

Charity Trustees – Legal Duties and Responsibilities

Seamus Clifford – Partner

Paul Forsyth – Solicitor

What is a charity trustee?

- The trustees have general control over the management and administration of the charity.
- The trustees have ultimate responsibility for the charity.
- If the charity is incorporated the trustees may also be known as 'directors' and will have additional responsibility and duties imposed by the Companies Act 2006.

Matters to consider before becoming a trustee

- Take steps to find out as much about the charity as possible.
- Useful sources of information available from the charity:
 - annual reports;
 - annual accounts;
 - internal policies (if available);
 - speak to the existing trustees and charity staff; and
 - review the charity's governing document (if the charity is incorporated the Articles of Association are available online from Companies House).

Is the charity incorporated?

- Charities may be:

1. Unincorporated:

- these may be formed as 'trusts' or 'associations';
- their governing document will usually be a trust deed or a constitution or a scheme of the Charity Commission;
- the property of the charity is usually held by the trustees or their nominees on trust for the charity.

2. Incorporated:

- a charitable company is registered with Companies House usually as a company limited by guarantee and the Charity Commission;
- the charity is a legal entity in its own right. The trustees are the directors of the company; and
- the charity is capable of owning property in its own right.

Is the charity incorporated?

3. Charitable Incorporated Organisation:

- Charitable Incorporated Organisations (CIOs) are a new type of body, brought into being by the Charities Act 2006. Detailed regulations can be found in the Charitable Incorporated Organisations (General) Regulations 2012 SI 3012. It became possible to submit applications for registration from 10th December 2012;
- a CIO is an incorporated form of charity which is not a company;
- it only has to register with the Charity Commission and not Companies House; and
- it is only created once it is registered with the Charity Commission.

Summary of trustees duties

- Trustees have and must accept ultimate responsibility for directing the affairs of the charity, ensuring that it is solvent, well run, and delivering the charitable outcomes for the benefit of the public for which it has been set up **(the "Beneficiaries")**.
- Compliance - Trustees must:
 - ensure that the charity does not breach any of the requirements or rules set out in its governing document;
 - comply with the requirements of its regulators and legislation (such as the Charities Act 2011); and
 - act with integrity, and avoid any personal conflicts of interest or misuse of charity funds or assets.

Summary of trustees duties

- Duty of prudence – Trustees must:
 - ensure that the charity is and will remain solvent;
 - use charitable funds and assets reasonably, and only in furtherance of the charity’s objectives;
 - avoid undertaking activities that might place the charity’s endowment, funds, assets or reputation at undue risk; and
 - take special care when investing the funds of the charity, or borrowing funds for the charity to use.

Summary of trustees duties

- Duty of care – Trustees must:
 - use reasonable care and skill in their work as trustees, using their personal skills and experience as needed to ensure that the charity is well-run and efficient; and
 - consider getting external professional advice on all matters where there may be material risk to the charity or; where the trustees may be in breach of their duties.
- Trustees Act 2000 (Chapter 29, Part 1, Section 1)
 - 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.

Trustees and decision making

- Trustees must:
 - act within their powers in accordance with the charity's governing document and legislation such as the Trustees Act 2000;
 - act in good faith and only in the interest of the charity;
 - make sure that that they are sufficiently informed;
 - take account of all relevant factors;
 - manage conflicts of interests; and
 - make decisions that are within the range of decisions that a reasonable trustee body could make.

Trustees – acting within their powers

- Trustees must only make decisions that are consistent with their charity's objects and powers.
- These powers come from statute and the charity's governing document.
- If the trustees are not sure about their powers they should seek advice from the Charity Commission or from suitably qualified person such as an accountant, solicitor or expert in the relevant area.

Trustees – acting in good faith

- 'Good faith' as defined by the Charity Commission:
 - genuine honest intention; and
 - acting in the best interest of the charity.
- 'Bad faith' as defined by the Charity Commission:
 - acting in a way that the trustee didn't honestly believe was in the interests of the charity;
 - intentionally benefiting someone in a way that is not in the charity's interests; and
 - deliberately using a power for a purpose for which it was not intended.
- Consequences of acting in 'bad faith':
 - trustee may not be able to recoup associated expenses they have incurred in connection with the decision; and
 - the decision may be challenged and the trustees may have to repay the charity for any losses they have caused.

