

Paper P2a (an annexe to P2)

Law and polity advisory group

Counsel's opinion

Basic Information

Contact name and email address	Dr Augur Pearce augur@dunelm.org.uk
Action required	For information
Draft resolution(s)	None

Summary of Content

Subject and aim(s)	Trustee responsibilities for United Reformed Church buildings. This opinion from legal counsel is mentioned in para 3.4 of Paper P2. This advice was sought with Mission Council's approval, and is reported to Mission Council accordingly.
Main points	Trustee responsibilities; delegation of certain Trustee responsibilities; elders' and Church Meeting responsibilities.
Previous relevant documents	
Consultation has taken place with...	

Summary of Impact

Financial	
External (e.g. ecumenical)	

**THE UNITED REFORMED CHURCH
WHO ARE THE CHARITY TRUSTEES OF CHURCH BUILDINGS?**

OPINION

This is a version of Mrs Quint's Opinion issued, with slight typographical corrections, in April 2014. Pagination has been added.

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Ref: Andrew Middleton

**THE UNITED REFORMED CHURCH
WHO ARE THE CHARITY TRUSTEES OF CHURCH BUILDINGS?**

OPINION

- 1 I am asked to confirm in writing and add slightly to the advice which I gave during the helpful discussion in conference at my chambers on 22 October 2013.

- 2 The trustees of an increasing number of church buildings held on the statutory trusts referred to in s 8 and Schedule 2 Parts I and II of the United Reformed Church Act 1972 or s 6 and Schedule 2 Parts I and II of the United Reformed Church Act 1981 (as amended) are corporate trustees connected with URC Synods instead of a body of individual trustees as was the more usual arrangement at the time when those Acts were passed. In most cases the corporate trustee is or has become the sole trustee. In this opinion for convenience I refer to the statutory trusts under Schedule 2 Part I of the 1972 Act but the arguments apply equally to the corresponding provisions under Part II and to the statutory trusts in Parts I and II of the 1981 Act.

- 3 Although paragraph 7(5) of the statutory trusts requires the number of trustees ‘so far as practicable’ to be kept up to four, the fact that the company is the sole trustee creates no legal problem since each of the trustee companies in question is a trust corporation. Indeed, s 19 of the 1972 Act specifically envisages the appointment of URC trust corporations even in cases where there is a religious qualification for trustees. However, the trustee companies are relatively remote from the churches of which they are the trustees, and this naturally militates against their close involvement in the day to day management of the relevant trusts and the buildings subject to them. It is a natural consequence that the Church Meeting, and in particular the Elders of individual churches, find themselves taking more responsibility than when there was a body of individual trustees appointed locally. This has led to the suggestion that in law the corporate trustee is a custodian trustee and the Elders and/or the Church Meeting are the charity, or managing, trustees.

- 4 In my view this is an incorrect analysis.
- 5 In the first place, a ‘custodian trustee’, which is a term of art, is a specific type of holding trustee, being a trust corporation, whose powers and duties are set out in the Public Trustee Act 1906 and the Public Trustee Rules 1912 and who can only be appointed expressly as such. A custodian trustee has no powers of management and is bound to concur in the decisions of the managing, or charity, trustees unless those trustees have made a decision in breach of trust. In other words, if there is a custodian trustee the trust must by definition have a two-tier trusteeship structure.
- 6 It may be that the trusts of some church buildings which fall within s 8 of the 1972 Act, or the equivalent provisions under the 1981 Act, were originally constituted with a two-tier structure with both a custodian trustee and a separate body of managing trustees. In such cases, if the governing document’s trusteeship provisions have not been expressly amended, the trust will continue to be administered with a two-tier trusteeship structure and there will still be both a custodian trustee and a body of managing trustees. The statutory trusts will have replaced all the other provisions in the original governing document including any provisions relating to the appointment of trustees, but do not affect the trustee structure itself. In this connection, it is worth noting that s 20 of the 1972 Act and s 11 of the 1981 Act specifically preserve existing trusteeships and make provision for those changes which are necessary as a result of the unification of the relevant churches.
- 7 In the great majority of cases, however, the original governing document simply refers to a body of individual trustees and the statutory trusts give the power of appointing future trustees to the Church Meeting. Unless the Church Meeting expressly appoints a trustee company as a custodian trustee and at the same time appoints a separate body of managing trustees – and I am not aware of any case in which this has been attempted – the fact that a trustee is a trust corporation and may be (or become) the sole trustee does not alter the nature of its trusteeship, which will be equivalent to that of the trustees appointed under the original governing document.
- 8 In other words, the norm is for the original trustees, and thus their successors, to be the trustees for all purposes of the relevant trusts, both holding title to the property

