

The Lytham Schools (526315)

Decision Review as to whether to make a Scheme

1. Background

The charity is governed by a Charity Commission scheme dated 21 August 1998 as amended in 2002, which is also the governing document of a separate charity called the King Edward VII and Queen Mary School Prize Fund. The objects of the charity are:

- a) The provision and conduct in or near Lytham St Anne's of a day school for boys and girls to be called King Edward VII and Queen Mary School; and
- b) The provision of primary schools for girls and boys in or near Lytham St Anne's.

The objects of the Prize Fund are awarding prizes to pupils attending King Edward VII and Queen Mary School.

As well as operating the King Edward VII and Queen Mary School, the charity also owns the premises occupied by two voluntary aided primary schools and provides other support to the two primary schools (and other schools in the area).

2. Reasons for scheme application

In July 2011, the trustees' legal representative told the Commission that the future of the King Edward VII and Queen Mary School was threatened because of financial challenges and a continuing decline in pupil numbers.

A formal application for a scheme was received by the Commission on 7 September 2011 from the trustees of The Lytham Schools (526315).

3. Proposal

The trustees proposed merging the King Edward VII and Queen Mary School with another school (Arnold School) operated by the United Church Schools Trust. The proposal is to create a new school which will operate on the current site of the King Edward VII and Queen Mary School.

Key features of the proposal are:

- The Lytham Schools and the King Edward VII and Queen Mary School Prize Fund will be combined and known as The Lytham Schools Foundation (the Foundation).
- A new corporate trustee The Lytham Schools Trustee Limited will be appointed as trustee of the Foundation.
- The unrestricted assets belonging to the Foundation will be transferred to the United Church Schools Trust.
- The freehold of the King Edward VII and Queen Mary School site, the two primary schools, the investment properties and a number of investment funds will be retained by the Foundation.
- The United Church Schools Trust will be granted a 999 year lease of the King Edward VII and Queen Mary School site.
- King Edward VII and Queen Mary School staff will be transferred to the United Church Schools Trust under TUPE.

- Rental incomes under the lease will be used to fund bursaries for the new school.
- The income from restricted funds (including the Prize Fund) will be applied for the benefit of pupils at the new school.

4. The proposed scheme

The proposed scheme will:

- alter the objects of The Lytham Schools and the King Edward VII and Queen Mary School Prize Fund;
- enable the transfer of the unrestricted assets to the United Church Schools Trust;
- appoint the corporate trustee; and
- provide a power to lease the King Edward VII and Queen Mary School site to the United Church Schools Trust.

5. Public notice and representations

The trustees' legal adviser asked the Commission to respect commercial confidence during negotiations about the proposals. Draft Heads of Terms were agreed between the parties in relation to the proposed transactions and conditional contracts were exchanged on 25 August. The trustees' made their proposals public at the start of the new term in September and held public meetings to hear concerns.

The proposed scheme was published on the Commission's website for one month from 19 September. It was also published on a notice board at the school and in a local newspaper. However, the declaration notice suggests notices were not displayed until 21 September. We are therefore taking the period of notice as ending on 21 October.

A number of objections were made stating that notices were not displayed on the school notice boards. However, it is clear from the number of representations we have received that the interested parties have had the opportunity to read and comment on the Scheme. In the circumstances, I am not satisfied that any useful purpose would be served by exploring this objection.

6. Decision Review

Harry Iles, Head of Operations Wales ("the reviewer") was appointed to review the representations and the draft Scheme in accordance with the Commission's decision review procedures.

7. The representations

The Commission received approximately 120 representations, all but two of them objecting to the merger and the proposed scheme. There was great concern about the lack of consultation with parents and other stakeholders regarding the proposed merger.

8. Request to expedite the decision

The United Church Schools Trust's legal adviser has advised that the timing of the scheme is critical and that there is a risk the merger will fail if the scheme is not made very quickly. He explained that the effect on the school and community is

destabilising and that each day that goes by is damaging confidence in the new school as well as the two existing schools. It is his view that the situation is unsettled and will potentially result in parents withdrawing pupils from the schools. He believes that a review lasting months or even weeks will put the situation beyond recovery.

