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The changes to charity law made by the Charities Act 2022

A Church Growth Trust Briefing Paper (May 2022)

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1.0 Introduction

In 2013 the Law Commission began work on its review of various technical issues in Charity Law which were highlighted as requiring attention in Lord Hodgson's review of the Charities Act 2006 published in 2012. The Law Commission published its own report in 2017 including a draft Bill which has now resulted in the Charities Act 2022 ("CA22") which was given the Royal Assent on 24 February 2022.

This paper is intended to cover the most significant changes which have been brought about by amendments to the Charities Act 2011 ("CA11"). So, the CA11 still stands, but it now incorporates the amendments made by the CA22.

2.0 Alterations of charities objects or purposes

The ways in which the constitutions of charitable companies, charitable incorporated organisations ("CIOs") and unincorporated charities could be altered varied considerably and they have now been harmonised as much as possible having regard to the different legal structures available.

2.1 Charitable companies

A charitable company is free to alter its articles of association, but certain alterations, including alteration of objects or purposes, cannot be made without the consent of the Charity Commission ("CC") and these are called 'regulated alterations'[1].

Following the CA22 they are now:

(a) an alteration which alters the charitable purposes/objects of the company;
(b) an alteration of a provision directing the application (sale or use of proceeds from a sale) of any property of the charity on its dissolution; and
(c) an alteration which would provide authorisation for any benefit (e.g. salary, payment for services or a gift) to be received by directors or members or persons connected[2] with them.

The change brought about by the CA22 is that an alteration to the statement of the company's objects which does not alter the substance of the charitable purposes of the company will not be treated as a regulated alteration, but equally, any alteration of the articles of association which alters the substance of the charity's purposes will still be a regulated alteration.

Examples:

(1) A change in the geographical area of benefit (e.g. "for the benefit of the residents of Newtown" to "for the benefit of the residents of Oldtown" or "for benefit of the residents of Newtown and Oldtown" would be a regulated alteration).

(2) A change from "the advancement of the Christian faith" to "the advancement of the Christian faith including but not limited to, by the proclamation of the Christian faith in Newtown" would not be a regulated alteration, because "the proclamation

[1] Section 198 CA11

[2] Section 200 CA11 defines 'connected persons' widely, including children, spouses, business associates and institutions and companies in which a trustee has an interest. For the purpose of the definition 'child' no longer includes an illegitimate child (Section 42 CA22).

of the Christian faith in Newtown" would simply be an example of the charitable purposes of the charity.

The CA22 has introduced a statutory basis for the factors which the CC must have regard to when considering an application for consent to a regulated alteration as follows:

(a) the purposes of the company when it was established, if and so far as they are reasonably ascertainable;
(b) the desirability of securing that the purposes of the company are, so far as reasonably practicable, similar to the purposes being altered; and
(c) the need for the company to have purposes which are suitable and effective in the light of current social and economic circumstances[3].

2.2 Charitable Incorporated Organisations (CIOs)

As CIOs are a relatively new legal structure for charities the need to alter their objects will not be common at present, but there is now provision to facilitate a regulated alteration of the CIO's purposes in similar terms to that for charitable companies. CIOs are free to make alterations to their constitution, but the following are regulated alterations requiring the prior consent of the CC in similar terms to those for a charitable company:

(a) alteration of the CIO's purposes;
(b) alteration of any provision of the CIO's constitution directing the application of any property of the CIO on its dissolution;
(c) any alteration which would provide authorisation for any benefit to be obtained by the charity trustees or members of the CIO or persons connected with them[4].

By new Section 226(2A) CA11 (as amended by CA22) the CC must have regard to the same factors as for charitable companies described above. If CC consent is not obtained for a regulated alteration the alteration will not take effect[5].

The resolution of the CIO to make the alteration will take effect when the resolution is passed or on a later date specified in the resolution, but in the case of a regulated alteration the resolution will only take effect when registered with the CC or a later date specified in the resolution[6].

The resolution can however be worded so as not to take effect until the CC has given its consent.

2.3 Unincorporated charities

These are charities which are neither companies nor CIOs and are usually governed by individual trustees or a committee of individuals under a trust deed or a constitution.

Under the CA11 certain unincorporated charities with no 'designated land' and an income of £10,000 or less had power to transfer all their property to another charity or alter their purposes. Those powers have been swept away by the CA22. In addition, all unincorporated charities had power to modify administrative provisions in their governing documents, but these powers were unclear as to their scope. All these powers have now been replaced by a

[3] Section 198(2A) CA11
[4] Section 226(2) CA11
[5] Section 226(1) CA11 as amended
[6] Section 226(2B) and (2C) CA11 as amended by CA22

new general power to amend by resolution of the trustees the governing document (e.g. trust deed of an unincorporated charity[7]).

The new power provides that any amendment must be expedient in the interests of the charity and cannot be exercised in a way whereby the charity would cease to be a charity. Subject to that and to the requirement for regulated alterations to be made with the consent of the CC, there is no limitation on the type of amendment that may be made under this new power. The new power under Section 280A CA11 cannot be excluded or modified by the charity's governing document.

Examples:

(1) New powers may be conferred on the trustees:
    (a) to borrow;
    (b) to relieve poverty as a means of fulfilling an object of advancing the Christian faith.

(2) The following changes could be adopted and would not be regulated alterations:

    (a) changing the right of trustees to co-opt further trustees;
    (b) changing the right of members to appoint or remove trustees or the requirement of members to ratify certain matters;
    (c) changing the rights of a category of people (such as the residents of a particular area) to vote on certain matters;
    (d) amending a requirement for a minimum or maximum number of trustees;
    (e) any requirement for trustees to reside in a particular area or be a member of a specific church;
    (f) amending a power to mortgage land or merge with another charity;

As in the cases of charitable companies and CIOs 'regulated alterations' of the governing document of unincorporated charities require the previous consent of the CC, and are:

(a) altering the purposes of the charity;
(b) altering a provision directing the application of any property of the charity on its dissolution;
(c) providing authorisation for any benefit to be received by charity trustees or persons connected with them;
(d) altering a restriction making property permanent endowment;
(e) altering a requirement for the consent of any person other than:
    (i) a charity trustee of or for the charity, or
    (ii) a member of the charity
    unless that person consents or is no longer in existence;
(f) an alteration which would affect any right directly conferred by the trusts of the charity on a person who:
    (i) is named in the trusts of the charity, or
    (ii) holds an office,
    (iii) or other person specified in the trusts of the charity other than trustees or members of the charity unless that person consents or is no longer in existence;

[7] Under new Sections 280A and 280B CA11 inserted by Section 3(2) CA22

(g) an alteration which would confer power on any person to make an amendment within any of paragraphs (a) to (f) above[8].

