

Our ref: CHK/RF/103354-0013-8  
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20 August 2019

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Dear Neil

**Re: Therfield Regulation Trust, structure and governance**

You have asked me to write to the Conservators to confirm advice I have given previously as regards the structure and governance of the Charity. This request arises from a recent meeting of the Conservators at which you all agreed to ask for this.

The Charity's history is complex and unusual. However, it is possible to peel away the complex elements so as to understand the essential principles. The aspects which have caused particular confusion are:

- a) The Charity dates from 1979 but arrangements for the management of the Therfield Heath and Greens existed in a non-charitable form from 1888;
- b) Those who govern the Charity are called *Conservators*, whereas in most charities they are called *charity trustees*, *managing trustees* or simply *trustees*;
- c) There are individuals who hold the legal title to the Charity's property and are referred to in the Charity's governing document as *Trustees*, whereas in most similar charities they are called *property trustees*, *holding trustees* or *custodian trustees*;
- d) Some people have interpreted the situation as one where there are two organisations: *the Conservators of the Heath and Greens* and *Therfield Regulation Trust*, and have been persistent and public in arguing that this is so;
- e) There are examples of the Conservators themselves and relevant documents (minutes, letters, etc) suggesting or even stating that there are two organisations.

**Background**

We have consistently advised the Conservators there is just one organisation in place: Therfield Regulation Trust. This is a charitable trust with statutory origins. Arrangements for

the management of the land were first established by the 1888 Act but then re-characterised and granted charitable status in 1979.

This is Hewitsons' interpretation of the legal structure and status of this Charity and it is also reflected in the Charity Commission's own record, in that the governing document for the Charity is recorded as the Trust Deed dated 1 May 1979 and the objects set out in the Trust Deed make direct reference to the 1888 Act. There is no evidence of which I am aware which suggests otherwise: no register, agency, authority or document states persuasively there are two organisations. There are some people who think there are two organisations but there is insufficient evidence to support this. In contrast, there are important documents (see below) and the Charity Commission register which all make clear there is just one organisation.

I have read quite a lot of historical material, sometimes because this has been identified by those seeking to argue there are two organisations. However, I have not read all historical material: this is voluminous, and it is not cost effective to do so. The material extends to a number of boxes full and this is not systematically catalogued. I am not a historical researcher and the Conservators have agreed with me it is not cost effective to ask Hewitsons to pore over this material. The key documents to consider on this issue are:

- a) The Charity's governing document, which is the Trust Deed dated 1 May 1979;
- b) The nineteenth century legislation referred to in the Trust Deed, which is the Commons Regulation (Therfield) Provisional Order Confirmation Act 1888 and the subsequent Award made on 21 April 1893 (amended in a minor respect by an Amendment Order in 1990);
- c) The Charity's founding property document, which is the Conveyance also dated 1 May 1979;
- d) The Charity Commission register for the Charity.

I have also considered the Charity's accounts and annual report, although I have known examples (in other charities) of these being inaccurate and I do not rank these as high as the governing documents on this issue.

Certain historical Charity Commission letters as well as a barrister's opinion from the 1990s have been mentioned as being of possible relevance. However, these documents have not so far been located amongst the Charity's records. I do not consider these are likely to influence my assessment. I contacted the barrister's chambers for example and was told the advice concerned the Charity and another party called Aggate, although a copy of the actual advice has not been produced. I have since been told by Conservators this matter concerned the extension of someone's garden into a small part of the Heath. There is no indication this matter would be relevant to the issues discussed in this letter.

Please note, any document, such as a letter or a set of minutes, is of lesser authority than the governing document as regards the issue of the Charity's structure and governance. So, in the case of a conflict of meaning, the governing document will prevail.

I also remind the Conservators I wrote to the Charity Commission earlier this year for their formal written advice as to the structure and governance of the Charity. Regrettably they

declined to oblige, so the Conservators are without the regulator's opinion on this issue, save for one or two references in historical correspondence.

### Legal position

It is worth noting some relevant principles of charity law.

First, as I indicate above, it is common for non-corporate charities like Therfield to have two sets of trustees: managing trustees and property trustees. The managing trustees govern the charity and are the *charity trustees* in law, as defined in section 177 Charities Act 2011: "*charity trustees means the persons having the general control and management of the administration of a charity*". This definition derives from previous Charities Acts dating from the 1960s and before that to principles of charity law dating back several centuries; there is thus no mileage in pondering the fact that the Charity's Trust Deed predates the Charities Act 2011. The property trustees hold the legal title to the Charity's property and no more. Where these two groups of trustees exist, charities sometimes have completely separate groups of individuals for the two roles, sometimes have some overlap, and sometimes have complete overlap so the same individuals fulfil both roles.

