NCN: [2021] UKFTT 365 (GRC)

Appeal Ref: CA/2021/0007

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(CHARITY)

Heard using the Cloud Video Platform on: 4, 5, 6 & 9 August 2021

Decision given on: 8 October 2021

Written closing submissions received on:
Appellant: 24 August & 2 September 2021
Respondent: 17 August & 1 September 2021

Before

Upper Tribunal Judge O'Connor
(Acting Chamber President)

Between

THE KNIGHTLAND FOUNDATION

Appellant

and

THE CHARITY COMMISSION OF ENGLAND AND WALES

Respondent

Representation:
For the Appellant: Dr N Pratt of Counsel
For the Respondent: Mr F Sadiq of Counsel

DECISION AND REASONS

Decision: The appeal is DISMISSED

The hearing was convened using the Cloud Video Platform. The parties joined remotely. The Tribunal is satisfied that it was fair and just to conduct the hearing in this way.

Introduction

1. This is an appeal against the Charity Commission's ("the Commission's") decision, of 8 April 2021, appointing Interim Managers by way of an Order ("the Order") under section 76(3)(g) of the Charities Act 2011 ("the 2011 Act") to manage the affairs of The Knightland Foundation ("the Charity").

2. The hearing of the evidence in this appeal took place between 4 and 9 August 2021. On behalf of the Charity I heard evidence from Jacob Friedman and Uriel Kaplan, both trustees of the Charity. For the Charity Commission, I heard evidence from Joseph Colley - the Interim Manager of the Charity, Brian Wilson - a senior investigator for the Charity Commission, and Kevin Broad - a senior accountant at the Charity Commission. Each witness provided a lengthy witness statement, and I was also provided with over 2000 pages of documentary evidence.

3. In addition, I have had the advantage of careful and considered written submissions from Dr Pratt, on behalf of the Charity (24 August and 2 September 2021) and Mr Sadiq, on behalf of the Commission (17 August and 1 September 2021), for which I am grateful.

The Charity

4. The Charity is a private company limited by guarantee (registered company no. 07535303), incorporated on 18 February 2011. It was registered as a charity (charity no. 1143110) on 27 July 2011. The Charity is governed by its Memorandum and Articles of Association dated 18 February 2011, as amended by a special resolution dated 7 July 2011. It is a grant making charity and its charitable objects are set out in full at Article 4 of the Articles of Association. In summary, those objects are the relief of hardship in the Jewish community, the advancement of the Jewish religion and the education of Jewish pupils.

5. There are, at present, four trustees of the Charity (all of whom are directors of the company):

    i. Jacob Friedman – appointed on 15 April 2011;
    ii. Uriel Kaplan – appointed on 26 January 2012;
    iii. Samuel Lew – appointed on 31 March 2017; and,
    iv. Baruch Ehrenfeld – appointed on 30 December 2020.

6. Rachael Friedman (Jacob Friedman's wife), was previously a trustee; she resigned in 2017 following an Action Plan issued to the Charity by the Commission pursuant to the section 15(2) of the 2011 Act.

7. The Charity does not solicit donations from the public; all funding is obtained by way of donations from Mr Friedman's companies, as well as returns on the Charity's investments.

The Charity's subsidiaries

8. The Charity has four active subsidiaries, of which Mr Friedman is the sole director:

    i. Canvey Housing Ltd (company no. 10486552) – the Charity owns 100% of the shares. Mr Friedman transferred 100% of the shares to the Charity on 18 November 2016 (the date of the company's incorporation);
    ii. Bellview Management Limited (company no. 07239964) ("Bellview Management") – the Charity owns 100% of the shares. Mr Friedman previously owned 100% of the shares and transferred these to the Charity on 1 March 2011;
    iii. Rowe Lane Estates Ltd (company no. 10010592) ("Rowe Lane") – the Charity owns 50% of the shares and Mr Friedman owns the remaining 50%. Mr Friedman previously owned 100% of the shares and transferred 50% to the Charity on 1 February 2017;
    iv. Bellview Land Ltd (company no. 08798911) ("Bellview Land") – the Charity owns 50% of the shares and Goldheart Charity Limited ('Goldheart') owns the remaining 50%. Mr Friedman previously owned 100% of the shares, and transferred the entire shareholding to the Charity, with the Charity subsequently transferring 50% to Goldheart.

9. The property assets held by the subsidiaries are/were as follows:

    i. Canvey Housing Ltd – 32 Hardy Way, Canvey Island SS8 9PT (title no. EX586063);
    ii. Bellview Management – 54 Lynmouth Road, London N16 6XL (title nos. EGL183715 and AGL224897);
    iii. Rowe Lane – 14-16 Rowe Lane, London E9 9EL (title nos. NGL299742 and EGL293705);
    iv. Bellview Land – 44a Gloucester Road, London CR02 2DA (title nos. SGL116559 and SGL796896) (sold on 31 January 2020);
    v. Bellview Land – Fountayne Holdings Ltd (company no. 11464094).

The Charity and The Commission

10. The Commission first engaged with the Charity in January 2016, following the Charity's failure to file its accounting information for the year ending 31 January 2015. The overdue accounting information was filed in February 2016, with the accounting information for the year ending 31 January 2016 filed in November 2016.

11. On 7 March 2017, the Commission issued the Charity with an Action Plan pursuant to its powers under section 15(2) of the 2011 Act. The Action Plan included requiring the trustees to take the following actions:

    i. draw up and follow a conflicts of interest policy;
    ii. appoint unconflicted and independent trustees;
    iii. formalise existing loan arrangements and ensure any future loans entered into by the charity are subject to a written loan agreement;
    iv. ensure that the Charity's future accounting submissions comply with the required accounting standards.

12. A follow up case was opened by the Commission in August 2017 to consider the Charity's progress with the Action Plan. In November 2018, the Commission opened an internal case to consider the accounting information for the years ending 31 January 2017 and 31 January

2018. Following correspondence with the Charity, the Commission held a books and records inspection at the Charity's offices on 4 and 5 March 2020, following which the Commission wrote to the Charity on 26 August 2020 to request further information. Mr Friedman replied to that request on 30 September 2020. The Commission, on 24 February 2021, opened an inquiry into the Charity pursuant to section 46 of the 2011 Act and subsequently, on 7 April 2021, appointed Interim Managers.

Legal Framework

13. The Charity Commission's statutory objectives under section 14 of the 2011 Act include a public confidence objective, a compliance objective, and an accountability objective. Its statutory functions under section 15 of the 2011 Act include encouraging and facilitating the better administration of charities, identifying, and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action.

14. Section 76 of the 2011 Act provides (where relevant) as follows:

> "(1) **Subsection (3) applies where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied—**
> **(a) that there is or has been any misconduct or mismanagement in the administration of the charity, or**
> **(b) that it is necessary or desirable to act for the purpose of—**
> **(i) protecting the property of the charity, or**
> **(ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity**.
> (2) …
> (3) **The Commission may of its own motion do one or more of the following—**
> **(a)…**
> **(b) by order appoint such number of additional charity trustees as it considers necessary for the proper administration of the Charity…**
> **(c)…(f)…**
> **(g) by order appoint (in accordance with section 78) an interim manager, to act as receiver and manager in respect of the property and affairs of the charity.**
> (4)… (5)…
> (6) The Commission—
> (a) must, at such intervals as it thinks fit, review any order made by it under paragraph (a), or any of paragraphs (c) to (g), of subsection (3), and
> (b) if on any such review it appears to the Commission that it would be appropriate to discharge the order in whole or in part, must so discharge it (whether subject to any savings or other transitional provisions or not)." (emphasis added)

15. Section 78 of the 2011 Act provides (where relevant) that:

> "(1) The Commission may under section 76(3)(g) appoint to be interim manager in respect of a charity such person (other than a member of its staff) as it thinks fit.
> (2) An order made by the Commission under section 76(3)(g) may make provision with respect to the functions to be discharged by the interim manager appointed by the order. This does not affect the generality of section 337(1) and (2).

(3) Those functions are to be discharged by the interim manager under the supervision of the Commission.
(4) In connection with the discharge of those functions, an order under section 76(3)(g) may provide—
(a) for the interim manager appointed by the order to have such powers and duties of the charity trustees of the charity concerned (whether arising under this Act or otherwise) as are specified in the order;
(b) for any powers or duties specified by virtue of paragraph (a) to be exercisable or performed by the interim manager to the exclusion of those trustees.
(5)…(9)".