Examples:

(1) An example of paragraph (b) would be the changing of the ultimate beneficiary[9] upon dissolution from denomination x to denomination y, or from one missionary organisation to another.

(2) An example of paragraph (c) would be to authorise remuneration for a charity trustee or the spouse of a charity trustee under a contract of employment.

(3) An example of paragraph (d) would be an alteration to remove a restriction on the disposal of a property which may only be used for Christian worship.

(4) An example of paragraph (e) would be a power for a named person (other than a trustee or member of the charity) to nominate trustees for appointment, unless that person has died or consents.

(5) An example of paragraph (f) would be amendment of a right for a pastor or minister or elders, not being a trustee(s) or member(s) to set the spiritual direction of the church, or a requirement for his, her or their consent to be obtained for any decisions or amendments or to be consulted on any such matter.

(6) An example of paragraph (g) would be an alteration which gives the trustees power to alter the purposes of the charity. That would itself be a regulated alteration.

In considering whether to consent to a regulated alteration the CC must have regard to the same matters as are required for alterations of the governing documents of charitable companies and CIOs and set out above[10].

The definitions of 'benefit' and 'connected persons' are consistent with the definitions set out in Sections 199 and 200 CA11 (as slightly amended by CA22) for charitable companies and CIOs (Sections 280B (2) and (3) CA11 as amended).

2.4 How is an amendment of the governing document of an unincorporated charity actually made?

The amendment of the governing document is to be made by the passing of a resolution of the trustees by not less than 75% of the charity trustees, but if the charity has a membership distinct from the trustees which is entitled to attend and vote at a general meeting then the charity trustees must pass the resolution by a simple majority. In addition, the trustees' resolution must be approved by the members by a further resolution which itself is passed:

(i) at a general meeting by not less than 75% of the members entitled to attend and vote who vote at the meeting; or

[8] Section 280A(8) CA11

[9] "Ultimate beneficiary" in this context is the organisation or organisations to which, under the terms of the governing document of the charity, the charity's assets will pass if and when the charity comes to an end.

[10] Section 280A(10)CA11 as amended

(ii) at a general meeting by a decision taken without a vote and without any expression of dissent in response to the question put to the meeting; or
(iii) otherwise than at a general meeting, by the agreement of all the members entitled to attend and vote at a general meeting.

This last option without a meeting means that a resolution can be a written one which all members sign by way of agreement.

If CC consent to the resolution is not required then it takes effect on the latest of the date when the resolution is passed, the date specified in the resolution and the date of the members' resolution to approve the amending resolution if required. If CC consent is required, then the resolution will take effect on the latest of all these dates and the date of CC consent.

It follows that where CC consent is required that consent could be obtained first and the resolution of the trustees and of the membership (if required) could be obtained later.

3.0 Permanent Endowment

3.1 Definition of Permanent Endowment

Whether property held by a charity is permanent endowment ("PE") or not is often a difficult assessment to make. Although there was under the CA11 a statutory definition of PE the Law Commission said of it "There is no consistency or clarity in the Act, where it refers to permanent endowment" and more generally they said of the expression "permanent endowment":

(i) The phrase PE means different things to different people; and
(ii) There is a dearth of authority on the statutory definition of PE; and
(iii) The only universal characteristic of PE as defined in statute is that there is some sort of restriction on spending capital.

The Law Commission shied away from trying to find a definition of PE which had universal application for all purposes, so they confined themselves to providing a new statutory definition of PE for the purposes of the CA11 (as amended). Within the CA11 the definition is a gateway to certain enabling powers under the CA11 relating to PE.

The new definition of PE is: "For the purposes of this Act, property is "permanent endowment" if it is subject to a restriction on being expended which distinguishes between income and capital"[11]. So, if the capital has to be retained it is PE and the enabling powers given by the CA11 relating to PE come into play in relation to it.

The Law Commission noted examples in CC guidance of restrictions which are likely to give rise to an asset being PE:

(i) land and buildings held for a specific purpose with no power for them to be sold;
(ii) money donated on the condition that it is to be invested and the income received from the investment is to be spent on the purpose of the charity;
(iii) property that is to be held "forever" or "in perpetuity";
(iv) surplus income that is set aside by the trustees pursuant to a power of accumulation and invested to increase the income of the charity.

[11] Section 353(3) CA11 as amended

The CC guidance indicates that the following are unlikely to be PE:

(i) money to be spent by the trustees in furtherance of the purposes of the charity in such a way as they see fit; and
(ii) money donated to be invested but which can be spent if the trustees so decide.

PE is often found in the trusts of church charities and so the rules relating to PE are likely be relevant to church buildings. However, the main changes relating to PE introduced by the CA22 are concerned with PE in the form of investments where for example a portfolio of investments is held on trust for a charitable purpose, so that only the income can be applied for the charitable purpose.

Under Sections 281 and 282 of the CA11 funds which are PE could be spent in certain circumstances and these powers have been amended by the CA22. These sections now apply to corporate charities (companies and CIOs) as well as unincorporated charities.

3.2 Section 281 CA11 (as amended)

Under this section trustees may resolve that the "available endowment fund" as defined, or a portion of it, may be freed from the restrictions with respect to expenditure of capital that apply to it. This means that capital may be spent as if it was income. For the section to apply the market value of the fund as a whole must not exceed £25,000 and the trustees must be satisfied that the purposes set out in the trusts to which the fund is subject could be carried out more effectively if the capital of the fund or the relevant portion of it could be expended as well as income accruing to it rather than just such income.

For this section to apply it no longer matters what the income level of the fund is, nor does it matter whether the fund was donated or the result of accumulation of income in whole or in part by the trustees.

The "available endowment fund" is defined as:

(a) the whole of the charity's PE if it is all subject to the same trusts, or
(b) any part of its PE which is subject to any particular trusts that are different from those to which any other part is subject.