and being responsible for the proper administration and management of the trust. These responsibilities include the duty to pay any rates, taxes and other outgoings relating to the trust property, to insure the buildings, to take legal proceedings to protect the title to the trust property or defend proceedings where a third person has a contested claim for damages relating to the property or its occupation and to obtain any official permissions required for the intended use of the premises, e.g. for the celebration of marriages.

- 9 Clearly, the original trustees were the charity trustees and therefore the trust company as sole trustee is the sole charity trustee. It should be noted that where an unincorporated charity has a trustee which is a company (whether charitable or not) the directors of the company are not technically charity trustees. Their duties as directors under the Companies Act 2006 and the Articles are owed to the company itself and not directly to any trust of which the company is the trustee. These duties inevitably require them to ensure that the company acts lawfully and conscientiously as a trustee of the charitable trust. Such directors will of course be charity trustees in relation to the company if it is itself a charitable company.
- 10 The next question relates to the roles of the Elders and the Church Meeting. The statutory trusts require the trustees to act only with the authority of the Church Meeting in exercising the powers specified in paragraph 2 (subject also, in some instances, to the approval of the Provincial Synod or the District Council) and in paragraph 3. The Church Meeting also has the statutory power of appointing new trustees (paragraph 7) and the power (subject to the sanction of the Provincial Synod and the General Assembly) to exercise the power to amend the trusts (paragraph 8). The Church Meeting would normally act on the recommendation of the Elders.
- 11 It is technically possible for there to be more than one person or body in the role of charity trustee of a charity at the same time: see Re Carapiet, Manoogian v Sonsino [2002] EWHC 1304, where Jacob J adverted to the possibility, but declined to decide whether the Armenian Patriarch of Jerusalem, who had certain functions relating to investment and the application of income under the trusts of a charitable settlement was a charity trustee alongside National Westminster Bank PLC. (He had decided that the Bank was definitely a charity trustee despite the fact that it was obliged to act in

accordance with the Patriarch's decisions on those aspects of the administration of the Settlement.) It is in fact not uncommon in the constitutions relating to mosques and Hindu and Sikh temples for there to be separate bodies of charity trustees being the 'trustees' and 'the management committee' who have complementary functions, and the Charity Commission frequently expresses the view in such cases that the members of both bodies are charity trustees. However, it seems reasonably clear to me that it is not necessary or indeed appropriate to analyse the statutory trusts in this way.

- 12 In the first place, no positive duty is placed on the Church Meeting or the Elders by the terms of the statutory trusts. References to their approval in paragraphs 2 and 3 are expressed using negative terminology to the effect that the trustees may not exercise the relevant powers without the requisite approval: it is a restriction on the trustees' discretion, not a requirement that the Church Meeting should consider whether or not to give approval. The powers of appointing trustees and amending the trusts conferred by paragraphs 7 and 8 are clearly powers, not duties, and are perfectly compatible with the body exercising the power not being itself a trustee.
- 13 Secondly, the duty placed on the trustees under the core trust itself is extremely limited. It is simply to 'permit the premises to be used' for one or more of the stated purposes (paragraph 1). There is no obligation to ensure that the premises are so used, and there is the further limitation, indicating a potentially very passive role for the trustees, that trustees are not responsible for the repair and upkeep of the buildings to the extent that they are not supplied with funds to do so (paragraph 4). This is no doubt a reflection of the reality that many trusts for church buildings do not have significant assets apart from the land and buildings themselves, and have to look to the local church which uses the building to cover the essential outgoings. This does not make the local church a trustee as such of the statutory trust.
- 14 The Elders and the Church Meeting have important fiduciary duties of their own, however, which derive, not from the statutory trusts of the premises, but from their position as the governing body of the local church as a charitable institution in its own right. The local church is, in effect, the beneficiary of the statutory trusts in that it is the body to which permission is given by the trustees to use the premises for worship etc. In my view, the approvals without which the trustees cannot exercise the powers