16. There is no statutory definition of the terms *"mismanagement"* or *"misconduct"* to be found in section 76 of the 2011 Act, or elsewhere in the 2011 Act. The meaning of the words *"misconduct"* and *"mismanagement"* was considered by the First-tier Tribunal in Mountstar (PCT) Limited v Charity Commission, (CA/2013/0001 & 0003), at [136] – [139] and, whilst that decision is not binding on me, I concur with the following reasoning therein:

> "136. There is no statutory guidance as to what is meant by "mismanagement" or "misconduct". Both are ordinary English words which should be given their ordinary meaning: Scargill v Charity Commissioner (unreported) 4th September 1998 (which was confined to the meaning of "mismanagement"). The Commission has issued guidance:
>
> > "Misconduct includes any act (or failure to act) in the administration of the charity which the person committing it knew (or ought to have known) was criminal, unlawful or improper.
> >
> > "Mismanagement includes any act (or failure to act) in the administration of a charity that may result in significant charitable resources being misused or the people who benefit from the charity being put at risk."
>
> 137. Mr Smith submitted that both take their colour from the serious consequences which follow from the appointment of an interim manager, namely the powers it opens up as well as the reputational implications for the Charity, Mountstar and all those involved. Only serious mismanagement and even more serious misconduct will suffice to satisfy the statutory threshold, albeit that this argument shades into whether the decision to appoint a manager is proportionate to the acts of mismanagement or misconduct complained of by the Commission.
>
> 138. We do not think it necessary to so qualify "mismanagement" and "misconduct". We do however accept that it or the several acts or omissions complained of in their totality must be of some substance to justify the appointment of an interim manager rather than the alternative which would involve the use of some or all of the other statutory tools within the Commission's armoury. The Commission's guidance may provide illustrations of what might constitute mismanagement and misconduct, but cannot restrict their ordinary meaning.
>
> 139. It is a question of fact and degree to be viewed in the overall context of each case whether the act(s) or omission(s) complained of constitute "mismanagement" or "misconduct". In our view it would encompass a failure by the charity trustee to act as an ordinary prudent man of business both in terms of process (how decisions are made, including declaring and managing conflicts of interest) and

> substance (what decisions are reached and why they have been reached). If the process is adequate and the decision reasoned it may be rare for the Commission to challenge the decision per se."

17. Mr Sadiq submits that the Tribunal should also have regard to the nature of the duties on a charitable trustee when considering whether there has been mismanagement or misconduct by the trustees. I agree that this must be so. Such a consideration should not be undertaken in a vacuum, but rather in its proper context.

18. The nature of a charitable trustee's duties was considered by Briggs J in White v Williams [2011] EWHC 494 (Ch)8. At [36], Briggs J said:

> "At its most general level the duty of trustees of a charity is well defined by the following passage in Picarda's Law and Practice Relating to Charities (4th edition) at page 629, under the heading 'Duty to protect trust property':
>
> > "In performing this duty of safe custody he is not bound to look with more prudence to the affairs of the charity than to the management of his own affairs. But this assertion requires a gloss. Much more is in fact expected from trustees acting for a permanent charity than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as what is strictly prudent, and his prudent motive cannot afterwards be separated from the others which may have governed him. Trustees of a charity, within the limits of their authority, whatever they may be, should be guided only by desire to promote the lasting interest of the charity."
>
> Under the heading 'Duty of loyalty', the author continues at page 633 as follows:
>
> > "A private trustee must be loyal to the interests of the beneficiaries. The charity trustee owes his duty of loyalty to the public."
>
> As noted in Picarda at page 633 to 634, the duty of loyalty involves a duty to act gratuitously, save where authorised to receive remuneration by the terms of the trust, or by authority from the Charity Commission."

19. The duty on charitable trustees as set out by Briggs J is supplemented by the duty of care imposed on trustees by section 1 of the Trustee Act 2000 ("2000 Act"), which provides that:

> "Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular-
>
> (a) to any special knowledge or experience that he has or holds himself out as having, and
>
> (b)if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession."

The First-tier Tribunal's role

20. Pursuant to section 319(4) of the 2011 Act, in determining an appeal of the instant type the Tribunal must (a) consider afresh the decision appealed against and (b) may take into account evidence which was not available to the Commission when doing so.

21. The parties have dedicated a substantial amount of ink, and I dare say time, to the issue of who bears the burden of proof before the Tribunal in the instant appeal - diametrically opposed positions being taken.

22. Before I consider this issue, I remind myself (and the parties) that legal authority suggests that cases in which a resort to the burden of proof will be a legitimate route to a decision, are likely to be rare. In the recent decision of the Court of Appeal in Constandas v Lysandrou [2018] EWCA Civ 61, Rose J (as she then was) reviewed the authorities relating to issue of when a fact-finding tribunal could properly fall back on the burden of proof to resolve a matter in dispute. In doing so, Rose J referred to the decision in Stephens v Cannon [2005] EWCA Civ 222, which concerned the quantification of an award of damages awarded in lieu of specific performance of a contract for the sale of a parcel of development land. The Master had received conflicting expert evidence about whether the land was worth more or less than the contract price but he had been unable to choose between the rival views and had decided the case on the burden of proof. After referring to the relevant authorities, Wilson J (as he then was), with whom Arden and Auld LJJ agreed, set out the following propositions ([46]):

> "(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.
>
> (b) Nevertheless, the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
>
> (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.
>
> (d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.
>
> (e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in [a] judgment will be necessary."
>
> The Court of Appeal held that the Master's decision could not stand, as he had not sufficiently striven to come to a decision or explained why he could not reasonably do so.

23. Rose J then referred to the refinement of the propositions in Stephens v Cannon by the Court of Appeal in Verlander v Devon Waste Management [2007] EWCA Civ 835. The issue in that case concerned the circumstances in which an industrial accident had taken place. Auld LJ expressed the relevant principles as follows:

> "19. …First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort. …
>
> 24. When this court in Stephens v Cannon used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice - and a respectable and useful part at that - where a tribunal cannot on the state of the evidence before it rationally decide one way or the other."

24. Having identified that resort to the burden of proof in deciding an appeal before the Tribunal should be rare, I will consider where such burden lies in the instant appeal.

25. In a number of recent decisions, this Tribunal (including by judge McKenna, sitting as the President of the Chamber) has directed itself to the burden and standard of proof in terms akin to the following:

> "The burden of proof in a de novo appeal rests with the Appellant as the party seeking to disturb the status quo. The standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities."

(see for example: Hipkiss v The Charity Commission (CA/2017/0014) at [22] and Tamara Lloyd v The Charity Commission (CA/2019/0017) at [39]).

26. This is the approach advocated for by the Commission. The Commission further submits that its position on this issue is supported by the following:

    (a) The normal approach to the burden of proof in civil appeals where the appeal is by way of re-hearing is identified at [48] of R (Hope, Glory Public House) v Westminster Magistrates Court [2011] EWCA Civ 315. The burden is on the appellant;

    (b) Rule 26(1) of the 2009 Rules provides that an appellant starts an appeal by lodging a notice to appeal. By rule 26(2)(h), the notice of appeal must include the grounds on which the appellant relies. In its Response the respondent to an appeal in the Tribunal's charity jurisdiction must state whether it opposes the appellant's case (rule 27(3));

    (c) The default position in civil litigation is that the burden of proof lies on he who asserts. The appellant is asserting that the Commission's decision is wrong and is seeking to displace the status quo, so it is the appellant who has the burden of

proving this;

(d) The 2011 Act is a consolidating Act and the Tribunal is entitled to have regard to decisions of the courts on the legislation that is now consolidated into the 2011 Act. Consideration of the Court of Appeal's decision in Jones v Attorney General [1974] Ch. 148, supports the respondent's contention that the burden lies on the appellant;

27. The Charity asserts that it is the Commission who bears the burden of proving that the appointment of Interim Managers ought to be made. Particular reliance is placed on the decision of Seevaratnam v The Charity Commission (CA/2008/0001), in which the Tribunal (chaired by Judge McKenna, then Principal Judge of the Tribunal's Charity jurisdiction), gave consideration to an appeal against a decision of the Commission to remove a person as a trustee of a charity, albeit in circumstances where the relevant statutory framework pre-dated the 2011 Act (see schedule 1C, paragraphs 1(4) and 1(5) of the Charities Act 1993 (as amended) - *"(a) shall consider afresh the decision, direction or order appealed against, and (b) may take into account evidence which was not available to the Commission"*). Having heard argument on the issue of burden and standard of proof and having, *inter alia*, referred to the decisions of the High Court in Scargill v Charity Commissioners [1974] 1 Ch 148 and that of Court of Appeal in Jones v Attorney General, the Tribunal concluded as follows:

> "The Respondent's counsel submitted that, following the earlier authorities, the burden of proof lay on the Appellant to show that the removal order was "wrongly made". The Appellant's counsel submitted that the burden of proof must lie with the Respondent. In the context of the substantive re-hearing with which it was tasked, the Tribunal concluded that the onus was on the Respondent to prove the facts on which it relied to the civil standard." – at [5.6].

