Covenant. I shall also consider the position if the Conditions were to be treated as freehold covenants, which may be of some importance if the analysis suggested in paragraphs 31-34 above is correct.

54. Firstly a brief comment on registration of covenants. I note from instruction that title to the Gardens is unregistered. The Conditions, being created before 1925, would not be registrable as class D(ii) land charges. The same reasoning means that the Leasehold Covenants would not be registrable as land charges either, and also because covenants between lessor and lessee are never registrable even where they relate not to the land demised but to adjoining land of the lessor: *Darstone Ltd v Cleveland Petroleum Co. Ltd* [1969] 1 WLR 1807. The doctrine of notice will apply. The Council, as the continuation of the original covenantor (who received the Gardens by Gift and who plainly would have been aware of the Conditions, if not necessarily the Leasehold Covenants), could not raise a defence of being a bona fide purchaser for value without notice.
55. As to the Leasehold Covenant, this prohibits any building on the Gardens. It may be enforced by the present owners of the leasehold titles in question on the basis that the benefit and burden of the covenant will have passed in equity, being a restrictive covenant that 'touches and concerns' the Terraces: in *Ricketts v Enfield Church-wardens* [1909] 1 Ch 544 it was held that a covenant not to build on adjoining land sufficiently 'touched and concerned' the demised land. However the potential breach of the Leasehold Covenant, the erection of the Pavilion in about 1919 and in the 1950s, will no longer be actionable at the suit of the leaseholders of the Terraces who profess to have the benefit of the Leasehold Covenant. Apart from questions as to whether the original construction of the Pavilion was with the permission of their predecessors in title, and any estoppel arguments that may arise, any action for damages on the covenants will be time-barred under section 8 of the Limitation Act 1980 (the 12-year limitation period applicable to action brought to enforce a covenant under deed) and/or be reason or laches or acquiescence.
56. As long as the renovation works to the Pavilion are relatively minor, and do not extend the footprint or height of the building, there is therefore little danger of liability for breach of the Leasehold Covenant. Any plan for the

future extension of the Pavilion or the erection of other buildings may, however, be caught.

57. As to the Conditions, being treated as freehold covenants, it seems likely that the burden of them is transmissible in equity under the rule in *Tulk v Moxhay* (1848) 2 Ph. 774 on the basis that they are restrictive covenants. However, whilst the burden of the covenant might pass in this way, the benefit will only pass in the cases of those Conditions which can be said to 'touch and concern' land retained by the covenantee, namely the Terraces retained by the Transferor. Whilst this might be said to apply to the Buildings Condition and the Nuisance Condition, it cannot be said of the other Conditions.
58. As discussed above in relation to a potential breach of trust, it will be difficult for a claimant to prove that the terms of the Buildings Condition have been breached. There is no positive evidence that consent was not obtained. Questions of estoppel may also arise. Furthermore, and unlike the position in respect of a breach of trust, it is clear that the same time-barring as discussed above in relation to the Leasehold Covenant would prevent any realistic prospect of a successful legal challenge to the perceived breach of the Buildings Condition by the construction and extension of the Pavilion. The erection of the Pavilion c.1919 and its extension in the 1950s took place far more than 12 years ago. Future extensions or the construction of other buildings in the Gardens may, however, be caught.
59. In any event, apart from the objections of the freeholder of Nos. 8 and 9 Lowther Terrace to the use of the Pavilion for Council business, I am not aware of any other opposition to the Council's control of the Gardens by any successors or heirs to the freehold reversions of the Terraces. Nor am I aware of any challenge to the Council from any such successor(s) in respect of an alleged breach of the Buildings or Nuisance Conditions.
60. I should add that the jurisdiction of the Lands Tribunal to order the discharge of restrictive covenants affecting freehold land does not extend to covenants entered into on the occasion of a disposition made gratuitously or for nominal

consideration for public purposes: section 84(7) Law of Property Act 1925. The Gift was made gratuitously and therefore the possibility of discharge of the covenants is not available here.

### **Summary and consequences of Opinion**

61. Whilst the Leasehold Covenant and some of the Conditions may remain enforceable by some owners of land neighbouring the Gardens as restrictive covenants, in my Opinion the most significant aspect of this matter for the Council is that they most probably hold the Gardens upon charitable trust.
62. Assuming that the Gift amounts to a charitable trust, by virtue of section 3(7)(a) of the 1993 Act the Council is under a duty to apply to the Charity Commission for registration of the Gift of the Gardens in the Register of Charities. I am not aware of any exemption or exception from this requirement that would apply in this case.
63. I have understood from those instructing that the application of charity law to the Gift of the Gardens has not previously been considered, and that no charity registration has to date taken place. If I am wrong in this assumption, please inform me, and this Opinion will require modification accordingly. It occurs to me that the Council may have considerable previous experience in the administration of charitable trusts and even in the specific sphere of public pleasure grounds, in which case please excuse those parts of the following which only serve to reiterate what is already known.
64. If the probability of a charitable trust of the Gardens comes as news to the Council, it is of crucial importance that the Council should appreciate the distinction between this basis of land-holding and that of any other land that they may control under statutory authority: their use of the land is subject to the Conditions imposed in the Gift and subject to the supervision of the courts and the Charity Commission. The primary responsibility of the Council as trustee is to observe the terms of the trust, in this case the Conditions

contained in the Gift<sup>12</sup>. Breach of any of the Conditions could lead to legal action being taken against the Council for breach of trust. In the foregoing I have advised as to the potential breaches of trust past, present and future. The key issues of potential contention have been identified as:

- the erection and extension of the Pavilion;
- charging for entry to the Pavilion;
- the conduct of Council business in the Pavilion;
- car-parking in the Gardens; and
- the lease of the café within the Gardens to a private enterprise.

