

FARRER & Co

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Dear Miss Butt

The Arthur Anson Memorial Trust

Thank you for your letter of 17 April.

In replying to the questions raised by the Directors I need to make one or two preliminary points.

Preliminary – General

The first is the structure of the charity. Although in general terms we refer, quite accurately, to the “Anson Trust”, we are in fact talking about two different legal bodies. The first (which I shall call “the Trust”), is the original trust set up by the Anson Sisters. It used to be governed by the original Trust Deed of 1913 but that has been replaced by the Charity Commission Scheme (“the Scheme”) dated 10 May 2005. It is registered with the Charity Commission under number 264435. The second (“the Company”) is the charitable company which has recently been set up and which under the Scheme has been appointed as managing trustee of the Trust. It has a separate registration number 1107174. The two bodies have the same charitable objects and are very closely connected but for some of the purposes of your letter I need to distinguish between the two.

The Company at present has no independent assets of its own. Its sole function is to be a trustee of the Trust. That does not necessarily have to be the case. There is no reason why assets should not be given to the Company and if anyone did in future want to benefit the purposes mentioned below that could be a sensible thing to do. One distinction is that the Trust has “permanent endowment” while the Company does not.

I will also sometimes refer to “trustees”. In the case of the Anson Trust these are the individuals who are the directors of the Company and are therefore responsible for the affairs both of the Company and the Trust. Although they are in law directors, the Charity Commission (and many rules of law)

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refer to them as trustees to emphasis that their duties are to consider the best interests of the charity, rather than being able to look at matters in a purely commercial light.

To the extent that it is run by the Charity the Anson Field is occupied by the Company and if for instance there were a claim by someone injured as a result of a danger on the Field it would be against the Company (and its insurance policy) and not against the individual Directors personally. Professional services are provided to the Company and therefore any one who supplies services and is not paid can sue the Company. Of course to the extent that the Company operates properly in its capacity as trustee of the Trust, and any contract is within the purposes of the Trust, then the assets of the Trust are available to meet the liabilities of the Company.

The Directors also have their own duties to perform and if they take a decision which is not authorised by charity law they may have to account to the Charity Commission.

Preliminary - Permanent Endowment

In much of what I am saying I will assume that the assets of the charity are freely available for disposal. There is however one point I need to mention in that the land is regarded as the permanent endowment of the charity. Clause 9 of the Scheme permits the Company to sell or dispose of the land in the Trust provided the Directors comply with the general rules imposed by law. But clause 9 goes on to say that if the Company wishes to dispose either of the Institute Building or of the Anson Field they are subject to special conditions. In particular those properties must no longer be required for use (for whatever reason) and either the disposal will not affect the operation of the Charity or the land must be replaced by a new site. This is of course subject to any further directions that the Commission may make. The Scheme also says that unless the Commission otherwise direct the Company must invest the proceeds of sale of any land. Whether or not property is "required for use" for the purposes of clause 9 is a matter which will depend on all the circumstances but in the last resort it is something for the Directors to decide, where relevant after advice.

"Endowment" has two meanings in this context. One is land that is actually used and occupied directly for the purposes of the Charity that is to say for carrying out its duties and objects. The other is land that is held in order to provide an income so that the income can be spent on the charitable purposes or if the land is sold, then the proceeds of sale and reinvestment can produce an income which can be used to further the objects of the Charity. In both cases it is the Directors' duty as far

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as possible to keep the assets in one form or the other in a way that will continue to further the purposes of the charity.

That does not mean that any particular asset must remain in its same form and indeed as circumstances change (such as the Anson Field becoming surrounded by housing) then it is important that the Directors reconsider the precise form of the endowment which belongs to the Trust. Clause 9 specifically considers the possibility of disposal of the Anson Field and the Institute subject to conditions. It is nevertheless the duty of the Directors to protect and as far as possible enhance the capital value of what belongs. If that can be done by selling an existing under-equipped playing field and using the proceeds to buy another area which can then be adequately equipped it may be right to do so but that is in the last resort a matter for the Directors (having consulted as mentioned below) to decide. The Charity Commission has power under the recently passed Charities Act 2006 to authorise the expenditure of permanent endowment and it would be sensible to discuss any proposal with them at an early stage. Furthermore, in the case of the Anson Trust, clause 11 of the Scheme requires the Directors to obtain prior approval of the Commission before spending permanent endowment.

With that introduction I will turn to your specific questions.

1. What happens if there are cash flow problems?

I will assume that the Company acts properly and correctly in all its dealings. If that is so then the question of liability for bills is a simple question of contract law. The fact that some third party such as an architect, surveyor, solicitor or even an employee is dealing with a charitable company rather than a commercial organisation does not change the position. The Company is liable to the supplier in exactly the same way as anyone else who incurred a bill. (If the Directors cause the Company to act improperly then they may be personally liable in certain circumstances.)

It follows therefore that the remedies of the supplier are the same as they would be if they were dealing with any other person. If they are not paid they may decide not to press for payment or they may decide to pursue their legal rights. If they do so they will need to sue the Company in court and obtain judgment. Once they have that they have various remedies available to them. If the Company has no money in its bank account, then they may ask the court to enforce the judgment against the property of the Trust. To the extent that any money represents permanent endowment (that is sale

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proceeds of land originally put into the Trust) then it will be subject to the same restrictions as apply to the land.