28. I also observe that in a more recent decision of this Tribunal, Dr Naik v The Charity Commission (CA/2019/0014), a case relating to a Disqualification Order made under the 2011 Act, the panel directed itself in terms which do not accord with the approach advocated by either of the parties to the instant appeal:

> "[32] It is for the Charity Commission to demonstrate that the statutory criteria for disqualifying Dr Naik from being a trustee are met. Once it has done so, however, the burden of proof rests with Dr Naik (as the party seeking to disturb the status quo) to show that a disqualification order should not be made (or that it should be made on different terms and/or for a shorter period of time)."

29. The Charity further submits that its position i.e. that the burden of proving that Interim Managers should be appointed lies on the Commission, is supported by the following:

(a) The *de novo* nature of the appeal, which causes the burden of proof to lie with the Commission;

(b) The Tribunal is entitled to have regard to decisions of the courts on the legislation that is now consolidated into the 2011 Act. One such decision is that of the High Court in Scargill, in which the court concluded that it was for the Charity Commissioners to prove the case on the balance of probabilities. The Tribunal is bound by this decision.

(c) The Commission is seeking to upset the status quo by appointing Interim Managers and thus bears the burden of proof. By section 76(1) of the 2011 Act, the Commission must be satisfied that the statutory test for the exercise of the protective powers in section 76(3) of the 2011 Act is met. In such circumstances, the burden on appeal is on the decision-taker to show that the test has in fact been met - see Kaivanpor v DPP [2015] EWHC 4127 (Admin).

30. Needless to say, the above cited conclusions and rationale from other constitutions of the First-tier Tribunal are not binding on me. Furthermore, my attention has not been drawn to any authority from the Upper Tribunal or Court of Appeal on the issue as to where the burden of proof lies in an appeal where the Tribunal's role is framed by section 319(4) of the 2011 Act. My attention has, however, been drawn to authorities from the higher courts which, whilst not venturing into the realm of the 2011 Act, provides rationale relating to the application of earlier appeal provisions from decisions made by the Commission. I will start by considering these authorities, which directly bear on the Charity jurisdiction, albeit in relation to provisions and procedures which predate the 2011 Act.

31. The ability to appeal against decisions of the Commission has existed since at least the enactment of the Charities Act 1960 ("1960 Act"). Section 20 of the 1960 Act conferred upon the Commission powers to remove trustees where there had been misconduct or mismanagement in the administration of the charity. The Charities Act 1992 inserted into section 20 the power to appoint a *"receiver and manager"* of the property and affairs of the charity where, *inter alia*, there had been a finding of *"misconduct and mismanagement*". Thereafter came the Charities Act 1993 and Charities Act 2006. The Charities Act 2011 came into force on 14 March 2012 and was a consolidating Act.

32. Turning then to the authorities relied upon by the parties. In Jones, the Court of Appeal considered whether (a) an appeal brought pursuant to section 20(7) of the 1960 Act was a review or a rehearing, and (b) who bore the burden of proof on such an appeal. Section 20(7) conferred a right to appeal to the High Court against a decision of the Commission made under section 20, but provided no further indication as to the role the High Court should play in such proceedings.

33. It was argued in Jones, on behalf of the Attorney General, that the appeal to the High Court was a review, and that the burden lay with the appellant. John Vinelott QC, appearing for the trustees, contended that the appeal was a rehearing and that the rehearing was to be conducted in the same manner as an appeal from the petty to the quarter sessions – i.e. the respondent went first. Orr LJ, giving the judgment of the Court, summarised the trustees' argument thus, at [159G]:

> "…that the right of appeal granted to a trustee under section 18 (11) and section 20(7) of the Act should be construed, in the absence of any indication to the contrary in the statutory language, as a right of appeal both as to law and fact by way of a rehearing, and that this should involve, as in the case of appeals which formerly lay from petty sessions to quarter sessions and now lie from petty sessions to the Crown Court, an appeal by way of a new trial in which it would be for the respondents to open their case and to prove it by appropriate admissible evidence."

34. At 160B, he said that during argument, Vinelott QC:

> "…without resiling from his extreme submission, was disposed to accept that it would be a workable and a fair construction of the provisions of the Act that the onus of proving that an order under section 20 has been wrongly made should be deemed to rest on the appellant, who should accordingly open the appeal …"

35. The Court held that an appeal brought by a trustee under section 18(11) and section 20(7) of the 1960 Act was a rehearing and that the burden of proof was on the appellant. At 162D Orr LJ said of the burden of proof:

> "… we would equally reject the extreme argument advanced by Mr Vinelott that the right of appeal conferred by the Act is to be deemed to be, as in the Crown Court on appeal from petty sessions, by way of a new trial in which it would be for the respondents to open and prove their case and in which the report and the findings contained in it would have no evidential standing. In our judgment, it is for the appellant who appeals against the order to show that it was wrongly made and the report, to the extent that it is not challenged by him, should be treated as evidence in the appeal. So to hold involves, as it appears to us, no possible injustice to the appellant, and we cannot believe that it can have been the intention of Parliament, in laying down an elaborate procedure for a fact finding body, that its findings, when uncontested by the appellant, should be treated as having no evidential value..."

36. Whilst the decision in Jones broadly travails the same substantive legal sphere as the instant appeal, it was taken against the backdrop of a different legal and procedural framework and whilst, therefore, I have regard to it, I conclude that it is not binding on me.

37. The decision in Jones is not the only decision of significant vintage and deriving from the same substantive legal sphere that is relied upon before me. The Charity places reliance on the decision of Neuberger J in Scargill; indeed, it is the Charity's position that this decision is binding.

38. Scargill was a matter in which the High Court considered an appeal, brought pursuant to sections 16(2) and 18(8) of the Charities Act 1993 ("1993 Act"), against a decision of the Commission to remove two persons as trustees of two charitable trusts. The Court's attention was drawn to the decision in Jones (see page 36 of the judgment), and it, correctly, observed that the effect of Jones was that *"First, the onus is on the appellant to show that an order made under section 16 or section 18 was wrongly made…Secondly, it is open to an appellant to challenge the factual or legal basis, which is normally contained in the report, upon which the order suspending or removing him was based … Thirdly, to the extent that the contents of the report are not challenged by an appellant, they should be treated as evidence in the appeal…Fourthly, it is open to an appellant to rely on fresh evidence that was not before the Commissioners…"*

39. The following is found at page 39 of Neuberger J's judgment,:

> "Given that this is a hearing de novo, it appears to me that, despite the guidance given in the Court of Appeal in Jones, there is force in the submission …that, while the onus with regard to challenging the findings of fact or conduct of the Commissioners is on [the appellants], then, at least as far as question of whether or not to remove [the appellants] as trustees is concerned, the onus is on the Commissioners. I would obviously be reluctant to reach a decision in these appeals which depended on the issue of where the onus of proof lay. However, for what it is worth, given that it is common ground that this is effectively a de novo hearing, it appears to me to follow that the onus of whether or not a removal order under Section 18(2)(ii) ought to be made should lie with the person seeking such an order, namely the Commissioners."

40. Contrary to Dr Pratt's contention, I do not accept that the decision in Scargill binds this Tribunal to conclude that it must approach its task, in an appeal conducted within the framework of section 319(4) of the 2011 Act and the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("2009 Rules"), on the basis that the burden of proving that Interim Managers should be appointed is on the Commission. First, as I also said when considering Jones, the instant matter relates to a different legal and procedural framework to that considered by the Court in Scargill. Second, Dr Pratt has not advanced any cogent submission as to why, if I am wrong as to the implications of the court in Scargill having given consideration to a different legal and procedural framework in play in the instant appeal, the same counter argument cannot be made as to the decision in Jones. If that is the case then Jones, as an authority of the Court of Appeal, would take precedence over that of Scargill. Finally, and in any event, on close analysis it seems to me that the indication found at page 39 of Neuberger J's judgment was not part of the *ratio* of his decision, as appears self-evident from the terms of the passage cited above.

41. There is further authority from the High Court which takes an approach consistent with that taken in Scargill: Seray-Wurie v (1) Charity Commission and (2) the Attorney General [2008] EHWC 1091 (Ch). In this case HHJ Pelling QC, sitting as a Deputy Judge of the High Court, was again considering an appeal under the 1993 Act against a decision of the Charity Commission to remove a trustee. On the issue of burden and standard, the Judge said as follows at [32]:

> "Mr Pearce QC, who appeared for the Charity Commissioners accepted, and in my judgment rightly accepted, that the onus rests upon the Charity Commissioners to prove on the balance of probabilities that the two preconditions to the making of a removal order are satisfied and that it was otherwise appropriate to make the order"

42. Once again, I do not consider this decision to be binding on me.

43. The parties have not attempted to reconcile the above decisions, and in my view they were correct not to do so. They are, it appears to me, irreconcilable.