3.3 Section 282 CA11 (as amended)

The power to free capital from restrictions as to its expenditure is similar to the power under Section 281 CA11 save that it only applies where the "available endowment fund" as defined, exceeds £25,000 in value and the CC agree to in the resolution passed by the trustees. The CC will give their consent if they are satisfied the implementation of the resolution would accord with the spirit of any gift to the fund.

Again, the level of income from the fund and whether the fund was given by a donor or built up by the trustees with accumulated income are irrelevant to the power under Section 282 CA11 as amended.

The trustees must send a copy of their resolution under the Section to the CC, together with a statement of reasons for passing the resolution. This will need to cover the wishes of a donor and any response the donor may have made to the proposal to release the restriction.

On receipt of the copy resolution the CC may require public notice of the resolution to be given. They must give their decision to the charity within 60 days, but this period is suspended for a period if public notice has to be given and/or further information is required from the trustees.

In calculating the value of the fund for the purpose of determining whether it is less or more than £25,000, the amount of any borrowing from the fund by the trustees which is outstanding must be included in the value of the fund. This may take the value of the fund above £25,000 so CC agreement will be required.

Equally, the trustees may resolve not to repay the outstanding amount to the fund so long as they are satisfied that the purposes set out in the trusts to which the fund is subject could be carried out more effectively if the obligation to repay ceased to have effect. Again, the amount of the outstanding borrowing must be added to the value of the fund to determine whether the exercise of the power falls within Sections 281 or 282 CA11 (as amended).

It should be noted that this power should not be used simply to default on repayment of an existing borrowing. It can only be used where the trustees could repay but decide not to do so for good reasons. In any case where trustees cannot repay a borrowing from permanent endowment, they should apply to the CC for an Order which will give directions as to how to proceed.

3.4 Power to borrow from Permanent Endowment (PE)

It has been possible under existing rules to apply to the CC for an Order under Section 105 CA11 allowing borrowing from PE and the CC after due consideration allowed borrowing, provided that arrangements were made to repay the borrowing within a fixed period, which was usually 20 years. This facility has been granted by the CA22 to trustees under the new Section 284A CA11 without the involvement of the CC. Under this new section trustees may resolve to borrow an amount not exceeding the permitted amount, from the PE if they are satisfied:

a) that it is expedient for the amount to be borrowed in the light of the purposes set out in the trusts to which the fund is subject and the purposes of the charity; and
b) that arrangements are in place for the amount to be repaid within 20 years of being borrowed.

The permitted amount is 25% of the value of the fund on the date of the trustees' resolution added to existing borrowing from the fund under this power and then deducting from that amount the amount of the existing borrowing. So, for example, if the fund is valued at £20,000 and the outstanding borrowing is £5,000 then the permitted amount would be 25% of £25,000 less £5,000 which is £1,250.

The effect of exercising the power is that the amount borrowed is released from restrictions on spending capital and so the amount released can be used to make social investments with a negative financial return. This power could be useful where trustees are not satisfied that the fund ought to be freed from the restrictions applicable to it without any requirement to recoup expenditure.

This power may be excluded by the trust deed governing the PE, so benefactors may wish to take advantage of this in settling the terms of their gift.

3.5 Total Return Investments from Permanent Endowment

Total return investment ("TRI") permits charities to invest with a view to optimising the overall investment return, no matter whether that takes the form of capital or income. All investment returns are designated as 'unapplied total return'. The charity then decides whether to allocate unapplied total return to the charity for investment as capital, which is added to the endowment, or to the charity as income to be spent on its charitable purposes.

The Trusts (Capital and Income) Act 2013 and the Charity (Total Return) Regulations 2013 facilitate TRI by permanently endowed charities. PE can be used to make social investments (within the meaning of Section 292A CA11) provided those social investments do not contravene the restriction on expenditure of capital that applies to the PE. Accordingly social investments with an anticipated negative financial return cannot generally be made using PE. These regulations have now been amended so as to allow trustees, who have opted into the TRI regulations, to resolve that PE restrictions be further relaxed to permit them to make social investments with a negative or uncertain financial return which would not otherwise be permitted as investments.

This power is brought in by new Section 104AA CA11, and Section 104B CA11 has been amended to empower the CC to amend the 2013 Regulations to bring this power into effect.

Although these new or amended powers focus mainly on investment funds, some churches hold a portfolio for a fund which is dedicated to a particular purpose set up by a benefactor under a Will or a lifetime donation. It may be beneficial to review those portfolios to see if they can be more effectively used in the light of these new legal powers.

4.0 Ex-gratia payments by charities

Ex-gratia (Latin meaning given as a favour or out of a sense of moral obligation without legal basis) payment is a payment out of charity funds that the trustees feel morally obliged to make, but for which there is no legal basis. Examples of ex-gratia payments are:

(a) a church wishes to give a pastor/minister on retirement a pension or lump sum for pension in excess of that to which he or she is contractually entitled;
(b) a church which is closing wishes to make redundancy payments to an employee which exceeds what would be required by employment law;
(c) a person's will leaves the remainder of his estate to the church, and he instructs solicitors to change his Will, so as to include an additional legacy to an impoverished relative, but dies before the amendment could be signed. The church wishes to give the relative the legacy the relative would have received if the amendment had been made.

The CC already have power under Section 106 CA11 to authorise an ex-gratia payment which they will grant where they are convinced that there are reasonable grounds for the trustees to believe they would be acting immorally by refusing to make the payment.

This power has now been granted specifically to charity trustees to make small ex-gratia payments without the need for CC authority subject to certain limitations and in certain circumstances. New Section 331A CA11 sets out the payments that can be made as follows:

(a) making any application of property[12] of the charity, or

[12] The word "property" is not defined in the legislation, but in the context of Section 331A CA2011 is not bricks and mortar, but could include cash securities and moveable chattels such as a car.

(b) waiving to any extent, on behalf of the charity, its entitlement to receive any property.

The conditions for making the application of property or waiving the entitlement are:

(c) the value of the property does not exceed the relevant threshold;
(b) the trustees of the charity have no power to take action apart from this power or under Section 106 CA11;
(c) in all the circumstances the trustees could reasonably be regarded as being under a moral obligation to take the action.

The relevant thresholds are:

Charity's gross income in previous financial year	Relevant payment permitted
£25,000 or less	£1,000
£25,001 to £250,000	£2,500
£250,001 to £1,000,000	£10,000
£1,000,001 or higher	£20,000

This power to make small ex-gratia payments can be excluded by the charity's governing document, but this in turn could be overridden under an amendment now made to Section 106 CA11, whereby "in all the circumstances the charity could reasonably be regarded as being under a moral obligation" to make it[13]. The test has become objective in that the trustees must reasonably regard themselves as being under a moral obligation, whereas it used to be subjective in that the trustees simply regard themselves as having a moral obligation.

