

## **LEGAL ADVISORY COMMISSION OF THE GENERAL SYNOD**

### **Seeking the consent of the DBF to the sale of PCC property**

1. The Commission has been invited to consider the effect of section 6(3) of the Parochial Church Councils (Powers) Measure 1956, and in particular the manner in which the diocesan board of finance ('DBF') should determine whether to give or withhold its consent to the sale or other disposal of property vested in it on behalf of a parochial church council ('PCC').

2. Discussion should start with section 6(2) of the Measure, which provides for specified parochial property to be held by the DBF:

“Where, at or after the commencement of this Measure, a council holds or acquires an interest in land (other than a short lease as hereinafter defined) or any interest in personal property to be held on permanent trusts, such interest shall be vested in the diocesan authority subject to all trusts, debts and liabilities affecting the same, and all persons concerned shall make or concur in making such transfers (if any) as are requisite for giving effect to the provisions of this subsection.”

3. Subsection 6(3) then proceeds to establish the requirement for the consent of the DBF to be obtained before such property is sold or otherwise dealt with:

“Where any property is vested in the diocesan authority pursuant to subsection (2) of this section, the council shall not sell, lease, exchange, charge or take any legal proceedings with respect to the property without the consent of the authority; but save as aforesaid, nothing in this section shall affect the powers of the council in relation to the management, administration or disposition of any such property.”

4. Where property is vested in the DBF as 'diocesan authority' by virtue of these provisions the DBF is, on the face of the Measure, more than merely a 'custodian trustee', since its consent to certain dealings with the property is expressly required; but the difference may be more apparent than real.

5. The role of custodian trustee arises where a corporate body (of certain specified kinds) is appointed as such under section 4 of the Public Trustee Act 1906. In that event, trustee functions are divided between the custodian trustee and the trustee(s) otherwise responsible for managing the trust property ('the managing trustee(s)') in the way specified in section 4. The Act provides (in section 4(2)(b) and (d)) as follows:

“(b) The management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are hereinafter referred to as the managing trustees);

...

(d) The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but, unless

he so concurs, the custodian trustee shall not be liable for any act or default on the part of the managing trustees or any of them;”

6. Accordingly, the position under the 1906 Act appears to differ from that under the Measure, in that the consent of a custodian trustee is not required for the sale etc of the trust property or for the taking of legal proceedings in connection with it. The DBF therefore appears to have greater powers of control than does a custodian trustee.
7. The power conferred upon the DBF as diocesan authority is a fiduciary (or trustee) power, given to it to ensure the proper administration of the trust property, and in particular to protect that property against the possibility of a decision by the PCC which is inconsistent with the duties of the PCC as trustee. The question is how far the DBF’s responsibilities in this respect justify it in over-riding the views of the PCC.
8. It would seem clear that one aspect of the DBF’s role as diocesan authority is to ensure that the PCC is acting within the scope of its powers in relation to the trust property, so that it should decline to give its consent to a disposition, or to legal proceedings, by the PCC which are outside those powers. In *IRC v Silverts*, [1951] Ch 521, a case of custodian trusteeship, the Court of Appeal accepted the submission of counsel for the Commissioners (at page 522), who said:

“The Crown contends that this case is governed by *British American Tobacco Co. Ltd v Inland Revenue Commissioners*, [1943]AC 335; that to find the control one must look to the character in which that bank is on the register; and that since the bank is merely a custodian trustee bound by s.4 of the Public Trustee Act, 1906, to give effect to the directions of the managing trustees, it must be regarded as being in the position of a bare trustee. That is not the correct way of looking at the position of the bank. Under s.4 the bank is bound, when it receives any directions from the managing trustees, to see that they are within its scope or powers. The relation of custodian trustee to managing trustee differs substantially from the relationship of a bare trustee and his *cestui que trust*.”
9. One particular manifestation of this principle is that if the PCC disposes of, or mortgages, its land (including a rentcharge) it has to comply with sections 36-40 of the Charities Act 1993;<sup>1</sup> and since it would be unlawful for it to attempt to dispose of or mortgage its land without doing so, the DBF can properly, and should, refuse consent until satisfied that the requirements of those sections have been observed.
10. Taking legal proceedings with respect to the property may involve the DBF in making a judgment as to whether there would be a breach of trust, and the DBF possibly has a more substantial role to play in such a (comparatively rare) case; but, again, so would a custodian trustee under section 4(2)(b). Charity trustees have wide powers to bring, defend and compromise legal proceedings, but those powers must (like other trust powers) be exercised prudently; and the law takes a stern approach to charity trustees bringing or defending legal proceedings irresponsibly (even when they act on legal advice in doing so: see *Re Beddoe*, [1893] 1 Ch 547). Before giving its consent to legal proceedings, therefore, a DBF would

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<sup>1</sup> Sections 36 and 37 require the consent of the Charity Commission for certain disposals of land held by or in trust for a charity, unless specified requirements (including obtaining and considering advice from a qualified surveyor) are met. Sections 38 and 39 require the consent of the Commission for any mortgage of land held by or in trust for a charity, unless certain conditions (including obtaining and considering proper advice) are met. Section 40 deals with rentcharges. Further advice can be found on the Charity Commission’s website at <http://www.charity-commission.gov.uk/publications/cc28.asp>

be entitled at the least to satisfy itself that the PCC was acting responsibly by asking it to justify its decision and enquiring, for example, whether the PCC had sought the advice of the Charity Commission in relation to the proceedings.

11. Beyond these cases, the right of the DBF to decline to give its consent to decisions taken by the PCC in the administration of the charity is less clear. However, it would appear that central to the interpretation of subsection 6(3) is the weight which is to be given to the saving provision at the end. This expressly states that “nothing in this section is to affect the power of the [PCC] in relation to the management, administration or disposition of the property”. Thus the consent of the DBF should be given (even where the DBF might itself have taken a different view of the matter) unless the PCC is acting beyond the scope of its legal powers or in bad faith, has been guilty of some procedural or other irregularity (such as basing its decision on considerations which were irrelevant) or has reached a decision which is so far beyond the range of reasonable options that no reasonable PCC could have made it; i.e. the DBF should apply similar principles to those set out in the well known test in Associated Provincial Picture Houses Limited v Wednesbury Corporation, [1948] 1 KB 223.
12. It is recommended that when seeking the consent of the DBF, the PCC submits a brief written statement of its reasons for the proposed sale or other disposal together with copies of all relevant resolutions passed by the PCC. This will enable the DBF to form a view as to whether there might be reasonable grounds (of the type outlined above) to refuse to give its consent.