44. I next turn to look outside the sphere of charity regulation, and in particular to the decision in Hope, which is at the heart of the Commission's submission on the issue of burden of proof. Hope was a matter that concerned the conditions attached to the licence of the Endurance public house in Berwick St, Soho. The appellant licensee appealed to the City of Westminster

Magistrates' Court against the conditions imposed on the licence, and the appeal to the Court of Appeal considered whether the approach of the District Judge sitting in the Magistrates' Court was correct. The District Judge had held, following the decision of the Court of Appeal in Sagnata Investments Ltd v Norwich Corporation [1971] 2 QB 614, that he should only reverse the decision of the Licensing Committee if he was satisfied that it was wrong; that he would hear evidence and that he was not concerned with the way in which the licensing sub-committee had approached their decision or the process by which it was made. Giving the judgment of the court, Toulson LJ said, at [34–35]:

> "34. … Burton J said in his judgment:
>
> > '…[45] At the end of the day the decision before the district judge is whether the decision of the licensing committee is wrong. Mr Glen has submitted that the word 'wrong' is difficult to understand, or, at any rate, is insufficiently clarified. What does it mean? It is plainly not ' Wednesbury unreasonable' [Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223] because this is not a question of judicial review. It means that the task of the district judge —having heard the evidence which is now before him, and specifically addressing the decision of the court below—is to give a decision whether, because he disagrees with the decision below in the light of the evidence before him, it is therefore wrong.'
>
> 35. Mr Matthias submitted that as a matter of principle, as well as precedent, there are good reasons why the magistrates' court should pay great attention to the decision of the licensing authority and should only allow an appeal if satisfied, on the evidence before it, that the decision was wrong. He pointed out that Parliament had chosen to make the local authority central to the promotion in its area of the licensing objectives set out in the 2003 Act, because local councillors are accountable to the local electorate and are expected to be sensitive to the needs and concerns of the local populace. … It is normal for an appellant to have to show that the order challenged was wrong. The only unusual feature about this type of appeal is that all parties have carte blanche to call evidence. It does not, however, follow that the respondent to the appeal should bear the responsibility of showing that the order should be upheld and so should be required to present its case first."

45. The Court of Appeal considered that there were two principal questions to be answered: (1) how much weight was the District Judge entitled to give to the decision of the licensing authority? and (2) more particularly, was he right to hold that he should only allow the appeal if satisfied that the decision of the licensing authority was wrong? Toulson LJ held that the first question can only be answered in very general terms, stating, at [45]:

> "It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances,

> taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

46. In relation to the second question, Toulson LJ rejected the suggestion that "*the function of a Court of Appeal is to exercise its powers when it is satisfied that the judgment below is wrong, not merely because it is satisfied that the judgment was right"* is only applicable in a case where the original decision was based on *"policy considerations"*. He said, at [49]:

> "We are also impressed by Mr Matthias's point that in a case such as this, where the licencing sub-committee has exercised what amounts to a statutory discretion to attach conditions to the licence, it makes good sense that the licensee should have to persuade the magistrates' court that the sub-committee should not have exercised its discretion in the way that it did rather than that the magistrates' court should be required to exercise the discretion afresh on the hearing of the appeal."

47. Finally, I turn to the decision in Kaivanpor v DPP relied upon by the Charity. Mr Kaivanpor sought to have his taxi licences reinstated by the High Court after their revocation by Brighton and Hove Council following a collision with a cyclist. Before the justices, the council had contended that it was up to the driver to show that he was a fit and proper person to be a taxi driver. They upheld the decision on that basis. However, on appeal Lord Justice Beatson and Mr Justice Wilkie accepted the contention that the Court of Appeal's earlier decision in Muck IT Ltd v Merritt and others [2005] EWCA Civ 1124 (a case concerning licences for goods vehicles) should be followed and that in taxi licence revocation appeals it is for the licensing authority to establish that an individual is not a fit and proper person. Underpinning this conclusion was the fact that the burden at the initial decision-making stage was on the licensing body to establish to its satisfaction that those changes of circumstance or prohibited circumstances have arisen and it was not for the licence holder endlessly to prove that they continue to be a fit and proper person or a person of good repute. It was said that sensibly and properly in such circumstances the burden on appeal should remain on the authority. I observe that the decision in Hope does not appear to have been cited to the court in Kaivanpor.

48. Insofar as a principled rationale can be derived from the above decisions, it seems to me that the rationale in Hope enjoins with the principled rationale to be derived from Jones. Where a discretionary decision has been made by a body in the exercise of a responsibility entrusted to that body by Parliament, and which Parliament has approved, in order to reflect the status of the decision making body, unless otherwise specified by Parliament, an appellant bringing an appeal against such a decision would need to demonstrate that the decision under appeal was wrong. I observe that the Supreme Court in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] 1 WLR 4799 approved Hope (at [45-46]), albeit only in relation to its specific observations that: *"careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."*

49. It is much more difficult to identify a principled rationale from the decisions in Scargill and Seray-Wurie, other than the consequence of an appeal being a *de novo* hearing is that the burden, at least in relation to the exercise of discretion and evaluative judgments, is on the decision maker not an appellant.

50. As I have indicated above, in my view none of the above authorities are binding on me. I do however prefer the rationale of the two decisions of the Court of Appeal – Jones and Hope. Parliament has entrusted the Charity Commission with the regulation and oversight of the charity sector. It is in the best position to make evaluative judgments and discretionary decisions in relation to circumstances within that sector. I pause at this stage to emphasise the words *"evaluative judgments and discretionary decisions"* in my previous sentence. Evaluative judgments and discretionary decisions rely on findings of primary fact, but the findings of primary fact are quite distinct. This is a matter I will return to shortly.

51. In my view, unless Parliament has clearly spelt out in legislation to the contrary, it is for an appellant on appeal, even an appeal in which there is to be a complete rehearing or where the Tribunal must consider the decision afresh, to demonstrate that the evaluative judgments and discretionary decisions of the decision-making body (in this case the Charity Commission) are wrong; *"that is to reach its conclusion on the basis of the evidence put before it and then to conclude that the judgment below is wrong , even if it was not wrong at the time"* (Burton J at [43] first instance in Hope (CO/5324/2009)). The weight to be attached to the reasons of the Charity Commission is a matter for the Tribunal to determine, bearing in mind that Parliament entrusted the Commission to regulate the charity sphere. To put this into words which have been used by other constitutions of this Tribunal, the Tribunal should *"stand in the shoes of the Charity Commission and take a fresh decision on the evidence before it, giving appropriate weight to the Commission's decision as the body tasked by Parliament with making such decisions."*

52. For the sake of completeness, I reject Dr Pratt's submission that it is the Commission in this appeal who are seeking to displace the status quo before the Tribunal. It is the appellant who is seeking the assistance of the Tribunal to displace the Charity Commission's decision to appoint Interim Managers and it is, therefore, the appellant who is seeking to displace the status quo.

53. Thus far, my conclusions have elided with the submissions of Mr Sadiq but I depart company with Mr Sadiq's submissions in concluding that the burden of proof remains throughout on a party seeking findings of primary fact to prove them to the civil standard in the normal way. To my mind, the Commission is at no particular advantage in the assessment of primary fact, in contrast to its role in the making of evaluative judgments and the exercising of its discretion in an legal sphere within which it is an expert. In such circumstances, I can identify no good reason to depart from the general approach in civil cases that *"he who asserts must prove*". In coming to its conclusion on issues of fact the Tribunal will attach appropriate weight to the factual findings set out in the Commission's Statement of Reasons. It may be that the evidential weight of those findings is such that, if there is no evidence before the Tribunal which is capable of leading to a contradictory finding of fact, such findings will be sufficient of

themselves of discharging the burden of proof before the Tribunal. This will, however, be for the Tribunal hearing the appeal to decide. Before the Tribunal the parties are not, of course, restricted to reliance on the evidence that was before the Commission when it made its decision; indeed, I anticipate that in many if not all cases the evidence will have grown significantly by the time the matter reaches the Tribunal for determination of the appeal.

54. As to the standard of proof, there is no dispute between the parties. There is only one civil standard in English law, the balance of probabilities. However, it is well established that, the more serious the allegation or the consequences of the allegation, the stronger must be the evidence before a court will conclude that the allegations concerned are proved on the balance of probabilities: see, for example, R (N) v Mental Health Review Tribunal [2006] QB 468.