So, in all three of the examples above, the church concerned could make an ex-gratia payment to meet the case, either under the new Section 331A CA11 or if authorised under Section 106 CA11 (as amended) as appropriate.

5.0 Cy-pres schemes and charity appeals

If a charity's purpose fails either initially (e.g. not enough is raised by an appeal to carry out the charitable purpose) or fails subsequently after the purpose has started to be implemented (e.g. there are surplus funds after the object of the appeal has been fulfilled), then in the case of an initial failure the funds should be returned to the donor, but in the case of a subsequent failure the gift can be applied cy-pres (Norman French meaning 'as near as possible', or 'near to this'). An example of this would be where an appeal is made for a church roof repair and not enough is raised or too much is raised. The important difference is that in the case of an initial failure the law requires that the donor showed a general charitable intention to benefit the charity to which he/she gave the gift when making the gift, whereas in the case of a subsequent failure of the gift the law does not require such an intent, because the gift has already been applied to the charity and can be applied cy-pres to other purposes of the charity. In other words, the initial purpose has been fulfilled; it did not fail from the start. So, in the example in the case of the initial failure the project to repair the roof never started so the donation should be returned to the donor, but in the case of the surplus funds the project was completed which gives rise to a cy-pres situation in relation to the surplus funds which should be applied cy-pres to other purposes of the charity.

[13] See new Sections 106 (1) and (1B) CA11

Although these rules were established by the courts over the centuries they were incorporated into statute, ultimately in Section 62 CA11. Under this section the CC can make a scheme for new purposes as close as possible to the original purposes in a range of circumstances set out in the section.

In making any scheme the CC must have regard to:-

(a) the spirit of the original gift;
(b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes; and
(c) the need for the charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

It has now been made clear by the CA22 that a cy-pres scheme can be made for any charity whether a company, a CIO or a charitable trust. This confirmation is needed because there has been some doubt which is now removed by new Section 75ZA CA11.

The Law Commission's main focus in this area of reform is the rules for failed appeals and appeal surpluses accruing to charities. The existing rules in Section 63 to 67 CA11 coupled with the Charities (Failed Appeals) Regulations 2008 sought to deal with the problems arising where no general charitable intent could be implied and funds, which should therefore be returned to donors, could not be returned, either because the donors could not be found or could not be identified. However, the rules were complex and cumbersome and have now been substantially reformed by the CA22 and are more straightforward.

New Section 63A CA11 provides four circumstances in which donations made to a failed appeal can be applied cy-pres, even though no general charitable intent is evidenced or implied, in the following circumstances:

(a) <u>It is unreasonable to incur expense to return the donation, or unreasonable for donors to expect donation to be returned</u>
The CC or the court decide that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property[14]; or

(b) <u>Donations of £120 or less</u>
The donor has given a total of £120 or less in one financial year (whether in a single donation or cumulatively over the year)[15].

Accordingly, charities will not need to take steps to contact donors of relatively small sums to offer the return of donations. A donor can however prevent this provision operating by expressly stating that he or she wishes the donation to be returned in the event of the fundraising appeal failing. If such a declaration has been made, then the property[16] is not applicable cy-pres under this subsection. But that does not prevent the property from being applicable by reason of the other conditions in Section 63A CA11 which apply regardless of the donor's wishes.

[14] Section 63A(1)(a) and (2) CA11
[15] Section 63A(3) CA11
[16] The word "property" is not defined in the legislation, but in the context of Section 331A CA2011 is not bricks and mortar, but could include cash securities and moveable chattels such as a car.

Where the donor has made a gift of £120 or less and the trustees "reasonably believe" that the total gifts given by the donor in the financial year do not exceed £120 then the gift may be applied cy-pres. The trustees must have taken reasonable steps to ascertain whether or not the donor has given other gifts in the financial year exceeding £120 in aggregate.

The amount of the gift for this purpose excludes gift aid and may be made by any means including standing order, cheque or direct debit. Where a donation is made by two or more persons, whether they are treated as an individual donor or separate donors for these purposes is a question of fact to be determined in each case; or

(c) Donors who cannot be identified or found

The charity agrees with the CC reasonable steps it should take to attempt to identify and find donors to a failed appeal in order to offer them a refund of their donation. Donations can then be applied cy-pres if, after taking steps, the donor cannot be found or identified[17].

This procedure replaces the complex requirements of the Charities (Failed Appeals) Regulations 2008 which are repealed; or

(d) Unidentifiable donors

Where:-

(i) the donations are the proceeds of cash collections made:
    (a) by means of collecting boxes, or
    (b) by other means not adapted for distinguishing one gift from another, or

(ii) the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken[18].

Whenever any of these four circumstances arise or if there are surplus funds from an appeal, the CC may make a cy-pres scheme in respect of the donations to the failed appeal or the surplus funds left over after the purposes of the appeal is satisfied. Then the trustees must pass a resolution by a majority of them to apply the funds for such charitable purposes specified in the resolution as they consider appropriate having regard to the usual considerations:

(a) the desirability of making sure that the purposes are so far as reasonably practicable similar to the specific charitable purposes for which the money or other property was given; and
(b) the need for the purposes to be suitable and effective in the light of current social and economic circumstances.

If the amount or the value of the property donated exceeds £1,000 the trustees must send a copy of the resolution (with a statement of reasons) to the CC and the resolution will not come into effect until the date on which the CC consents to it[19].

By way of summary therefore both a failed appeal and surplus funds can be applied cy-pres.

[17] Section 63A(4) and (5) CA11
[18] Section 63A(6) CA11
[19] Section 67A CA11

In the case of an appeal which fails initially by reason of insufficiency to implement the purpose of the appeal, the charity trustees can apply to the CC for a scheme cy-pres to use the funds for other purposes close to the initial purpose of the appeal under Section 63A (1)(a) and (2) CA2011 (as amended) and they can also proceed under Section 67A CA2011 (as amended) without a CC Scheme or Order, but in that case if the funds in question exceed £1,000 the charity must submit their proposal for the use of the funds in the form of a resolution to the CC for approval.

