

CHARITY COMMISSION

REVIEW OF A DECISION BY THE COMMISSION TO AUTHORISE UNDER SECTION 36(1) OF THE CHARITIES ACT 1993 A DISPOSAL OF LAND BY SHREE VISHWAKARMA ASSOCIATION OF THE UK

REVIEW DECISION OF THE COMMISSION MADE ON 13 JUNE 2006

1. *The Issue before the Commission*

This was a review of the Commission's decision on 20 October 2005 to make an order on the same date ("the order") under section 36(1) of the Charities Act 1993 authorising the disposition by the charity trustees of Shree Vishwakarma Association ("SVA") of the property 366a Stag Lane, Kingsbury, London NW9 ("the property") to a (non-charitable) company called Howun Ltd. This company is a "connected person" within the meaning of section 36(2)(a) Charities Act 1993.

2. *Review Decision*

The review decision is that the decision of 20 October 2005 to make the order was rightly made.

3. *Background*

Howun Ltd is one of two companies which, in terms of their beneficial ownership, are closely related. The other is called Howun (2002) Ltd. There is some uncertainty as to whether the reference in the order to "Howun Ltd" was intended to mean Howun Ltd or Howun (2002) Ltd. The disposition authorised by the order appears, in fact, to have been completed on 20 or 21 December 2005. There is also some uncertainty as to which of the two companies was the transferee. This could, of course, easily be resolved by obtaining a copy of the relevant entries in the Land Register. But for the reasons which are set out below, nothing turns on the question as to which of the two companies was the transferee.

Howun (2002) Ltd is also a connected person for the purposes of section 36(2) of the Charities Act 1993 by virtue of Schedule 5.

On 23 May 2003 Howun (2002) Ltd had agreed to purchase the property from a charity, Huntingdon Foundation Ltd, at a price of £975,000 ("the agreement"). This charity does not appear to be connected with SVA. A deposit of £48,750 was paid on that date, and a further deposit of £24,375 was to be paid on or before 2 June 2003. The agreement contains a provision which contemplates the possibility that the benefit of it may be assigned to SVA. On 11 August 2003 the benefit of the agreement **was** assigned by Howun (2002) Ltd to SVA ("the assignment"). As consideration for the assignment, the charity trustees of SVA agreed to indemnify Howun (2002) Ltd against its liabilities under the agreement.

The assignment contains an option for Howun (2002) Ltd to re-purchase the property from the charity at the original sale price of £975,000, plus an indemnity against expenses incurred by SVA in relation to the property. This option was to be exercisable if certain conditions which are specified in the assignment were not complied with by SVA. These conditions seem to relate primarily to the provision of some form of memorial at the property to the families of people connected with the Howun companies. The terms of the option recognised the possibility that Howun (2002) Ltd might, on the exercise of the option, direct the transfer to be taken by some person other than itself.

On 24 September 2003 the charity's title to the property was registered at HM Land Registry.

On 27 May 2005 solicitors acting for Howun (2002) Ltd wrote a letter to the charity purporting to exercise the option, on the basis that the specified conditions had not been complied with. The time scale which had been specified in the assignment for compliance with the conditions had by then long since expired, and, whilst there might be an argument that the trustees still had a reasonable period of time after 27 May 2005 to comply, it appears that they did not do so. On 6 June 2005 a notice in respect of the option was entered against the title to the property in the Charges Register.

The property was on 20 or 21 December 2005 transferred back to Howun (2002) Ltd (or transferred to Howun Ltd).

The basis upon which Howun (2002) Ltd entered into the agreement of 23 May 2003

There is some suggestion in the correspondence that Howun 2002 entered into the agreement as agent of, or trustee for, SVA. But the contemplation of an "assignment" from Howun (2002) Ltd to SVA, and the fact that the assignment was recognised in the agreement simply as one possibility, indicate that Howun (2002) Ltd entered into the agreement as principal, and not as agent of, or trustee for, SVA.

4. Basis for requesting a review

The arguments for review are based on the premise that the Commission had a discretion with regard to making the order and that the Commission should have exercised that discretion by declining to make the order.

5. The framework for the issues considered by the Commission

The Commission has looked at the circumstances in which the decision to make the order was made. For the reasons set out below, the Commission considers that, although it had a discretion whether to make the order, in the circumstances of the case, the decision it took was determined by the original acquisition and its terms.

The validity of the assignment

There has been some suggestion that the assignment is voidable because -

- the self-dealing, or fair-dealing, rule of equity applied to it (because of the connections existing between the administration of SVA and the administration of Howun (2002) Ltd); and/or
- the transaction involved a breach of trust or duty on the part of the charity trustees of SVA, of which breach the directors of Howun (2002) Ltd were aware.