Discussion

Opening of Statutory Enquiry

55. It is not in dispute that the first limb of the statutory test under section 76(1) of the 2011 Act, is met. The Commission opened a statutory inquiry into the Charity under section 46 of the 2011 Act, on 24 February 2021.

Misconduct or mismanagement

56. In its Response to the lodging of the appeal, the Commission identified 10 areas of concern that led it to conclude that there had been *"misconduct or mismanagement in the administration of the Charity"*. These concerns were elucidated under the following headings:

    a. Transfer of charitable funds to Bellview Estates Ltd;
    b. Temporary transfer of £2.5m to Bellview Estates Ltd;
    c. Longstanding failures to comply with the 2017 Action Plan;
    d. Purchase of 44a Gloucester Road;
    e. £1,190,000 development fee;
    f. Rowe Lane Estates Ltd;
    g. Payment of trading subsidiary debts;
    h. Canvey Housing;
    i. Recent concerns.

57. However, by the close of its case (in its written submissions of 17 August 2021), the Commission's position had resolved to reliance on the following seven *"issues as providing evidence that the s.76(1) criteria is satisfied:"* (which is said to include the requirements of both section 76(1)(a) and section 76(1)(b))

    A. Transfer of charitable funds to Bellview Estates;
    B. Temporary transfer of £2.5 million to Bellview Estates;
    C. Commission Action Plan – Conflicts of Interest/Failure to comply with Charities Statement of Recommended Practice ("SORP");
    D. Interest free loans to subsidiaries
    E. Payment of a £1,190,000 development fee
    F. Rowe Lane Estates Ltd

G. Transfer of shares to Goldheart and loan to Bellview Land

58. I will take each of these matters in turn. What follows below in sections A G is my assessment of whether, on the basis of the final case put by the Commission, there has been mismanagement by the trustees in the administration of the Charity. Before proceeding to this assessment, I will identify an overarching finding that I have made, that being that on the evidence presented to me I find that Mr Friedman and Mr Kaplan genuinely believe that they have, at all times, acted in the interests of the Charity and that each has a genuine desire to continue to do so.

A: Transfer of charitable funds to Bellview Estates

59. The Commission's overarching concern in this respect is set out in the following terms, in its Response to the Charity's notice of appeal:

> "42. Jacob Friedman is a director and majority shareholder of Bellview Estates Ltd ("BE"), a building project company. Mr Friedman is also a trustee of the Charity. Mrs Rachel Friedman (wife of Jacob) is the secretary of BE and is herself a former trustee of the charity. This company is a building development company. The Commission found that between 2 July 2019 and 21 May 2020 significant funds between were transferred between the Charity and or its subsidiaries and BE. Whilst funds moved between the entities in both directions, it has been calculated that c.£2.88M represents the net amount flowing to BE.
>
> 43. On 26 August 2020 the Commission wrote to the trustees requesting clarification and additional documentation regarding the details of the funds transferred between BE the Charity and its subsidiaries and seeking explanations as to transaction involving Charity monies which were being transacted through BE's Barclays.Net Account.
>
> 44. Mr Friedman during a meeting with the Commission on 4th March 2021 confirmed that BE's Barclays.Net account was conducting transactions with charity monies where the values exceeded £50,000. The explanation given was essentially that the Barclays facility to make such transfers above £50,000 was "costly" so that justified transferring monies belonging to the charity into a third party's account. This was also confirmed by way of letter of 30th September 2020.
>
> 45. Consequently, charitable funds were being transferred out the Charity accounts and to a third party account, in the process the Charity had no control over those funds nor protection. This irregular transferring of funds amounted in itself to misconduct and mismanagement in the administration of the Charity.
>
> 46. Furthermore, there appeared to be no insight or recognition on the part of the trustees as to: (i) the inappropriateness of dealing with the property in the manner above; (ii) the seriousness of these actions as regards the exposure of the Charity's assets to unnecessary risk. There seems an implicit inability to recognise that the monies are not the personal property of Mr Friedman but are (purportedly at least) the property of the Charity.
>
> 47. The trustees seem to believe that as there were fees associated with the transfer of amounts above £50,000 with Barclays it provided justification to transfer

charitable property into a third-party bank account. It is averred that such conduct demonstrates a distinct lack of awareness of the risks to the charity and extremely poor judgment. It amounts to misconduct and mismanagement in the administration of the charity.

48. Further, it is averred that it is evidence of a significant risk to the security of the charity's property.

49. In view of the above, the Respondent contends that there have been several instances of highly irregular and reckless dealings which, in the circumstances amounted to misconduct and/or mismanagement in the administration of the charity.

50. Further and or alternatively, that the said actions represented irregular and reckless behaviour on the part of a trustee by exposing Charity's assets to unnecessary risk thereby demonstrating a significant risk to the security of Charity's property"

60. There is no dispute that monies were transferred from the Charity and its subsidiaries to Bellview Estates, and that Bellview Estates is a private limited company of which Mr Friedman is the sole director and a majority shareholder. The net value of such transfers was £2.88 million.

61. In his evidence, Mr Friedman explains that Bellview Estates subscribes to a Barclays.net corporate banking facility for which a fee must be paid. This enables single outward transfers to third parties of sums greater than £50,000. This requires subscription to a particular Barclays facility ("Barclays.net banking facility*").* The Charity did not subscribe to such a facility because, it is said, it would have incurred a fee and because the process of applying for the facility is drawn out and cumbersome. If, and when, the Charity or its subsidiaries needed to make a payment in excess of £50,000, the money would first be paid to Bellview Estates, which then used its Barclays.net banking facility to make an onward payment to the intended recipient.

62. I observe that it is accepted in an Accountancy Services Report of 9 June 2021, produced by Mr Broad, that the trustees of the Charity had *"now provided evidence of, and explanations for, the transfers using Bellview Estates Ltd's .NET facility"*. It was also accepted by the Commission that the evidence produced by the trustees shows that the monies were not used by Bellview Estates Ltd.

63. I accept Mr Friedman's evidence of the circumstances in which monies were paid by the Charity or its subsidiaries to Bellview Estates. I also accept the truth of his explanation as to why such arrangements were put in place, that none of the Charity's monies were used by Bellview Estates and that it was his personal belief that the monies were held on trust by Bellview Estates. Mr Friedman further states that as from 16 October 2020 no further Charity payments have been routed through Bellview Estates, an assertion which has not been contradicted by any evidence put forward by the Commission. In such circumstances, I accept this evidence. I also accept that it is Mr Friedman's intention that no further monies from the Charity will be routed through Bellview Estates. The Charity now has its own .net banking facility.

64. During the course of oral evidence, Mr Friedman accepted that the routing of charity monies through Bellview Estates was bad practice, but did not accept that it amounted to mismanagement in the administration of the charity.

65. I am satisfied on the balance of probabilities that there has been mismanagement in the administration of the Charity. Applying the definition of mismanagement set out above, I conclude that although there was no misapplication of Charity funds, the Charity trustees did not take reasonable and proper precautions to ensure that they fully understood the level of risk to the funds once those funds had been transferred out of their control. I take account of the fact that managing a risk does not require avoiding all risk.

66. Although Mr Friedman's position is that the funds were held on trust by Bellview Estates for the Charity, and were therefore not at risk from third parties, he did not identify the basis upon which such a view was formed. Mr Friedman is not a lawyer and it is not said that such a view was obtained as a consequence of the taking of legal advice, as would have been prudent in the circumstances. In any event, even if the monies were held on trust, which I find to be likely, the Charity would have to demonstrate this, should a third party make a claim over them. An ordinary prudent man of business, a prudent trustee, would have created documentation and a paper trail to counter for such an eventuality, and have properly recorded minutes of the Trustees' decision to use Bellview Estates' Barclays banking .net facility. There are no such minutes or, at least, the Tribunal has not been provided with them. In reaching my conclusion, I find that the savings to the Charity in using Bellview Estates' Barclays .net banking facility were not significant and that, although there was a burden in the Charity setting up its own facility, that burden was also not significant; indeed, I note that the Charity set up its own facility in October 2020.