specified in paragraphs 2 and 3 are given or refused by the Church Meeting in its capacity as beneficiary and not as charity trustee of the statutory trust. The Elders and the Church Meeting owe their fiduciary duty to the local church and are concerned with the management and care of the premises subject to the statutory trusts, and interested in the manner in which capital funds may be applied, as representatives of the local church as a human institution. They are the decision-makers within a charitable unincorporated association regulated by its own rules and thus by the constitution of the United Reformed Church itself.

- 15 In practice, I gather, partly because of the common (but normally incorrect) perception that the trustee is no more than a custodian trustee and that it is legitimate for the local church to take management decisions relating to the premises, a number of the decisions which are required by the general law or even expressly by the statutory trusts to be taken by the trustee, are actually taken, in many instances, by the local church. For example the power at paragraph 3 of the statutory trusts to permit the church building to be used temporarily, occasionally or intermittently by another person or body, for a reputable purpose - i.e. otherwise than in accordance with the uses specified in paragraph 1 - is (I gather) often exercised in practice by the local church without reference to the trustee. Indeed it might well appear inconvenient and unnecessary to require any such arrangement to be made formally with the trustee given that the arrangement cannot amount a lease or tenancy.
- 16 The suggestion made in conference was that this should be regarded as an informal, implied delegation of the trustee's power. The problem with this approach is that trustees, being in a sense 'delegates' themselves, have no legal power to delegate their powers and duties except as provided for in the governing document or under the Trustee Act 2000. The Act of 2000 (see s 11) enables trustees of charities to delegate to anyone they think fit such of their functions as relate to:
- (i) fundraising (except via charitable trading),
 - (ii) investment management, and
 - (iii) the implementation of trustees' decisions.

It does not confer a general power to delegate. A trustee therefore remains potentially personally liable for the consequences of any unauthorised delegation as though it were the trustee's own act or omission. (A third party would not of course be

prejudiced because reliance could be placed on the ostensible authority of the local church to render the agreement enforceable.)

- 17 Thus, if the trustee through inaction or lack of interest were to allow the local church to make an arrangement for the non-charitable use of the church building on a particular occasion and the organisation using the building, being unsupervised, damaged it and did not have the money to pay for a repair, the cost might become payable by the trustee. In that case the directors of the trustee might be held to have breached their duty towards the company by not ensuring that it carried out its duties as trustee and might themselves have to find the funds from their personal resources to avoid a loss to the company or the trust.
- 18 The trustees might in theory seek reimbursement from the local church by claiming that the decisions-makers within local church had made themselves constructive trustees by ‘intermeddling’ with trust assets, and that this made them personally liable. The local church might then reply that the trustee’s inaction or lack of interest made it necessary for the local church to intervene. Such arguments could be unpleasant and stressful for all concerned and in my view can and should be avoided
- 19 If there were an express power to delegate decisions, and this were properly drawn with the normal requirement for the delegate to be appointed and the terms of reference set by the trustee and all acts of delegates were required to be reported back promptly to the trustee, the trustee would not be liable in those circumstances provided that it had exercised due care in making the appointment and setting the terms of reference and the delegates, having acted in accordance with their terms of reference, would be entitled to an indemnity from the assets of the trust.
- 20 There is an express power of amendment, vested in the Church Meeting, which is conferred by paragraph 8 of the statutory trusts. That power not only requires a 75% majority vote at a special meeting but also the sanction of the Provincial Synod and the General Assembly, the latter to be evidenced by a memorandum signed by the Moderator and attached to the trust deed in each case. I was told that this is considered a somewhat cumbersome procedure and has not, apparently, been used in practice.