In addition to these two options, if any of the conditions set out in paragraphs b, c or d above are met the charity may apply the proceeds of a failed appeal cy-pres under section 63 A (1)(b) without a Scheme of the CC, save that by the condition set out on paragraph d above certain steps must be agreed with the CC.

It will be for charity trustees to look at these options carefully to determine which best suits their circumstances.

In the case of surplus funds following a successful appeal the charity could apply for a cy-pres CC Scheme under Section 62 (1) (a) or (b) CA2011 without resorting to the new Sections 63A CA2011, but what is new for these situations is the option under Section 67A CA2011 to apply funds surplus to requirements without the involvement of the CC, unless the funds exceed £1,000, in which case the charity trustees must submit a resolution to apply the funds cy-pres for approval by the CC.

It is to be noted that the problems which these rules are designed to deal with can easily be avoided if a charity, when making an appeal, makes it a clear term of the appeal, that if the appeal fails or there are surplus funds, the funds of the failed appeal or the surplus funds will be applied to other more general purposes of the charity. If that is done there will be no need for a cy-pres scheme.

6.0 Charity names

6.1 Change of Name direction by the CC

The CC's jurisdiction to direct a charity to change its name is set out in Section 42 CA11. This section authorises the CC to direct a charity to change its name if:

(i) it is a registered charity and its name:
  (a) is the same as, or
  (b) is in the opinion of the CC too similar to the name, at the time when the registered name was entered in the register in respect of the charity, of any other charity (whether registered or not);

(ii) the name of the charity is in the opinion of the CC likely to mislead the public as to the true nature of:
  (a) the purposes of the charity as set out in its trusts, or
  (b) the activities which the charity carries on in pursuit of those purposes;

(iii) the name of the charity includes any word or expression for the time being specified in regulations made by the Secretary of State and it is likely to mislead the public as to the status of the charity;

(iv) the name of the charity is likely to give the impression that the charity is connected with Her Majesty's government or any local authority or with any other body of persons or any individual when it is not so connected;

(v) the name of the charity is offensive.

Section 42 CA11 has now been amended by the CA22 so as to apply to 'working names" of charities (i.e. a name under which a charity carries out its activities); for example Comic Relief is a working name for Charity Projects.

So now, the CC can require a charity to stop using a working name and must specify a period in which the direction must be complied with. Further, it is no longer a requirement that the charity to which a direction is given should be a registered charity.

When a direction has been given to a charitable company by the CC to change its name, the name of the company can be changed by the directors by resolution instead of the resolution having to be passed by the members[20].

6.2 Power to delay registration of unsuitably named charity

At present the CC do not have power to delay registration of a charity with an unsuitable name, so new Section 45A CA11 grants the CC power to delay registration of the charity while the process under Section 42 CA11 (as amended) runs its course. The CC have 60 days from the day set for compliance by them under Section 42 to commence enforcement action through the Tribunal or court, unless the charity complies earlier.

New Section 45B CA11 gives the CC power to delay registration of an unsuitable change of name in a manner equivalent to the power under new Section 45A CA11.

7.0 Charity land, disposals and mortgages

The detailed regulations for the disposal and mortgaging of land owned by charities is principally designed to ensure that the best price is obtained for the disposal of the land, that charity trustees do not over commit themselves when mortgaging land and that conflicts of interests are appropriately managed.

The reforms brought about in the CA22 do not change any of the intentions behind the design of the rules, but rather make it a slightly better fit to the aims.

It is important to comply with the regulations for disposals and mortgages of land by charities set out in Part 7 (Sections 117 to 129) CA11, because failure to comply renders a disposition void; although purchasers and lenders may be protected in the event that a disposition is void.

7.1 When is a charity's land subject to Part 7 CA11?

The first amendment brought in by the CA22 was to clarify when the disposal regime of the CA11 applies or does not apply to the disposal of an interest in land belonging to a charity. New Section 117(1A) CA11 says that for the purpose of Part 7 of the CA11 (which regulates the disposal of land) land is held by or in trust for a charity only if the whole of the land which forms the subject matter of the disposition is held:-

(a) by the charity solely for its own benefit and, accordingly, is not being held as nominee or in trust for another person, or
(b) in trust solely for the charity.

It is clear now that Part 7 applies in the following examples:

(i) when a charity owns land both legally and beneficially for itself;
(ii) where a trustee holds land on bare trust[21] for a single charity;

[20] See Para 45 Schedule 2 CA22

[21] Bare Trust is a simple trust, where the beneficiary (or beneficiaries) has an immediate and absolute right to both the capital and income of the trust, but the trust may not have a separate trust deed.

(iii) where land is left to a charity in a will and the executor has set apart the land for the charity;
(iv) where a charity owns land as one of several tenants in common, but is disposing of only its share.

However, Part 7 CA11 does not apply in the following examples:

(i) where a charity is one of several beneficial joint tenants of land and the entirety of the land is being disposed of by the trustees of the land;
(ii) where a charity is one of several tenants in common of the land and the entirety of the land is being disposed of by the trustees of the land;
(iii) where land which is being disposed of under a Will is left to, and has been set apart for or gifted to multiple beneficiaries, one or more of which is a charity;
(iv) where a trustee holds land on trust for multiple beneficiaries, one or more of which is a charity.

For these latter four cases, the procedure for disposing of charity land does not apply.

7.2 Exceptions to restrictions on disposal or mortgaging of charity land

The restrictions on disposition or mortgages of charity land which require an Order of the court or the CC do not apply in certain cases set out in Section 117(2) and (3) and Section 124(2) and (3) CA11 and to these there is now added by the CA22 a disposition or mortgage of charity land by a liquidator, provisional liquidator, receiver, mortgagee or administrator, as these have general duties to obtain the best terms for the proposed sale or mortgage[22].

Another important exception already provided for in Section 117 CA11 was any disposition (sale or lease) of charity land where it was not for the best price that could have been reasonably obtained, but where the trusts of the charity authorised it to do so (e.g. in the case of a charity for the relief of poverty selling a house cheaply to another charity to facilitate accommodation for those in poverty) (Section 117(3)(c) CA11). This has now been replaced by a new provision which will still be Section 117(3)(c) CA11 and is more focused on what is not within the exception. The entire exception is now as follows:

"any disposition of land held by or in trust for a charity which is made to another charity unless:

(i) the charity making the disposition is making it with a view to achieving the best price it can reasonably obtain, or
(ii) the disposition is a social investment for the purpose of Part 14A (social investments)."