B: Temporary transfer of £2.5 million to Bellview Estates

67. It is not disputed that on 7 February 2020, Bellview Land transferred £2.5 million to Bellview Estates, and that on the 10 February 2020, Bellview Estates transferred £2.5 million to Bellview Land. At [52] to [53] of its Response to the appellant's notice of appeal, the Commission states as follows regarding these transactions:

> "[52] …When asked about these irregular transfers Mr Friedman in a response of 30 September provided an explanation to the effect that as a long-standing recognised entity with commercial agents, real estate deals tend to be directed in the first instance to Mr Friedman via BE. In order to have any offers considered on a potential investment, it is essential to show that the purchaser has proof of funds. Therefore, when needed for this purpose, funds are transferred from the charity or the relevant subsidiary and held in BE's account briefly as proof of funds, after which they are returned.
>
> [53] This practice involves significant funds being transferred to BE a private company controlled by trustee Mr Friedman and outside of the direct control of the charity and its subsidiaries. This clearly presents a risk to the assets of the charity and its subsidiaries. It is unclear if this practice is conducted for the benefit of the charity or for the benefit of the private company that Mr Friedman is the major shareholder of or whether the dominant reason is to benefit BE with a mere incidental/*de minimis* benefit enuring to the Charity/subsidiaries."

68. Whilst Mr Friedman elucidated upon the explanation for this transfer in both his witness statement and under cross examination, the substance of the explanation remained consistent.

Monies were transferred from the Bellview Land to Bellview Estates in order to provide proof of funds as part of an offer to purchase 20-24 Mayday Road, Croydon. This arrangement was in place, it is said, because *"those active in the property development sector prefer to do business with known and established entities".* Under cross examination, Mr Friedman further asserted that companies do not want to deal with charities. If an offer is accepted then the fact that the purchase is by a charity would be revealed to the seller.

69. There is no evidence to contradict the above assertions, which I find to be perfectly plausible and, insofar as there is documentation relating to this transaction it supports the evidence that the monies were used as proof of funds as claimed. The documentation also supports the evidence that the sellers were not notified that it was the Bellview Land that had supplied the funds and the prospective purchaser. In all the circumstances, I accept the truth of this evidence.

70. To a significant extent the circumstances of the instant scenario present the same features of mismanagement as those identified above. Although there was no misapplication of Charity funds, in my conclusion, and for the same reasons identified above, the Charity trustees did not take reasonable and prudent precautions to ensure that they fully understood the level of risk to the funds once those funds had been transferred out of their control. The funds amounted to a significant proportion of the Charity's assets and an ordinary prudent businessman could be expected to have taken legal advice as to whether the funds, which were temporarily outside the control of the Charity, would be held on trust by Bellview Estates and, if so, what steps should be taken and/or documents created to ensure that this could be demonstrated.

71. In addition, although Mr Friedman gave evidence that there had been agreement by the trustees that he could transfer the £2.5 million to Bellview Estates as proof of funds in order that an offer could be made on a property, he accepted that there were no minutes of the meeting at which such an agreement is said to have been made. Given the size of the funds/offer in comparison to the Charity's assets, this failure of itself, in my conclusion, amounts to mismanagement. Also of some significance is Mr Kaplan's evidence, given under cross-examination, that he was not involved in any discussion about the aforementioned and was not party to a decision approving the transfer of funds. He further stated that he was unaware whether Mr Lew, the only other trustee of the Charity at that time, had undertaken such discussions and approved the transfer.

72. For the reasons which follow, I do not accept that it has been demonstrated that there was a meeting of the trustees at which the transferring of £2.5 million to Bellview Estates and the subsequent offer made through Bellview Estates for a property, were approved. There are no minutes relating to such a meeting. Mr Kaplan, one of only three trustees at the time, has no recollection of such a meeting or discussions, Mr Friedman made no mention during his evidence that the meeting of the trustees to which he was referring included only himself and Mr Lew, and Mr Lew – the only other trustee at the relevant time, did not give evidence before the Tribunal. This failure by Mr Friedman to secure the trustees approval also amounts to mismanagement in my conclusion, particularly in light of Mr Friedman's position as sole director etc of Bellview Estates, the company to which the money was being transferred.

C: Commission's Action Plan

73. As detailed above, on 7 March 2017 the Commission issued the Charity with an Action Plan pursuant to its powers under section 15(2) of the 2011 Act which, *inter alia*, required the Charity to draw up and comply with a conflicts of interest policy. On 1 February 2017, the Charity adopted a policy which included, *inter alia*, the following terms:

> "All staff, volunteers, and Trustees of The Knightland Foundation will strive to avoid any conflict of interest between the interests of the Organisation on the one hand, and personal, professional, and business interests on the other. This includes avoiding actual conflicts of interest as well as the perception of conflicts of interest. …
>
> In the course of meetings or activities, Trustees will disclose any interests in a transaction or decision where there may be a conflict between the organisation's best interests and the Trustees' best interests or a conflict between the best interests of two organisations that the Trustee/s is/are involved with.
>
> After disclosure, the Trustee may be asked to leave the room for the discussion and may not be able to take part in the decision depending on the judgement of the other committee members present at the time.
>
> Any such disclosure and the subsequent actions taken will be noted in the minutes."

74. A revised *"Conflicts of Interest and Conflicts of Loyalty Policy"* is to be found at page 1638 of the hearing bundle. Mr Friedman states that this revised policy was adopted by the Charity in February 2020.

75. In its written closing submissions, the Commission asserts that the Charity paid *"lip service"* to the need to comply with the aforementioned policy, detailing one example in support of such assertion - the Charity's consideration of the payment of a development fee by Bellview Land Limited to Bellview Housing Limited ("Bellview Housing"), of which Mr Friedman is the sole director and the majority shareholder. This is further discussed under heading *"E"* below.

76. The Action Plan of March 2017 also required the Charity to ensure all future accounting submissions to the Commission were in line with the Charities Statement of Recommended Practice (SORP). However, it is asserted, and I find, that the accounts for the years ending 2017, 2018 and 2019, which were submitted after the issuing of the Action Plan, all fail to meet the SORP requirements, *inter alia*, because the related party note was incomplete. This first came to the attention of the Charity on 7 April 2021. At an earlier Books and Records Inspection undertaken by the Commission, it was noted that the fixed asset note on the accounts was not complete. The Charity's auditor, Mr Heller, was in attendance on that occasion and it is said, and I accept, that he admitted to a clerical error in this regard. I accept Mr Friedman's evidence that prior to the submission of the 2020 accounts, a draft version of those accounts was sent to a different Charity accounts specialist. Of course, in more recent times the Charity has been overseen by the Interim Mangers and not the trustees.

77. The failures to comply with the SORP requirements have been admitted by the Charity. The Charity appointed accountants to produce its accounts during each of the aforementioned years. Ensuring that the Charity's accounts complied with the SORP requirements was an obligation that fell on the accountants. That is not to alleviate the trustees of their duties, but they are entitled to place substantial reliance on the competence of professional advisers.

Insofar as it is alleged that Mr Heller could not act independently because of his connections in a professional capacity to Mr Friedman's private companies, I do not accept that this is so.

78. Applying the definitions I have set out above, I conclude that the failures to comply with the SORP requirements do not, in all the circumstances, amount to mismanagement or misconduct by the trustees.

D: Interest free loans to subsidiaries

79. The Commission issues guidance notes to assist charities. One such guidance note, published on 24 February 2016 and titled *"Trustees trading and tax: how charities may lawfully trade explains when and how charities may engage in"* ("the Guidance"), explains when and how charities may engage in trading. At paragraph 4.11 of this Guidance, under the heading *"What considerations apply to a charity's investment of loan capital in a trading subsidiary?"*, the following is said:

> "Trustees might wish to provide a trading subsidiary with an interest-free loan, or a loan which is secured only by the contractual undertaking of the subsidiary, and not by a charge over assets of the subsidiary. However, HMRC Charities takes a critical view of loans which are not made on proper …commercial terms…"

80. It is explained at paragraph 4.12 of the Guidance, that loans that are not secured and not on commercial terms may well be deemed as non-charitable expenditure by HMRC, in which case the charity's tax exemptions may be restricted.

81. The Commission submits that in such circumstances the interest free loans made by the Charity to its subsidiaries were not in the best interests of the Charity. It is also submitted that there are no meaningful records evidencing the decisions to make these loans, that Mr Friedman is the sole signatory in respect of these loans and appears to be the only trustee involved in the process of making them, and that the loans are not loans that a prudent trustee would have made.

82. Mr Friedman accepts in his witness statement that the Charity has made unsecured interest free loans to its subsidiaries, identifying therein loans to Bellview Land, Bellview Management, Canvey Housing and Rowe Lane, with the former three loans being formalised in writing, pursuant to the Commission's requirements, on 1 February 2017 and the latter on 1 February 2018. Mr Friedman identifies that the loans are repayable on demand and further explains that the loans are unsecured because, for the most part, the subsidiaries were trying to secure commercial lending on an asset sought to be developed and that if the Charity were to secure its lending this may impact on the subsidiaries' ability to access the commercial funding and, consequently, affect its ability to generate a profit for the Charity. He states that the subsidiary ultimately acquires a valuable asset which, if necessary, could be sold to secure repayment of the loan. It is further said that the loans are interest free because interest payments would impair the subsidiaries' ability to raise the necessary commercial finance to undertake the development, and generate an 'unhelpful' additional liability during the development stage.