At that stage charity law can make a difference. If the relevant land were private property then a creditor could obtain what is known as a charging order from the court which is a sort of court mortgage. Once that has been issued the creditor then has the normal remedies of any mortgagee (such as a bank) which are to sell the property, repay themselves out of the proceeds and account to the debtor for the balance. In practice what they might wish to do is sell a corner of the Anson Field. Alternatively they might be able to let it and recoup themselves out of the rent.

The Charity has a complication however in that charities cannot either sell land or grant mortgages without going through a procedure laid down under the Charities Act 1993 and confirmed by clause 9 of the Scheme. That procedure requires either that the Charity Commission or the court gives its consent to the mortgage or the sale or that a particular procedure has to be followed by the charity trustees (in this case the Company). On the assumption I have made that it has been necessary to go to court, the Directors are unlikely to co-operate and therefore the creditor would have to apply to the court or the Charity Commission for an order for the sale of the land. If the creditor was pressing for payment the Charity Commission would undoubtedly have to make arrangements for them to be paid and if the only source was out of selling the land then that is what the Charity Commission would have to do. If they did not do that then a court would order them to. It is obviously important that charities should be able to carry on normal commercial dealings. This is however likely to be a long and complicated process. In reaching their decision the Charity Commission would also take into account the other factors mentioned below.

The Commission would either wish to investigate the use of money derived from permanent endowment to satisfy a commercial debt (as normally that is not permitted, although the circumstances here may provide an exception) or to authorise it in advance, for instance where there was a proposal to engage planning consultants for advice on the development of the Anson Field. As you know there have been discussions with the Commission about this over the years and they have shown themselves sympathetic to the situation of the Directors (and clause 11 of the Scheme indicates this) but that has been on the basis that in the long term it will be possible to resolve the current problems. The Commission have given limited authority to incur certain liabilities. If the Trust has an asset which is likely to increase in value, as by the grant of planning consent, then that would make it easier to present a case to the Commission for the expenditure of cash derived from permanent endowment than if the Directors had no such clear plan.

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2. What would happen if the Directors decided to dissolve the Trust?

Here we do need to distinguish between the Company and the Trust. It would be possible to dissolve the Company although that would have little legal consequence because the Company has no independent assets of its own. If it did have such assets then they would have to continue to be used for charity.

The Directors could not themselves decide to dissolve the Trust. The Trust has permanent endowment, is established for charitable purposes and is protected by the rules of charity law. Any proposed dissolution so long as its objects can be achieved would almost certainly be opposed by the Charity Commission and possibly also by the Attorney General.

If the Directors reached the view that the objects of the charity (mentioned below) could no longer be achieved then they would need to apply to the Charity Commission. There are various steps that the Charity Commission might take. One would be to authorise the Charity to amalgamate with another charity which has available assets but it might be difficult to find another charity ready to do that. Another would be to make a Scheme to reorganise the Charity, perhaps by directing that its assets (including the Anson Field) should be sold. If the Charity Commission did so then any sale would have to be on the best terms commercially available and that could involve applying for planning consent to develop the Anson Field. If the Directors were unable or unwilling to take matters further forward then in the last resort the Charity Commission could dismiss them as trustees and appoint new ones. The duties of those new trustees however would be much the same as the legal duties of the present Directors and they would be likely to take similar decisions.

3. Could the Trust transfer its assets to the Parish Council or some other body for nominal value?

The simple answer to that is no. A charity cannot transfer its assets to another body which does not have the same charitable purposes because to do so would be in breach of its charitable objects. If the Charity Commission were satisfied that the charitable objects could no longer be achieved then they might authorise this but they are unlikely to do so in favour of a body (such as the Parish Council) which is not itself a charity. It might of course be possible to appoint the Parish Council to be trustee in place of the Company (I am aware that the Marcham Parish Council already acts as charity trustee of the Recreation Ground) but that would not really change things as you would

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simply have another set of individuals (the members of the Parish Council) who as charity trustees would be obliged to take into account the same factors as the present Directors.

4. What course of action should the Directors consider at present?

The Directors have to act in the best interests of the purposes for which the charity is established. Certain purposes were set out in the original Trust Deed but they have been replaced in clause 4 of the Scheme. In outline they are:-

- (1) the provision and maintenance of facilities, amenities and services for use by the inhabitants of Marcham and its neighbourhood**
- (2) the relief of persons resident in Marcham and its neighbourhood who are in need, hardship or distress.**

The overriding requirement here is the best interests of the neighbourhood so long as those interests are exclusively charitable in law. The Charity trustees therefore have to consider how that purpose can best be achieved. In doing so the Directors need to consider the present assets (mainly the Anson Field and the Institute Building) and whether they are at present being most effectively used in order to achieve the Charity's objects.