The governing documents of this Charity are not very clear, which allows scope for confusion. I have referred above to a single governing document, the Trust Deed. Whilst that is indeed the position, I will discuss both this and the preceding legislation as the governing documents. The governing documents are as follows.

*Commons Regulation (Therfield) Provisional Order Confirmation Act 1888 and the subsequent Award 21 April 1893 (amended in a minor respect by an Amendment Order in 1990)*: this provided for the regulation of the Heath and Greens for the benefit of the local inhabitants, and the appointment or election of Conservators to govern and manage the land. The Conservators were to have responsibility for the "general management of the Common"; those are very similar words to the definition of charity trustees in section 177 Charities Act 2011. Trustees are not mentioned in the Act and Award, and the nineteenth century arrangement was not established on a charitable footing, although it is similar to the characteristics of a charity in being for public benefit. The legal title to the land was vested in the Church Commissioners from this time until 1979.

*Trust Deed, 1 May 1979*: this recites and adopts the 1888 Act and 1893 Award and acknowledges that the land is from this point in 1979 to be held not by the Church Commissioners but by Trustees for The Therfield Regulation Trust. There was a Conveyance dated the same day 1 May 1979 to transfer the legal title to the Trustees. The first Trustees were stated to be the Conservators at the time. The Trust Deed goes on to set out the two roles, being *Trustees* and *Conservators*: those called *Trustees* were in fact only property trustees as a matter of charity law, and those called *Conservators* were the charity trustees as a matter of charity law owing to the responsibilities recorded as being theirs in the Trust Deed and the correlation between that role and the definition of charity trustee in (what is now) section 177 Charities Act 2011.

The Conveyance dated 1 May 1979 transferred the legal title of the land from the Church Commissioners to the Trustees established under the Trust Deed of the same date. As I have

said, the people called *Trustees* were only property trustees and virtually their only role was to hold the legal title. The first Trustees were those who were Conservators on 1 May 1979.

#### Applying the facts to the law

Over the years the two roles of Trustees (ie property trustees) and Conservators (ie charity trustees) have sometimes been fulfilled by the same people and sometimes not so. The Charity has recently, with Hewitsons' help, been returning to a position where the two roles are fulfilled by the same people (this process is not yet complete).

Additionally, there have been times in the years since 1979 when the roles and arrangements set out above have not been clearly understood. Examples include:

- a) Letter from Hardcastle Burton to the clerk to the Conservators dated 15 May 1992: "it is clear there are two separate entities";
- b) Notes of a meeting of Conservators and legal and financial advisors on 23 March 1993: "it is now desirable to regard all finances as belonging to the Trustees and not the Conservators";
- c) A Decision of the Commons Commissioner dated 18 February 1981, as regards the ownership of the Therfield recreation ground: this stated this piece of land belonged to the *Conservators* and it has recently been suggested that as this land seems distinct from the land conveyed to the *Trustees* in 1979, there are thus two organisations;
- d) When the Charity responded to the Information Commissioner on a data disclosure issue in 2018: the impression was given there are two distinct entities, although this was subsequently corrected by Hewitsons and accepted by the ICO.

However, these can all be explained as either inconsistent with the position established by the governing documents and thus wrong, or consistent with there being one organisation but with two roles within it, property trustees and charity trustees, as set out above.

Additionally, there is also evidence that there has in the past been a correct understanding of the Charity's structure and governance. For example:

- a) Letter from previous legal advisors Limbach Banham dated 13 July 1999 to the then clerk: this clearly states the Conservators wear three different 'hats': *conservators* of the land elected under the process set out in the Act and Award, *managing trustees* as a matter of charity law and described in the 1979 Trust Deed, and for some of the conservators also *property trustees* holding the legal title;
- b) Letter from Charity Commission to Paul Palmer dated 8 November 2002: this deals in part with the meaning and status of the governing document and states "the land was settled on charitable trusts in 1979. The trust deed is the governing document of the Trust and it sets out the purposes of the Trust and how it is to be administered. [clause 2 is recited]. The Act that is referred to is the Commons Regulation (Therfield) Provisional Order Confirmation Act 1888. The important point regarding the relationship between the 1888 Act and the 1979 trust deed is that the purposes and activities mentioned in the 1888 Act are only acceptable for the Trust to the extent that they are exclusively charitable. [charity trustees' general powers are referred to].

With regard to the other provisions of the 1888 Act, it is the Commission's view that there is no conflict with the 1979 deed or the wider responsibilities of the trustees."

This Commission letter in particular is helpful in that it makes clear the connection between the Trust Deed and the Act within a single organisation. There is no suggestion at all that an organisation which was separate from the Charity persisted after 1979.