83. It is not in dispute that the formalisation of the loans in writing took place at the Commission's direction. In my conclusion, the fact that such loans were not formalised prior to that time and, in particular, at the time of the making of the original loan arrangements, amounts to mismanagement. In addition, there are no minutes of any meetings at which the

decisions to make such loans and the terms of the loans were discussed and approved. In particular, there is no evidence as to whether potential conflicts of interest were discussed and, if so, how those potential conflicts were resolved. In my conclusion, the lack of records as to the decision making process amounts to mismanagement.

84. Given that the loans are interest free, such a failure of process could have adverse tax implications which would unnecessarily put Charity funds at risk. I further agree with the Commission that a prudent charitable trustee would not make an interest free, or unsecured, loan to a subsidiary unless there was proper reason to do so. Whilst Mr Friedman has provided a broad brush ex post facto explanation for such loans, there is no documentation detailing the decision making process for each, or any, of the loans and no documentation in support of the rationale now provided; indeed, there is no evidence, other than Mr Friedman's unsupported assertions, as to the claimed adverse commercial impact of the Charity of making a secured and/or interest paying loan to its subsidiaries. During cross-examination Mr Kaplan accepted that it was not prudent to make unsecured loans and that the failure to secure the loans put the Charity's funds at risk. I agree that this is so.

85. When the circumstances are looked at as a whole, and despite the fact that the making of such loans falls within the trustee's powers, I find that there was mismanagement in the making of such loans.

E: £1,190,484 developer fee payable by Bellview Land to Bellview Housing

86. Bellview Land was incorporated in December 2013, at which time Mr Friedman held 100% of the shareholding. Bellview Land engaged Bellview Housing to assist in the development of a site known as 44a Gloucester Road, which had been purchased for £190,000. There was an agreement between these two private companies for the payment of a developer fee by Bellview Land to Bellview Housing. Mr Friedman also held 100% of the shares in Bellview Housing.

87. Mr Friedman subsequently transferred his shareholding in Bellview Land to the Charity, for nil consideration. There is a dispute between the parties as to whether this transfer took place in January 2014 (the Charity's case) or January 2015 (the Commission's case). At the time of the transfer, the trustees of the Charity were Mr Friedman, Mr Kaplan, and Mrs Friedman (Mr Friedman's wife). The exact date of transfer is not of significance because I accept, and it has not been directly disputed, that if there was an agreement between Bellview Land and Bellview Estates for the payment of a developer fee, this agreement took place prior to the transfer of shares in Bellview Land to the Charity.

88. On 1 February 2017, 50% of the shares in Bellview Land were transferred to another charity, Goldheart. This transfer is the subject of further concern by the Commission and is considered in detail below.

89. A developer fee of £1,190,484 (£992,070 + VAT) was paid by Bellview Land to Bellview Estates in or around February 2020 - 44a Gloucester Road having been the subject of compulsory purchase for the sum of £3,300,000 on 31 January 2020.

90. In its written closing submissions the Commission contends, in part, that:

a. There is no documentation supporting the requirement of the payment of the developer fee by the Charity;
b. There was a conflict of interest between the Charity and Mr Friedman, which was not appropriately managed because the trustees did not, independently of Mr Friedman, satisfy themselves as to the need to make such payment or as to the amount that must be paid. In particular, it was Mr Friedman who sought legal advice, and provided a gist of that advice to the other trustees. At the relevant meeting of the trustees, which was not properly minuted, Mr Friedman spoke so as to influence the decision made. Prudent trustees would have sought independent legal advice.
d. The trustees did not consider the lawfulness of the payment until 2/3 months after Mr Friedman authorised payment by the Charity.
e. No proper regard was had to whether the terms of any agreement were enforceable because of lack of certainty.
f. There were no proper records relating to the transfer of shares in Bellview Land by Mr Friedman to the Charity. The minutes of meetings in 2015 do not show the fact of such discussions, and there are no minutes of any meetings which took place in 2014.

91. I accept each of the criticisms of the Charity's actions made by the Commission, as set out at (a) to (f) above. In her closing submissions, Dr Pratt reminded the Tribunal that the agreement between Bellview Land and Bellview Housing for the payment of a developer fee took place prior to the transfer of shares in Bellview Land to the Charity. This I accept. There is, however, no documentation identifying the terms upon which the Charity took on the Bellview Land shares and, in particular, no documentation relating to the taking on of the obligation to pay the developer fee. In such circumstances, in my view a prudent trustee would have taken legal advice regarding the obligation of the Charity to pay such a fee, prior to making a payment in his regard.

92. I accept that Mr Friedman did indeed seek legal advice on behalf of the Charity, which raises the spectre of conflict of interest. It is to be recalled that it is Mr Friedman's company that was to benefit from the payment of the developer fee of £1,190,484. The fact that in such circumstances there is a conflict of interest in Mr Freidman being the trustee who sought the legal advice is stark, and becomes starker in circumstances where there is no contemporaneous documentary evidence relating to the obligation of the Charity to pay the fee. Fuel is further added by Mr Kaplan's evidence that Mr Friedman did not provide all of the trustees of the Charity with a copy of the legal advice, only Mr Ehrenfeld. The other trustees were provided with a gist of the advice by Mr Friedman. Mr Ehrenfeld did not attend the meeting of the trustees on 21 May 2020 at which the issue of the developer fee was discussed. Mr Friedman was part of those discussions at the meeting of 21 May 2020 to the extent that he set out his position as to why the fee should be made, and then absented himself whilst the other trustees discussed and decided upon the matter. There are no contemporaneous notes minuting the terms of such discussion.

93. In addition to the issues identified above, it is also relevant that the payments totalling £975,000 were made by Bellview Land to Bellview Estates over the course of February and March 2020. These payments are detailed in ledgers as part settlement of the "development fee" payable to Bellview Housing. Bellview Estates then in part settled Bellview Land's debt to Bellview Housing. The timing of these transfers is significant because the payments are made prior to both the production of the invoice for the developer fee (31 March 2020) and, more importantly, prior to the meeting of 21 May 2020, at which the trustees of the Charity discussed payment of the fee. My attention has not been drawn to minutes of any meeting prior to 21 May 2020 at which such payments were discussed.

94. Looking at the circumstances as a whole, I conclude that there has been a significant failure to manage the conflict of interest in Mr Friedman's role in these matters, and serious mismanagement of the Charity. This is not to say that Bellview Land was not ultimately contractually obliged to pay the developer fee to Bellview Housing, this is highly likely to be so, but proper processes, procedures and decision making must be put in place by the trustees prior to the payment of such sums of money, and there were plainly serious failings in this regard.

F: Rowe Lane Estates Ltd

95. The Charity entered into a loan agreement with Rowe Lane Estates, a company in which both the Charity and Mr Friedman have a 50% shareholding. This agreement was formalised in writing on 1 February 2018. Therein, the Charity agreed to provide Rowe Lane Estates with an interest free loan facility of £1,250,000, to be drawn upon *"when funds are required for the purpose set out in clause 3.1"* of the agreement i.e. to *"facilitate the purchase and development by the Borrower of the property known as 14-16 Rowe Lane…"* The agreement does not provide for a specified repayment date, although the loan is repayable on demand and the agreement also provides that "*the Borrower shall repay the Lender any net funds received from the sale or refinancing of the said property…"*. Mr Friedman signed the agreement on behalf of both parties.

96. The Charity's 2019 accounts show £1, 138,551 as having been drawn against the loan, and in 2020 this figure was £1,152,051. This is not as a consequence of an increase in the loan facility, but rather as a consequence of further drawing as against the existing facility. The Commission observes that Rowe Lane Estates recorded significant losses in both 2018 and 2019, however I accept that at this time the project in relation to which the loan facility was made available was in its development phase and thus it is not unexpected that the accounts of the company, which is operating on just this single project, would show a loss.

97. The Commission submits that there is no satisfactory evidence that the Charity has appropriately considered the grant of the facility or its continuation. This I accept. There are no minutes of any meetings at which discussions in relation to the provision and terms of this loan agreement and associated assessment of potential risks took place. There is also no documentation setting out the terms of discussions or, more importantly, the conclusions and rationale regarding the benefits of, or interests to, the Charity in providing the loan. In addition, there is no documentation relating to, or demonstrating consideration of, the

potential conflict of interest in the decision making process, which was necessary given that Mr Friedman owned a 50% shareholding in the borrower and is its sole director.