The making of a social investment by a charity is not per se affected by the CA22, except in relation to the use of permanent endowment (see section 3 above). "Social investment" is defined in Section 292A CA11 as the 'relevant act' (as defined) of a charity carried out with a view to both:

(a) directly furthering the charity's purposes; and
(b) achieving a financial return for the charity.

A relevant act of a charity is either:

[22] Sections 117(3)(aa) and 124(9) CA11

(a) an application or use of funds or other property, or
(b) taking on a commitment in relation to a liability of another person that puts the charity's funds at risk (e.g. giving a guarantee for a third party).

A financial return is achieved when the outcome is better in financial terms than expending the whole of the funds or property in question.

So, this exception will only apply where the disposition is neither a commercial transaction (i.e. intended to achieve the best price that can reasonably be obtained) nor a social investment as defined. This means that where the price is a motivating factor (even if only a partial one in the case of a social investment) charities will have to obtain the advice required under Part 7 CA11.

The requirement that the disposition is authorised by the trustees of the charity has been removed but this does not imply that a charity may make a sale or lease which it would not be permitted to make by its trust. The charity must still be making a disposal which furthers its purposes to come within the exception.

An example of the way the exception now works would be a church which owns a house used as a manse worth £300,000 and wishing to sell the house (because it is no longer required, and it is not permanent endowment) to another church for £200,000, to be used for providing free accommodation to its pastor. Both churches have the advancement of the Christian faith as their purpose. The transaction is motivated by both the financial return, but not the best financial return (so it does not fall within para (i) above of the exception), and by the direct furtherance of the church's purposes to advance the Christian faith; so it is a social investment within the meaning of 'social investment', as defined in Section 292A CA11.

Because it is a 'social investment' it falls within para (ii) above of the exception and so the advice required under Part 7 CA11 must be obtained. This would not apply if the house was being gifted to the other church, as there would be no financial return for the first church.

Equally, if the church was selling to the other church at the full value of the house at £300,000 it would be required to obtain the advice required by Part 7 CA11 because it would then be within para (i) above.

7.3 Advice under Part 7 Section 119(1) CA11

The advice given prior to a disposition of land (including buildings) must, except in the case of the grant of a lease for seven years or less without a premium, had previously to be given by a qualified surveyor. The persons from whom advice can be obtained will be widened from "qualified surveyor" to "designated adviser" and they will be:

(i) a fellow or professional associate of the Royal Institution of Chartered Surveyors; or
(ii) a fellow of the Central Association of Agricultural Valuers; or
(iii) a fellow of the National Association of Estate Agents.

The contents of the designated adviser's report will be prescribed in new regulations, a draft of which is shown in Appendix 1 to this paper. It will be seen that it is much simpler than the Charities (Qualified Surveyors' Reports) Regulations 1992, which will be revoked.

If the designated adviser advises in his report that advertising should be carried out there is no longer an obligation on the trustees to follow that advice (Section 119(1)(b) CA11 has been removed).

In the exceptional case of the grant of a lease of seven years or less, the advice required must be given by "a person who is reasonably believed by the trustees to have the requisite ability and practical experience to provide them with competent advice on the proposed lease" (Section 120(2) CA 2011) and so need not be a designate adviser.

7.4 Advice given by charity trustees, officers and employees

There has been some uncertainty as to whether trustees and their employees are able to give the advice to trustees required for dispositions and mortgages of land. This has now been clarified by new section 128A CA11 which provides that reports and advice for dispositions of land, granting a lease for seven years or less, and the granting of a mortgage may be provided by a charity trustee or an officer or an employee of the charity or of the charity trustees or in the course of a person's employment as an officer or an employee of the charity. The person would still need to have the requisite ability and practical experience to provide the trustees with competent advice.

7.5 Residential tenancies granted to employees

Normally an employee of a charity is a "connected person" within the meaning of that term in Section 118 CA11 and so the general exception, which permits a disposition of land or mortgage for a charity following advice from an employee, where they are given a tenancy, would not be available; so an Order of the CC or of the court would have to be obtained. This is unduly burdensome when for example an employee is to be granted a fixed term of one year or less or a periodic tenancy to use a charity property as his or her home where the period is one year or less.

To deal with this situation there is now an amendment of the definition of "connected person" in Section 118 CA11 so that in these circumstances the employee is not to be treated as a connected person.

It follows that the procedure for such a disposition in these circumstances (i.e. letting to an employee of a home) may be effected in the usual way under the exception whereby advice at a lower level (i.e. the exceptional case of a lease for seven years or less as described in paragraph 7.3 above) is obtained as a preliminary to the disposition under Section 120(2) CA11.

7.6 Information to be included in documentation for dispositions and mortgages

Dispositions (sale or lease) of land can take place either in one stage or two. Whilst a lease is often granted without any separate contract, a sale of a freehold property is usually carried out by first a contract and then a deed of transfer or conveyance. Section 122 CA11 as now amended by the CA22 requires certain statements to be included in these documents. These statements are required to be in every contract for sale or lease or other disposition of charity land and every conveyance, transfer, lease or other instrument effecting a disposition of such land. They must each:

(a) state that the land is held by or in trust for a charity;
(b) state whether the charity is an exempt charity;

(c) if the charity is not an exempt charity, state whether the disposition is one falling within Section 117(3)(a), (aa), (c) or (d)[23], and
(d) if the charity is not an exempt charity and the disposition is not one falling within Section 117(3)(a), (aa), (c) or (d)[24], include the statement required by sub-section (2A).

Where paragraph (d) above applies the statement required is:

(a) in a case where Section 117(1) applies (an Order of the court or of the CC has been made) to the disposition to which the instrument[25] relates, a statement that the disposition has been sanctioned by an Order of the court or of the CC, or
(b) in a case where Section 117(2) applies (the requisite advice from a designated adviser has been obtained) to the disposition to which the instrument[26] relates, a statement that there is power under the trusts of the charity to carry out the disposition and that Sections 117 to 121 have been complied with.

These statements will therefore appear in both the contract and conveyance, transfer or lease. Although these statements appear complex, essentially, they simply confirm that Section 117 CA11 as amended has been complied with so far as applicable.

The statements can now be made by the trustees or officers signing the documents on behalf of the charity whereas they previously had to be in part in the form of a certificate signed by the charity trustees personally, which was cumbersome in the case of corporate charities.