There are many examples of situations analogous to this Charity's governance.

First, the existence of two kinds of trustees, charity trustees and property trustees, is found in:

- a) Almshouses;
- b) Churches;
- c) Village halls;
- d) Community charities;
- e) Various trusts and scheme charities
- f) Property left under a Will.

Second, people governing a charity who, like the Conservators, are not called charity trustees or even trustees but who are *in law* the charity trustees can be found in:

- a) Charitable companies: usually they are called directors;
- b) Schools: usually they are called governors;
- c) Churches: usually they are called ministers, deacons or elders;
- d) Charitable community benefit societies: usually they are called board members;
- e) Charitable associations: usually they are called committee members;
- f) Charitable royal charter corporations: usually they are called council members.

Another important factor in deciding whether there are two organisations or just one involved, is to consider the fate of the land in 1979. Before 1979 the legal title to the land was held by the Church Commissioners. My understanding is in the lead up to 1979 the Church Commissioners decided they no longer wished to act as property title holder and no doubt this was part of the backdrop to the decision to create a charitable trust in 1979. At the same time, the land was conveyed to property trustees who were associated with the new charitable trust. This is clear from the Conveyance and also the Trust Deed both dated 1 May 1979. The first property trustees were in fact the Conservators, no doubt for convenience. If there have been two organisations since 1979, why then did the Trust Deed make clear the land was to be held by the same group of people as those who were to govern the Charity? This would have been an even more confusing arrangement than the one which exists.

Similarly, why is there a provision in the Trust Deed dealing with any conflict of meaning which might arise between the terms of the Act and the Trust Deed? That only makes sense

if the two documents relate to a single organisation. There is no evidence in the 1979 Trust Deed and Conveyance or anywhere else that there were to be two organisations.

A question has been asked as to what powers were used in 1979 to vary the Act and create a charity. Anyone has the capacity to create a charity by declaring an intention to undertake a purpose (or 'object') which is charitable in law and arranging for trustees to govern the fulfilment of that purpose. The first charity trustees of this Charity, the Conservators, did this in 1979. The Act was not varied, it was reaffirmed: clause 2 sets out the objects by direct reference to the purposes for the land which are set out in the Act, only adding that such purposes must from this point be charitable, and this point was necessary to state in order to enable the organisation to be a charity. Clause 5(3) further states if any conflict arises as to the meaning of the Act or the Trust Deed then the Act should prevail, save for the objects needing to be exclusively charitable in accordance with clause 2. The Charity Commission approved this arrangement in registering the Charity in 1979.

Another point arises as regards the land and the Charity Commission's approval of the arrangement. A principle of charity law is that a charity should not expend its resources on land or property belonging to a non-charity unless the charity also has an interest in that property. Thus for example a charity may conserve, maintain and operate a historic house, gardens, heritage landscape or wildlife reserve which either it owns itself or if owned by a non-charity where there is a long lease in place for the charity. Without ownership or a leasehold interest in the land or property, such a charity would be expending its resources for the benefit of a non-charity, which is not permissible. In the case of this Charity, the Trustees (ie the property trustees) hold the legal title and the Conservators manage the land: this is entirely appropriate and the Charity Commission approved this in 1979. If there were two organisations, expending the resources of 'the charity' on the land of 'the non-charity' would not be appropriate and the Commission would not have approved the arrangement.

### Conclusion

My view is there is clearly only one organisation, which is a charitable trust.

The evidence for this is to be found in the governing document of the Charity, the 1979 Trust Deed, and its foundation property document, the 1979 Conveyance. Together, these documents do three things: transfer the land to the first property trustees (who were the Conservators at the time), settle that property on charitable trusts, and incorporate the 1888 Act as part of the Trust Deed. This is a comprehensive arrangement for what was then the future of the land and its governance within the Charity.

As is the case for every charity, the primary document which constitutes the evidence for structure and governance is the governing document. In this case, the Trust Deed makes clear there is only one organisation and this is amply supported by the various other documents and principles I have discussed above. I have seen no other document which suggests strongly enough there are two organisations and no document I may yet consider is likely to do so because the governing document is the superior document on this issue.

I reaffirm I would only change my advice if evidence comes to light which overturns the existing analysis. However, given the primacy of the governing document in the matter of interpretation, the only document or authority which would provide such evidence would be another governing document (there is absolutely no evidence one exists) or the opinion of the

Charity Commission or a court. As for other documents, the Conservators should not undertake or tolerate a perpetual search for some document which it is thought may lead to such a change; this is unlikely to be in the Charity's best interests as it would not be an appropriate use of the Conservators' efforts or the Charity's resources.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Knight', with a horizontal line underneath.

**Chris Knight**  
**Partner, Head of Charities**