98. Given the size of the loan facility as a proportion of the Charity's overall assets, one would have expected an ordinary prudent man of business to have not only properly documented all relevant discussions, but also carefully documented how the loan serves the interests of the Charity, and how the obvious potential conflict caused by Mr Friedman's shareholding in Rowe Lane Estates was to be managed. The absence of such documentation amounts, in my conclusion, to mismanagement of the Charity.

G: Transfer of shares to Goldheart and loan to Bellview Land

99. On 1 February 2017, the Charity transferred 50% of the shares that it owned in Bellview Land, to Goldheart – a charity sharing broadly the same objectives as the Knightland Foundation. On the same occasion, and contingent upon the transfer of shares, Goldheart advanced a loan to the Charity, initially in the sum of £215,000, at an interest rate of 5%. The monies were then loaned interest free and without security, by the Charity to Bellview Land. As identified above, the main asset of Bellview Land was 44a Gloucester Road, which was the subject of compulsory purchase for the sum of £3,300,000 on 31 January 2020.

100. The Commission criticises the absence of minutes showing the decision-making process relating to the disposal of the shareholding in Bellview Land in return for an interest bearing loan and I conclude this criticism is well made. The absence of such minutes or other documentation showing the rational for, and approval of, the disposal of a valuable asset by the trustees amounts in my view, given the nature and scale of the transaction, to serious mismanagement. In evidence Mr Friedman and Mr Kaplan sought to justify the transfer of 50% of the shares in Bellview Land to Goldheart on the basis that this would share the burden and the risk in the development project of 44a Gloucester Road. There is, however, no evidence of a financial risk assessment having taken place nor is there evidence as to why, if such an assessment had taken place and the risk was found to be so significant that it required sharing, the trustees took the view that the project as a whole should proceed. I observe that £650000 of the profit from the sale of 44a Gloucester Road was passed to Goldheart.

101. I also conclude that there was mismanagement in the making of the interest free and unsecured loan to Belview Land, broadly for the same reasons I have identified above in relation to other interest free and unsecured loans made by the Charity to its subsidiaries.

Necessary or desirable to act for the purposes of protecting the property of the charity or securing a proper application of that property or property coming to the Charity

102. I am satisfied that given the nature of the mismanagement identified above, it was, and is desirable for the Commission to act for the purposes of protecting the property of the Charity. There have been numerous instances in which Charity monies, in some cases monies which amount to a significant proportion of the Charity's assets, have been outside the control of the Charity, and where there is a coinciding absence of a transparent decision making process and a documentary trail.

Appropriateness of the Order

103. I have found above that there has been mismanagement by the trustees in the administration

of the Charity and that it was desirable for the Commission to act for the purposes of protecting the property of the Charity. Such findings are not, however, the final step in my considerations. The power of the Commission to appoint an Interim Manager is discretionary and, as such, it is now necessary for me to decide whether as a matter of discretion the appointment of an Interim Manager ought to be made, or maintained.

104. In support of its contention that the Tribunal's discretion should be exercised so as to not maintain the appointment of the Interim Manager, the Charity points to its active history of grant-making, its long-standing cooperation of the trustees with the Commission, the fact that despite having been in place for approximately 6 months the Interim Mangers have not identified any 'missing funds', that the trustees had made significant improvements to the governance of the Charity in response to the 2017 Action Plan and are willing to work with the Commission to implement any further recommendations, that although the contemporaneous recording of decision-making "should have been better" conflicts of interest were at all times considered and managed in good faith, that Mr Friedman has made a significant financial commitment to the Charity by way of donations and guarantees, that the Charity has had a successful investment strategy and that the trustees act voluntarily and the Interim Managers have thus far incurred fees of £42000 plus VAT, which draws significantly on the Charity's funds.

105. I have taken all of the above matters into account. I have also taken account of my finding that Mr Friedman and Mr Kaplan genuinely believe that they have, at all times, acted in the interests of the Charity and that each has a genuine desire to continue to do so and a genuine desire to serve the interests of those who are the beneficiaries of the Charity.

106. Having done so I, nevertheless, conclude that I would appoint an Interim Manager on the basis of the evidence before me and I conclude that the appointment of the Interim Manager should continue. As a consequence of this finding I dismiss the appeal.

107. The foundation of the above conclusion is two-fold. First, there has been a long standing failure to document decisions and decision-making processes in relation to the investment and other use of the Charity's funds. This includes significant decisions made in relation to the nature of investments - even where those investments involve a significant proportion of the Charity's assets and there are potential conflict of interest issue; it also includes the disposal and other use of Charity assets – such as the advancement of unsecured interest free loans, and the disposal of shares in a subsidiary, both of which plainly drew on the Charity's assets. Second, is my concurrence with the Commission's assertions that it is Mr Friedman who *"dominates the operation"* of the Charity and that the other trustees are *"unwilling or unable"* to *"exert any control over the governance of"* the Charity. The two issues are, I find, not unconnected.

108. I accept that a number of the failures by the Charity to document and minute considerations and discussions, insofar as there were considerations and discussions between the trustees, took place some years ago and that, in light of the 2017 Action Plan, the Charity has

subsequently adopted a conflicts of interest policy, appointed two new trustees – although I observe that one of whom is an employee of a business owned by Mr Friedman, formalised both the inter-group loan agreements and the management agreement with Belview Management, and that advice has, when it has appeared necessary to do so, been taken by Mr Friedman from accountants and lawyers. The Charity has also obtained its own Barclays .net facility.

109. These are certainly positive steps. However, despite the terms of the Action Plan and ongoing scrutiny of the Commission, instances of serious mismanagement by the trustees, led by Mr Friedman's actions and the inability or unwillingness of the trustees to exert governance in the face of such actions, continued. This is particularly highlighted by the circumstances surrounding the payment of the developer fee by Bellview Land to Belview Housing in 2020. I do not repeat everything I have said on this topic previously, but highlight the fact that the developer fee was paid to one of Mr Friedman's companies prior to approval at a meeting by the trustees in May 2020, such approval in part being based on legal advice taken by Mr Friedman on behalf of the Charity in circumstances where at least two of the trustees were not shown a copy of that advice and were only given a gist of it by Mr Friedman.

110. One can well understand Mr Friedman exercising control of the governance of the Charity because it his generosity and business know how which has made the Charity such a success. Nevertheless, transparency and openness in the Charity's operations, procedures, decisions, and decision-making processes is paramount, particularly in circumstances where the Charity's operations are so closely related to Mr Friedman's private business operations. That is not to cast any aspersions on Mr Friedman's character, but it is make sure that no such aspersions can be cast and that the Commission, who oversee and regulate the Charity sphere, can properly ensure that the Charity is operating in accordance with the relevant regulatory framework. Ostensibly, that is the purpose of the inquiry instituted by the Commission under section 46 of 2011 Act, as set out in the Commission's letter of the 8 April 2021. The Charity did not appeal the decision to open an inquiry and the inquiry is ongoing. It would be wrong, on the evidence I have before me, to pre-empt the outcome of that inquiry and, given that the lack of transparency runs like a river throughout the regulatory concerns, in my view it is necessary for the Interim Manager to be in place pending the conclusion of the section 46 inquiry.

111. I find support for this conclusion in the fact that Mr Friedman's *modus operandi* has not significantly altered despite being under the gaze of the Commission since at least 2017, and the stare of the Commission since early 2020. The fact that the two new trustees did not engage with the serious mismanagement between March and May 2020, relating to the payment of the developer fee, leads me to conclude such circumstances would once again pertain if the Interim Manager was removed and trustees were to return to controlling the Charity in their current constitution. I do not accept that it has been demonstrated on the balance of probabilities by the Charity that there should be additional independent trustees appointed in lieu of the Interim Manager.

112. Dr Pratt additionally raised issue with the terms of the appointment of the Interim Manager, and in particular the power given to the Interim Manager to dissolve the Charity. I agree with the Commission that the terms of the Interim Manager's appointment are outside the jurisdiction of the Tribunal. The decision being appealed against is the order made under section 76(3) of the 2011 Act *"to appoint (in accordance with section 78) an interim manager"* (emphasis added). In any event, had I jurisdiction to consider this issue, I would have found the submissions made by Dr Pratt to be unmeritorious. The Commission has jurisdiction to confer upon the Interim Manager any of the powers of a trustee and the Charity's trustees have the power to make provision for the dissolution of the Charity. The provision of such a power is neither unlawful nor disproportionate.

Signed:

Upper Tribunal Judge O'Connor

Dated: 6 October 2021 (amended under the slip rule: 19 October 2021)