The Commission has made a commitment to complete all decision reviews within 3 months, unless there are exceptional circumstances. In this case, we have been asked to expedite the decision on the grounds that the proposed merger will fail if a decision is not made very shortly. However, the Commission has made a public commitment to give those people who have made representations the opportunity to speak to the reviewer and this is an important component of the review process.

The reviewer has sought to balance the Commission's undertaking to provide an opportunity to make oral representations and give proper consideration to all matters; against the pressing need to make a decision as soon as possible. We therefore offered all the interested parties an opportunity to make oral representations on 4 November so that a decision could be made by the 11 November.

The reviewer, together with colleagues, heard oral representations over the telephone from 43 people. The oral representations reinforced the points made in the written submissions and demonstrated the level of concern about the pupils' educational future and the strong commitment to the existing school.

9. Representations

Almost all the written and oral representations raised objections to the merger and the proposed scheme. There was great concern about the lack of consultation with parents and other stakeholders regarding the proposed merger.

The key points which have been made are:

- The trustees should have commissioned an independent professional review, which included consultation about the future of the school.
- The trustees lack professional marketing experience and experience of operating a secondary school and should have taken professional advice before the school got into financial difficulties.
- The trustees misled stakeholders into thinking the charity was financially sound.
- Other independent schools are managing to operate despite difficult financial circumstances.
- Under the new scheme, beneficiaries with special learning needs will not be catered for.
- The new scheme does not stipulate a requirement for religious instruction in the Christian faith.
- The new corporate trustee would not be a registered charity and its administration and composition of directors would be outside the jurisdiction of the Charity Commission.
- There is no requirement for the lease of specie land to be approved by the Commission.
- The new scheme does not oblige the trustee to operate a school.
- The United Church School Trust does not have the same commitment to providing a school in the area.

- The trustees have not adequately explained their reasons to enter into a merger.
- The merger will affect the proportion of pupils receiving free or partially funded places (from 33% to 10%).
- The merger will materially affect the operation of the school. An increase in the number of pupils on the site will put pressure on resources and the facilities are insufficient. It will also result in a change in culture and ethos at the school.
- The trustees have not considered other options including those put forward by the parents' group. One objector referred to the recent decision in the Sir Edward Heath Charitable Foundation decision review case and said that the circumstances are similar here.
- The trustees have been put under pressure by the United Church School Trust with threats that the Trust will invest in a rival school if the merger does not proceed.
- The charity's independence will be affected.
- The objective standards of due diligence have not been observed.
- The effect on the two primary schools has not been explained.
- Concerns have also been expressed about the sufficiency of the notices and it was questioned whether notices were properly displayed at the school.

2 representations in favour of the scheme made the following points:

- There has been a deterioration of the financial situation. Despite efforts to attract new pupils, demographic factors are against the school being able to continue as it is. The proposed merger is the best way forward.
- The proposed arrangement ensures not only the survival of the school, but potentially a far better one, with wider subject choice and more extra curricular activities.

10. How the decision was made

The decision was made by the reviewer on 11 November 2011.

The reviewer read the representations made by all the interested parties who are opposed to, and who support the Scheme. He also took into account the points made in the oral representations.

The reviewer considered all the Commission's papers relating to this matter, all the evidence provided, the Commission's policy and relevant charity law before reaching this decision.

The reviewer also received the briefing prepared by the Parents Group which outlined an alternative Business plan and a report prepared for KEQMS parents reviewing educational and governance issues surrounding the proposed merger.

The reviewer asked the trustees of The Lytham Schools to supply the latest draft accounts together with copies of the documents they had considered in order to reach the decision that it would not be viable to continue to operate the school without proceeding with a merger.

This documentation included:

- report prepared by Principal and Bursar in relation to financial position
- regional market analysis on the schools market in the Fylde

- financial projections and estimates of pupil numbers with and without the merger proceeding
- due diligence reports
- draft annual accounts for the year ended 31 July 2011
- minutes of trustees meetings where reports were considered and decisions made
- response of Lytham trustees to representations

11. The test for the Commission

Section 13(1) of the Charities Act 1993 (as amended by the 2006 Act) lists the circumstances in which the purposes of a charity can be altered to allow its property to be applied cy-pres.

The reviewer considered whether section 13(1)(c) of the Charities Act 1993 had been met, namely:

“(c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes”

“the appropriate considerations” means:

- (a) (on the one hand) the spirit of the gift concerned, and
- (b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes).