This is a really a matter for the Directors to decide (subject to Charity Commission supervision) but they may well take the view that the present arrangements are not satisfactory. The Institute Building itself is partly let and at the moment redevelopment of the building or adaptation to modern uses is frustrated by a number of factors. Similarly although the Anson Field is used as a facility for local people, it is not ideal for that purpose and most importantly it is badly under equipped. There is no proper pavilion. As a result of development that has been allowed to happen over recent years the Field is now surrounded by housing which must itself present problems, for example if the children playing games hit balls into people's gardens or indeed if people carrying out activities in the field were to make a noise which might be a disturbance to people living in those houses. There is therefore much to be said for moving away from the present Anson Field.

That itself is reinforced by the possibility that the Anson Field might be eligible for planning consent. If that were to happen it could result in a substantial increase in the value of the Charity's assets

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which could be realised for the benefit of the Charity and that would assist in performing the objects. In a matter of this sort charity trustees must put aside any personal feelings which they may have.

I do not know if any of the Directors happen to live in one of the roads surrounding the Field or have friends who do, but if so they then they must either disregard any personal interests or, if they can not, consider if they should resign from the trusteeship. It is most important to separate their duties as trustees from any personal interest or susceptibility to pressure from other people who may have such an interest. I can quite understand that people who live in the surrounding houses like the idea of having a green space in the middle. That however is a matter for private individuals and is not a relevant issue for a charity to take into account.

The duty of the charity trustees is to consider the best interests of the charity. In a famous case in 1991 between the Bishop of Oxford and the Church Commissioners the Judge made it clear that for most purposes that means the financial interests of the charity. If the charity has an asset which it can dispose of at a financial advantage then the Directors should consider doing so. They do not have to decide to do so if the better course in the interests of the charity is to keep the asset but they should not rule out the possibility.

That of course is a long term issue and it may well be that those who live in houses around the field may, for their own personal reasons, seek to make the disposal of the Anson Field as difficult as they can. That is quite understandable because of course they wish to protect the amenities of their homes and no criticism of them is intended but the Directors should not allow that to interfere with their duties.

It is however possible that it may take some time before the value can be realised. The Directors therefore have to consider how they can continue to operate and to pay their bills during that period. If the Company no longer has any money then it may have to borrow. In any event it would be sensible for the Directors to discuss the matter with the Charity Commission. The Charity Commission is well aware of the problems experienced by charities in similar situations and may be able to offer sensible advice. It might for example be possible for the charity to borrow money from the Bank against the future possibility of planning consent. In order to do so the Trust might have to grant a mortgage over the Anson Field and of course if the debts became substantial the Directors would need to consider the issues I mentioned above. In this case if the mortgage is authorised by the Charity Commission then that authority would need to cover the issue of the Bank enforcing its security and selling the Anson Field so the point will have to be faced at the outset. The Bank of

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course would be under exactly the same duty in order to get the best possible price and it therefore would be likely to use its best efforts to obtain planning consent.

5. What considerations should the Directors bear in mind and with whom should they consult?

The first consideration is the objects of the charity. In practice, in the light of past activities a relevant one is how best to secure recreation and education in the area of Marcham. If the Directors have concluded that the Anson Field is no longer suitable or if it needs improvement and there are no available funds other than from sale then the best way would be to dispose of it and try to find an alternative site on which they can carry out their activities with the proper equipment and proper buildings.

Secondly, you have asked with whom they should consult. Obviously it is right to take professional advice as the Directors are doing but that by itself will not give full protection. I would therefore suggest that the Directors consult the Charity Commission at an early date. As you know I have already corresponded with them about the general policy of the Trust and the proposals for the Anson Field. Although the precise position may well depend on the exact nature of any arrangements that are made, it is quite likely in view of the terms of the Scheme that the Directors will need express Charity Commission consent in order to carry out a proper disposal of the land belonging to the charity. If that is so it would be sensible to tell the Charity Commission as long in advance as possible what the Directors have in mind.

Public consultation

I note that you intend to publish this advice in the Marcham and District News and indeed you sent me an extract from the News for April. I note in that that there was a letter from a Mr Anderson of the NAF Committee. I take it therefore that Mr Anderson is one of those who is, quite understandably, seeking to protect the amenities of his home by wishing to resist the development of the Anson Field. In his letter he says that the Charity Commissioners confirmed that there is no requirement for assets to be sold off. Obviously without seeing a copy of his letter to the Charity Commission and their reply it would not be appropriate for me to comment in detail but that may be an over simplification. Although there may be no legal requirement for charity trustees in this position to sell land, it can still be the right course of action and it is one the Directors do have a legal duty to consider. In taking their decision they must have regard only to the interests of the Charity.

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As the Charity is set up for the benefit of the neighbourhood then of course they must also consider that benefit as well to the extent that the benefit is for exclusively charitable purposes.

They are not under any legal obligation to consult the local community either through formal institutions such as the Parish Council or through public consultations. There can be no objection to taking soundings but they must not be persuaded by outside opinions. The Directors must take their own decision based on what they as charity trustees consider solely to be in the interests of the charity on its own.

I hope these remarks answer the Directors queries. I regret the need to reply at such length but the Directors will understand that the issues need careful consideration.

Yours sincerely

C R Jessel