The statements required in a mortgage of charity land are where relevant, similar in effect to the statements required for dispositions and are set out in Section 125 CA11 (as amended by the CA22).

7.7 Protection of purchasers where these statements are required

When the statement required by Section 122(2)(d) CA11 has been included in a contract then it is to be conclusively presumed to be true for the purpose of enforcing the contract by a purchaser, even though the contract is otherwise void (Section 122(4) CA11 as amended). Even if the contract omits the requisite statement the contract is enforceable by a purchaser who has entered into the contract in good faith. The trustees who are selling the property may be in breach of trust, but the purchaser is protected.

Similarly, as regards the disposition by transfer, conveyance, lease or other document where the requisite statement under Section 122(2) has been included then, for the benefit of the person who acquires an interest in the land for money or money's worth, it is conclusively presumed that the statement is true (Section 122(4A) CA11 as amended) and, if the statement is omitted, then, in favour of a person who in good faith acquires an interest in land for money or money's worth, the disposition is valid (Section 122(5A) CA11 as amended).

Again, similar provisions for the protection of lenders and purchasers from the lenders apply under Section 125(3) and (5) CA11 (as amended) in relation to the inclusion or omission of the requisite statement.

[23] These are the exceptions to the requirement for advice under Part 7 CA11.
[24] These are the exceptions to the requirement for advice under Part 7 CA11
[25] Contract, conveyance, transfer, lease etc
[26] Ditto

8.0 Provisions relating to trusteeships

It is sometimes the case that individuals carry out the duties of trusteeship and so come within the definition of 'charity trustee' in the sense that they are de facto in "general control and management of the administration of a charity" (Section 177 CA11), but through some technical defect have not actually been formally appointed as a trustee of the charity; or perhaps it has not been possible to formally appoint them (e.g. because of the lack of a quorum at a meeting of trustees or there being no serving trustees or simply that the need for a formal appointment has been overlooked).

Such defects could arise in any context in which it is possible to be a 'charity trustee' as defined in Section 177 CA11 and so it could occur in relation to a director of a charitable company, the trustees of a charitable trust, the management committee of an unincorporated association or trustees of a CIO.

In new Section 184B CA11 a new remedy has been provided to deal with this situation. If there is uncertainty as to whether a person has been appointed or elected to a qualifying position, or if there has been a defect in such an appointment or election the CC may ratify from the date of their Order the appointment or election.

A position is a 'qualifying position' in relation to a charity if, as a result of a person holding that position, the person is in fact a charity trustee of the charity.

An illustration of the provision for a qualifying position would be where under the trust's governing document a minister of a church is to become a trustee of the charity, but he or she is never formally appointed, even though the minister acts as if appointed.

An Order can only be sought with the consent of the person who would be the subject of the ratification.

The CC can also, make an Order, following a ratification Order, which vests or transfers property (to be consistent with the appointment or removal of a trustee) under Section 184B(5)(a) CA2011 and confirm the validity of acts done by the person who is the subject of the ratification Order[27].

8.1 Remuneration of charity trustees providing goods or services to a charity

Charity trustees are not permitted to make any gain from their position as trustees; so they cannot be paid for the provision of services or goods, such as legal or accountancy services or the supply of stationery or building materials, unless there is authority within the governing document permitting this. Section 185 CA11 provides a default power for charity trustees or persons connected to them to be paid for services.

The CA22 makes two changes to Section 185.

First of all, the power in Section 185 is extended to payment for goods, as well as services; so, trustees can be paid for the supply of the service of painting a building and the goods in the form of the paint for the decoration work. The same safeguards[28] for payments for services will apply to the supply of goods. It must be remembered that a trustee receiving

[27] Section 184B(5)(b) CA11

[28] The safeguards are set out in Section 185(2) CA2011 and very briefly comprise (a) there is a written agreement for remuneration and the remuneration is reasonable, (b) the agreement must be in the best interests of the charity, (c) the charity trustees receiving remuneration are a minority and (d) there is no prohibition of trustee remuneration in the governing document.

or intending to receive remuneration must exclude him or herself from decisions relating to the goods or services supplied for which remuneration is paid.

Second, the statutory power to pay trustees for services and/or goods under Section 185 applies in addition to any power under the charity's governing document. The charity can therefore rely on the statutory power without having to study their governing document to see if they can pay under their governing document. However, a charity could not exercise the power to remunerate trustees under Section 185 CA2011 if trustee remuneration is expressly forbidden in the governing document[29]. Removal of the prohibition would require CC approval as it would in effect be a regulated alteration of the governing document[30].

It is to be noted that the statutory power under Section 185 still does not allow a charity to pay trustees for serving as trustees nor to pay trustees as employees of the charity.

8.2 Equitable allowance

However, despite the basic rule that trustees should not receive personal benefits from their position as trustees the court does have power to award an 'equitable allowance' to a trustee for work done for the charity. The CC now, by new Section 186 CA11 inserted by the CA22 has a statutory power by order:

(a) to require the charity trustees to pay the person who has done work for the charity as specified in their Order; and
(b) to authorise to the extent specified in their Order any benefit already received in connection with the work to be retained.

The CC must consider that it would be inequitable for the person concerned not to be paid the remuneration or not to retain the benefit and must have regard to:

(a) whether the charity would have paid someone else to do the work;
(b) the level of skill with which the work was carried out;
(c) any express provision in the governing document prohibiting remuneration of trustees;
(d) whether remunerating the person concerned or allowing him or her to retain a benefit would encourage breaches of trust by other charity trustees.

An example which illustrates the usefulness of this provision is a situation where a trustee has received some remuneration for doing work for the charity such as secretarial work in taking minutes at trustee meetings. Eventually, the trustees realise that such remuneration is unauthorised. Previously the CC could not act retrospectively to allow retention by the trustee of the past remuneration, but now they can under the new power.

8.3 Trust Corporation status

Trust Corporation status is derived from the Public Trustee Act 1906 and subsequent legislation. It is conferred in various ways, including by the grant of the Lord Chancellor's Certificate under the Law of Property (Amendment) Act 1926.