12. Applying the legal test

In summary, the majority of the representations asserted that there was no need for a Scheme to change the existing Scheme because the school could have a viable economic future as an independent school. They also argued that the beneficiaries would suffer from the disruption associated with the proposed merger, a lack of facilities for the increased numbers and the changed ethos of the school. The trustees’ considered opinion is that the Scheme is necessary because of the projected financial losses, the over supply of independent education places in the area and the prospect of a continued decline in pupil enrolment. Taken together these factors demonstrate a considerable risk to the future existence of the school.

In judging whether a cy-pres occasion has occurred under section 13(1)(c), the test is not whether there has been a ‘failure’ of the Trusts, ie that the school is no longer viable; rather the test is whether the property “can be more effectively used in conjunction” with other charitable property given for similar purposes.

The reviewer considered the proposition that the school could be returned to profitability through the alternative business plan prepared by the Parents Group, which involves a combination of better marketing, corporate sponsorship, boarders and fundraising. Following this course of action carries risks that the school will not return to profitability within an increasingly competitive market for independent education in the area. In this situation, the trustees have the responsibility for taking decisions in the best interests of the charity. The reviewer agrees with the trustees’ conclusion that a merger (ie that the property can be more effectively used in conjunction) presents the best prospect of securing a successful school.

The school is facing considerable challenges and cannot continue to sustain financial loss and falling roles. It has the opportunity to combine the pupils and gain capital assets through a merger with a neighbouring charitable school. The reviewer considered that

these circumstances meet the legal test under section 13(1)(c) of the 1993 Charities Act. In particular, the reviewer considered that the proposed use of the charitable property accorded with the spirit of the gift (which the reviewer took to be the carrying on of a successful school) and appropriate in relation to the social and economic circumstances now facing the charity.

13. Amendments to Scheme

With regard to the following representations about specific aspects of the draft Scheme, the reviewer commented:

13.1 Power to lease

It was argued that the power to lease specie land without prior consent from the Charity Commission would allow the charity to lease on any terms and there were no safeguards to ensure the charity's best interests are served. Another concern was that the lack of restriction could lead to the lease being granted to a purely commercial entity.

Having considered this issue, the reviewer proposes the following amendment to clause 8 of the scheme:

- (1) The trustee may grant a lease to the United Church Schools Trust (charity number 1016538) of all or any part of the land specified and numbered (1) in Part 1 of the schedule to this Scheme, to enable such land to be occupied for use as a school.

13.2 Religious instruction

Several representations made the point that there was no requirement for religious instruction in accordance with the principles of the Christian Faith in the draft Scheme, although this requirement was set out in clause 4(33) of the 1998 Scheme.

The reviewer agreed that there were no reasons to change this provision for religious education in the schools and therefore clause 8 of the draft Scheme will be amended to include:

- (4) Religious instruction in accordance with the principles of the Christian Faith shall be given in the School and the Primary Schools. The parent, guardian or person liable to maintain or having the actual custody of any pupil attending the School or Primary Schools may claim by notice in writing addressed to the principal teacher the exemption of such pupil from attending prayer or religious worship, or from any lesson or series of lessons on a religious subject, and such pupil shall be exempted accordingly.

13.3 Corporate trustee

Objections were made to the proposal that the new trustee will be a corporate body, which is not a charity, and that the Charity Commission would have no jurisdiction over its administration or the composition of its directors. The reviewer noted that it is not uncommon for a corporate body to be appointed trustee and the operation of the charity continues to fall within the jurisdiction and regulatory powers of the Charity Commission. The review did not consider there was reason to amend the scheme with regard to the proposed trustee.

14. The decision

The role of the reviewer is to determine whether or not the Commission should make the proposed Scheme for the charity. Having conducted a decision review in accordance with our published policy, the reviewer has concluded that the Scheme be made with the

amendments set out above. These amendments do not affect the purpose of the scheme and therefore there is no requirement for a further round of public notice.

The scheme has been made under sections 13 and 16 of the Charities Act 1993. There is a right of appeal against the scheme to the First-tier Tribunal (Charity). Further details about the time limits for an appeal, form of notice of appeal and how to apply can be found on the [Tribunal website - www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/charity/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/charity/index.htm)

Harry Iles
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