It has not been considered necessary to explore these questions, for the following reasons:

The consequence of the voidability of the assignment would have been that it could have been either affirmed or repudiated. If the assignment was to be affirmed, it would have had to be affirmed as a whole, including the option. If the assignment was to be repudiated, Howun (2002) Ltd would have been entitled to have the property returned to it, on the basis of its indemnification of SVA against all the liabilities contemplated by the assignment. But since the effect of the exercise of the option is essentially the same as this, the Commission considers that there is no point in exploring the question whether the assignment could have been repudiated, and, if it could have been repudiated, whether it should have been repudiated.

section 36(3) of the Charities Act 1993

Before a valid agreement to sell can be entered into by a charity, section 36(3) requires the charity trustees to take certain actions. An option granted by a charity is usually considered as an agreement to sell.

However, the option in the assignment did not engage the provisions of section 36(3) of the 1993 Act for the following reasons. Agreements by a charity to **purchase** land may include an undertaking, or conditional undertaking, to make a subsequent disposition of the land or part of it. This would, for example, include, as well as the sort of option which is a feature of the assignment in this case, an undertaking to grant an easement of way over the land acquired, for the accommodation of land retained by the vendor, or an undertaking to lease back the acquired land or some of it. The Commission considers that also included in this category is the option element of an equity sharing agreement which is simply one aspect of the terms under which the charity and the employee agreed to purchase the land as joint owners.

The language of section 36(3) is considered by the Commission as inappropriate to embrace an agreement which is essentially for the **purchase** of land, but which incidentally contemplates a disposition or possible disposition of the land which is to be purchased, or some of it.

Does the completion of the disposition contemplated by the option provision in the assignment engage the provisions of section 36(1)?

This is the disposition which took place on 20 or 21 December 2005. If this disposition fell within the scope of section 36 at all, it ought to have been authorised by an order.

In the Commission's view, the fact that the person to whom the disposition is made is connected to the charity within the meaning of schedule 5 to the 1993 Act makes no difference. Since there was no compliance with section 36(3) at the time of the assignment, the condition in section 36(2)(b) was not complied with. The fact that, in the Commission's view, section 36(3) had no application at all to the assignment does not alter this.

In **Moore v Clench** (1875) 1 Ch Div 447, the court was of the view that if the trustees of a charity entered into an agreement to dispose of land, which agreement did not require the consent of the Commission, and which agreement was valid without such consent, then any legal requirement that the actual disposition contemplated by the agreement should be authorised by the Commission -

- either did not apply, or, if it did apply,
- it would be an abuse of power on the part of the Commission to withhold the authority.

In the context of the present regulatory controls over charity land dispositions, the Commission's view is that this approach needs some qualification. For it is clearly intended by the current legislation that the Commission **should** be in a position to prevent a disposition to a connected person, even if the trustees **have** made a fully enforceable agreement to make the disposition to such a person. It could be said that this should also apply in the unlikely event of an agreement being both enforceable against the charity and manifestly unfair to the charity or for any other compelling reason why the authority should be withheld. But, subject to those points, the Moore v Clench approach remains, in the view of the Commission, the right one.

The Commission considers it should adopt the second of the possibilities suggested in Moore v Clench, as this permits the withholding of consent in exceptional circumstances.

The order of 20 October 2005

The Commission considers that Howun (2002) Ltd was entitled to exercise the option, and was seeking to do so. It would have been open to Howun (2002) Ltd, under the terms of the option, to require the property to be transferred to Howun Ltd, and that may have been what Howun (2002) Ltd did.

Following **Moore v Clench**, it is the view of the Commission that the order authorising the December 2005 disposition should have been made. However, in this case it was unnecessary to make any enquiry as to whether the indemnity terms contemplated by the option provisions in the assignment

represented the full open market value of the property at the time when the option was exercised.

If a charity purchases land on terms which give the vendor the right to re-purchase if the charity fails to comply with certain conditions, then, in the Commission's view, the propriety of the transaction as a whole must be considered as at the time of the purchase. If, say, A agrees to sell a property to a charity for 50% of its market value, subject to conditions which, if not fulfilled, allow A to repurchase the property for the same price, it is not for the Commission to require, as a condition of providing authority for the disposition back to A, that A pays the charity full market value. There is no reason why it should make any difference that A is a "connected person". On the other hand, if the option to re-purchase was on terms that called into question the expediency of the purchase by the charity (for example, if the vendor, as option holder, only had to pay a fraction of the price which the charity had paid to the vendor) then the Commission may be justified in withholding the section 36 authority.

The present case falls between these two extremes. But the Commission takes the view that there is nothing in the terms of the assignment which suggests that the *Moore v Clench* approach should not be adopted. The terms of the disposition from Howun (2000) Ltd to SVA were the same as the terms of the disposition back to Howun pursuant to the option, and the price was the same as that which Howun (2002) Ltd had originally paid for the property.

The basis on which the order was made

The Commission considers that the option should not be regarded as capable of being excised from the assignment. It was clearly an essential feature of the terms on which Howun (2002) Ltd had agreed to dispose of its interest in the property to SVA. Either the assignment was valid as a whole, or it was invalid as a whole.

In the event, for the reasons set out above, it is not material which was the case. It appears from the correspondence that the disposition was, in fact, completed on 20 or 21 December 2005 in accordance with the terms of the option.

5. Conclusion

The decision of 20 October 2005 to make the order was rightly made.