Having Trust Corporation status is useful because it enables the corporation as a trustee to act on its own to hold land and deal with it by giving a good receipt for proceeds of sale. It has been unusual for charitable companies to seek Trust Corporation status, but now under

[29] See Condition D Section 185(2) CA2011.
[30] See Section 198 (2)(c) and Section 280A(8)(c) CA2011 as amended.

new Section 334A CA11 inserted by the CA22 any corporate body, including CIOs and charitable companies will have Trust Corporation status.

This will apply to a corporate body formed before or after the passing of the CA22, but in relation to any action or event prior to the CA2022 it will not retrospectively be a trust corporation.

One advantage of this new rule is that where any charitable company is a trustee with other individual trustees, the individual trustees can be discharged as trustees, leaving the corporate trustee as a Trust Corporation to act as sole trustee. This would be an appropriate step where the trustees of for example a church building transfer it to a corporate charity which will now have Trust Corporation status.

Any of these new trust corporations can act as a custodian trustee as set out in the Public Trustee Act 1906.[31]

A further advantage is that where any corporate charitable body is sole trustee of permanent endowment it can deal with it on its own because it can give good receipts for proceeds of sale or any other capital money arising from the permanent endowment.

9.0 Charity mergers

9.1 Shell charities

There was a case called Berry v IBS-STL(UK) Ltd in 2012 which involved a testatrix who in her Will left the residue of her estate to "such of the following charities as shall to the satisfaction of my trustees be in existence at the date of my death, namely…." [there followed a short list of named charities]. By the time of the lady's death one of the named charities had merged with another charity and that merger had been registered with the CC under Section 311 CA11, which provides for the passing of legacies to the merged charity.

In order for the legacy to pass to the merged charity under Section 311 CA11 it is necessary for the merger to qualify as a "relevant charity merger". For it to be within the definition of a relevant charity merger under Section 306 CA11, the transferring charity must have ceased to exist; so on the face of the Section the merger qualified as a relevant charity merger and so the gift should have passed to the merged charity. But the wording of the Will was that the named charity must be in existence at the date of the testatrix's death and so by virtue of the wording of the Will, the gift to that named charity failed and could not be rescued by Section 311 CA11.

The result of this case is one of the reasons why charities have not taken advantage of Section 311 CA11 and have retained the transferring charity in existence, notwithstanding the merger; so that it can still receive a legacy.

An amendment has now been made by the CA22 to Section 311 CA11; so that even where the gift specifies that it will only take effect if the charity continues to exist on the date the gift takes effect (e.g. on the death of a testator) it will be treated as a gift to the charity that has merged with the original charity provided the gift would have taken effect if the original

[31] See Section 334A (2)(c) CA2011 which refers to Section 205 (1)(xxviii) Law of Property Act 1925, which in turn refers to Section 4(3) Public Trustee Act 1906, which in turn authorises corporate bodies authorised by the Lord Chancellor to be custodian trustees under what is now Rule 30(d) of the Public Trustee (Custodian Trustee) Rules 1975.

charity had continued in existence, and, as if the date it took effect was on or after the date of registration of the merger with the CC.

This removes one of the reasons why some charities do not take advantage of the merger provisions in Section 311 CA11 and retain the transferring charity as a shell to receive legacies which might otherwise fail. There could be other practical reasons why charities retain a shell version of themselves, such as the worry that standing orders will not be transferred to the merged charity. However, the legal problem arising from the Berry case should no longer deter charities from registering the merger with the CC under Section 311 CA11. Similar amendments apply to CIOs[32].

These amendments are effective in relation to all gifts made on or after the CA22 came into force, no matter when the Will or other document giving rise to the gift was executed or entered into.

9.2 Exclusion of certain types of assets from vesting declarations

Section 310 CA11 provides a simple method of transferring all assets from one charity to another on a merger by what is called a 'vesting declaration', which is a simple declaration by deed (in a form suggested by the CC on their website), made by the trustees of the transferring charity and it transfers the assets without further documentation. However, some assets were excluded from the automatic transfer by the declaration, including land held as security subject to the trusts of the transferor and leases subject to a covenant not to assign the lease without the landlord's consent unless that consent has been obtained.

The provision excluding land held as security (an obsolete form of mortgage) has been removed by the CA22 and a new provision excluding leases has been substituted for the previous wording, whereby a lease is excluded from the automatic transfer by the vesting declaration if the circumstances are such that, had the transferor assigned its interest in the land (transferred the lease), that assignment would have given rise to a breach of covenant or forfeiture in the lease. This change of wording is intended to exclude situations where the person with the benefit of the covenant (whether absolute or qualified) (usually a landlord) has consented to the assignment, agreed to release the covenant, or otherwise waived their right to enforce it.

10.0 Regulations to enact the provisions of the Act

At present it is unknown when the various provisions of the Charities Act 2022 will come into force. The Charity Commission have indicated that they will be working with the government to put in place secondary legislation (regulations) and change their systems and procedures to implement the changes brought about by the Act between March 2022 and the autumn of 2023: with the following guide as to when each part of the Act will be implemented:

10.1 Provisions of the Act expected to come into force Autumn 2022

- Cy-près powers – see section 5 above.
- Ex gratia payments – see section 4 above.
- Remuneration of charity trustees etc providing goods or services to charity – see section 8.1 above.
- Trustee of charitable trust: status as trust corporation – see section 8.3 above.

[32] Sections 239 and 244 CA11 as amended

10.2 Provisions of the Act expected to come into force Spring 2023

- Permanent endowment - see section 3 above.
- Charity land - see section 7 above.
- Charity names - see section 6 above.

10.3 Provisions of the Act expected to come into force Autumn 2023

- Charity constitutions - see section 2 above.
- Remuneration etc of charity trustees etc - see section 8.1 above.
- Charity mergers - see section 9 above.

Appendix 1

Matters to be dealt with in the adviser's report

4. (1) A report prepared for the purposes of section 119(1)(a) of the Charities Act 2011 (requirements for dispositions other than certain leases) must deal with the following matters–

(a) the value of the relevant land;

(b) any steps which could be taken to enhance that value;

(c) whether and, if so, how the relevant land should be marketed;

(d) anything else which could be done to ensure that the terms on which the disposition is made are the best that can reasonably be obtained for the charity; and

(e) any other matters which the adviser believes should be drawn to the attention of the charity trustees.

(2) The report must also include a statement by the adviser that–

(a) the adviser has ability in, and experience of, the valuation of land of the particular kind, and in the particular area, in question; and

(b) the adviser has no interest which conflicts, or would appear to conflict, with that of the charity.