- 21 There is now an alternative, however. Trusts in the form of the statutory trusts which related to any particular church building could be modified by resolution of the trustee in so far as the amendments did not alter or affect the charitable purposes of the trust. Although I am not aware of the exercise of the relevant power in a previous case involving trusts contained in a statute, I consider that a resolution modifying the trustees' administrative powers and procedures could be passed under s 280 of the Charities Act 2011. That section applies to all unincorporated charities, whatever their size and regardless of how they are constituted. It would therefore be possible for a trustee company to adopt an express power of delegation relating to the management and hiring out of the church building and thereby enable such routine transactions lawfully to be dealt with by the local church without prior reference to the trustee.
- 22 If it were considered generally desirable to do so, it would be possible for a single trustee to pass a single resolution to this effect in relation to all the trusts of local church buildings of which it was the sole trustee. If this course were to be adopted I would recommend:
- (i) that some thought first be given to the extent to which it was felt desirable to enable trustees to delegate matters to the local church, with suitable safeguards to protect the trust; and
 - (ii) that the form of words should be drawn with care, bearing in mind that the trustee would not be shedding all responsibility for the matters to be delegated but merely adopting in each case a more convenient procedure for the proper administration of the trust.
- 23 I would also recommend two further preparatory steps, namely that:
- (i) the local church be consulted and asked to agree in principle to the proposals, since no delegation will be workable unless the basis for it is understood and agreed; and
 - (ii) an explanatory letter be sent in advance to the Charity Commission by or on behalf of the trustee, informing the Commission of the proposal and the outcome of the consultation with the local church and inviting comments. This would help to ensure that the Commission was not taken by surprise and had the opportunity to ask for a more detailed explanation if it so wished.

- 24 One of the concerns expressed during the discussion on 22 October related to actual or potential conflicts of interest and duty, including conflicts of loyalty. Such a conflict may arise for the director of a trustee company when the trustee company is (for example) taking a decision about a local church building where the director is an Elder of the local church. The interests of the local church may or may not be in conflict with those of the trustee company as trustee of the trust. In my view, Company Law requires the potential conflict to be disclosed in any event but whether the director concerned must be excluded from the decision and/or even discussion on the matter will depend on whether there is a conflict or coincidence of interests, whether the director concerned can provide helpful information to his co-directors and what express provision is included in the trustee company's Articles, which may contain a procedure for 'authorising' certain conflicts.
- 25 The existence of a power of delegation can of course also assist in a practical way in the management of conflicts: simply by delegating a decision the trustee or director concerned can avoid becoming conflicted. If, however, a power has been validly delegated to the local church, and a member of the body of local church is personally conflicted in some way, he or she should not take part in the decision. As is illustrated by s 14(3) of the Trustee Act 2000, delegates are as much bound as trustees themselves by the fiduciary duty to avoid placing themselves in a position of actual conflict or to take a decision which may be perceived as affected by a conflict.
- 26 I have been asked since the conference to add a note about the way in which church buildings should be accounted for. I understand that they are often accounted for by the local church. This is not strictly correct because the church building is not an asset of the local church, which has no more than permission from the trustees to use it. Therefore it should be made clear in the local church's accounts that it is permitted to use the church building under the (separate) trusts of the church building and any expenditure on the church building from the funds of the local church should be treated as expenditure rather than as a capital addition to the assets of the local church. It would be appropriate for a trustee company which is the sole trustee of several Schedule 2 trusts to identify each of them in its accounts as a special fund showing the relevant church building and any associated cash or investments as the assets of that

special fund. Where there is more than one trustee of a Schedule 2 trust it will normally require its own individual set of accounts.

27 I will be happy to advise further at any stage.

**Francesca Quint
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7 November 2013**