Of these, it is in respect of

(1) the use of the Pavilion for Council business unrelated to the Gardens themselves (which is almost certainly unlawful), and

(2) the Pavilion ticket sales (which it may be justifiable to a degree depending upon further detail of the sums involved and the use to which any profit has been put)

that the Council is most vulnerable to a claim for breach of trust - although it is fair to comment that each issue holds some risk for the Council.

Minor internal and external alterations to the Pavilion, unless geared to an unlawful purpose, are unlikely to prove controversial.

65. Some consolation for the Council amidst the responsibilities of the trusteeship that I have described may be drawn from fact that the Charity Commission can be asked to provide advice to charity trustees under section 29 of the 1993 Act, and the Council can protect themselves against any allegation of breach of trust by acting in accordance with that advice (s.29(1)).
66. It is therefore prudent for the Council to contact the Charity Commission with a view to registration of the Gift and seeking advice, primarily to confirm the status of the Gift of the Gardens as a charitable trust and the need for its registration. In due course, and insofar as is necessary, the Council may seek further advice under section 29 of the 1993 Act and any necessary Orders

---

<sup>12</sup> Subject to the argument advanced above that some Conditions, namely the Buildings and Nuisance



under section 26 of the 1993 Act to approve certain uses of the Gardens (such as charging admission for the Pavilion and car park, the lease of the café, and possibly – but more controversially - occasional use of the Pavilion for Council events). It may even be necessary to seek the imposition of a Scheme to allow such uses, should the Commission require so drastic a step.

67. However I should add a strong note of caution. Approaching the Charity Commission, and the probable registration of the Charity that would ensue, will invite scrutiny of the past and present use of the Gardens in the hands of the Council. Accounts will have to be made available on request, and annual reports will have to be returned. It is therefore important that the Council should organise its records and accounts in relation to the Gardens in anticipation of the possibility of such scrutiny, which is all the more likely in light of the apparent local concern as to the use of the Gardens. For example, and as mentioned above, any retention of profit from Pavilion ticket sales should be justified and such income kept separate from other Council revenue, if this has not been done already. Care should also be taken, in producing accounts, to check that matters such as the calculation of rates and any VAT have been given proper consideration.
68. The Council might also want to consider whether they hold any other property on a similar basis to the Gardens in the instant case, as the position in regard to these too will need to be regularised.
69. It is fair to warn that the potential scrutiny of the administration of the Gardens will be intensified because of the Charity Commission's expressions of reservations as to the fitness of local authorities to act as charity trustees. Although local authorities are empowered to act as charity trustees under section 139 of the Local Government Act 1972, as recently confirmed in the Commission's recent decision in respect of the Trafford Community Leisure Trust and Wigan Leisure and Culture Trust, the Commission is wary of the risk that local authorities are more likely to fail to take proper account of their

---

Conditions, should be treated as restrictive covenants rather than trust terms.

obligations as charity trustees and merely deal with trust property in the same way as their other, corporate property.

70. It will be seen, therefore, that the approach to the Charity Commission that I have suggested ought to be handled with utmost care. Doubtless an explanation of the history and administration of the charity over the years since 1905 will need to be proffered and should be carefully thought through. It would seem prudent to stress the current benefit to the community of the present uses to which the Gardens are put, and whatever evidence there is of the popularity of such uses. I will gladly assist in the production of any such documents if required to do so upon further instruction.
71. The Charity Commission website<sup>13</sup> is a useful source of guidance as to the proper administration of a charitable trust. The Council might have regard to the following Charity Commission publications in particular:
- CC3 The Responsibilities of Trustees
  - CC21 Registering as a Charity
  - CC24 Users on Board: Beneficiaries who become Trustees
  - CC28 Disposing of Charity Land
  - CC29 Charities and Local Authorities
  - CC36 Amending Charities Governing Documents: Orders and Schemes
  - CC38 Expenditure and Replacement of Permanent Endowment
  - CC60 The Hallmarks of an Effective Charity.
72. I am aware that one of the local groups concerned as to the use of the Gardens has sought the advice of counsel in these chambers. Their position will no doubt be made clear to the Council in due course.
73. By way of final word I should apologise for the time taken in returning this Opinion, which has raised some interesting and complicated points. Nothing else occurs to me at present but please do not hesitate to contact me if I can assist further.

---

<sup>13</sup> [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)

WILLIAM MOFFETT  
11 Old Square

9<sup>th</sup> June 2005