Trustees – being sufficiently informed

- Trustees should demonstrate that their decision is based on sufficient and appropriate evidence such as:
 - the cost or value involved;
 - the complexity of the issue;
 - the impact of the decision;
 - how far reaching is the decision; and
 - how urgent is the decision.

Trustees – taking account of all relevant factors

- Relevant factors will vary depending on the circumstances. Depending on the circumstances relevant factors to consider could include:
 - is the proposed decision in the best interest of the charity;
 - is the decision consistent with the charity's objects;
 - do the trustees have all the powers they need to make and carry out the decision;
 - what are the risks / benefits of the proposed decision;
 - reputational risks;
 - are sufficient funds available; and
 - have the charity's stakeholders been consulted, consider:
 - the charity's employees;
 - the charity's beneficiaries;
 - the charity's founders; and
 - other individuals or groups who may be impacted by the charity's decisions.
- For incorporated charities the factors considered should be noted in the company's board minutes.
- For unincorporated charities a minute should be produced and held on file.

Trustees – managing conflicts of interest

- If there is a potential conflict between a trustee's personal interests and those of the charity a trustee should proceed with caution.
- The trustee should refer to the charity's constitution and clarify whether it contains provisions for dealing with conflicts of interests.
- If the charity is incorporated as a company the Companies Act 2006 will require the trustee to declare their interest in accordance with the requirements of section 177 of the Companies Act 2006 and the interest should be declared at a meeting of the trustees. The trustee should then refer to the charity's governing document as it will provide guidance as to whether the interested trustee may vote at a meeting of the trustees.

Trustees – managing conflicts of interest

- Example extract from a charity’s governing document taken from the Charity Commission:

“Declaration of directors’ interests

A director must declare the nature and extent of any interest, direct or indirect, which he or she has in a proposed transaction or arrangement with the charity or in any transaction or arrangement entered into by the charity which has not previously been declared. A director must absent himself or herself from any discussions of the charity directors in which it is possible that a conflict will arise between his or her duty to act solely in the interests of the charity and any personal interest (including but not limited to any personal financial interest).”

Trustees – managing conflicts of interest

If a conflict of interests arises for a director because of a duty of loyalty owed to another organisation or person and the conflict is not authorised by virtue of any other provision in the articles, the unconflicted directors may authorise such a conflict of interests where the following conditions apply:

- (a) the conflicted director is absent from the part of the meeting at which there is discussion of any arrangement or transaction affecting that other organisation or person;*
- (b) the conflicted director does not vote on any such matter and is not to be counted when considering whether a quorum of directors is present at the meeting; and*
- (c) the unconflicted directors consider it is in the interests of the charity to authorise the conflict of interests in the circumstances applying.*

How do trustees ensure their decision is within the range of decisions that a reasonable trustee body could make?

- Trustees should consider:
 - have they given enough time and consideration to their decision;
 - have they missed anything;
 - have they taken professional advice and followed it;
 - have they read relevant guidance that is available;
 - can the trustees justify their decisions in the circumstances;
 - is the decision consistent with previous decisions made by the trustees; and
 - what grounds could anyone have for saying the trustees had acted unreasonably.

Collective Decisions

- Trustees have a duty to make decisions 'collectively' a collective decision means:
 - all trustees have a duty to participate in the decision making process (unless they are not permitted due to a conflict of interests); and
 - decision making process must comply with procedures set out in the governing document of the charity.
- Some trustees may have a particular role, for example, the treasurer. However, responsibility for decision making still lies with the trustees as a whole.

Additional duties for trustees of incorporated charities

- If a charity is incorporated the trustees will also be directors and therefore, subject to duties and requirements under the Companies Act 2006.
- These duties can be found in the Companies Act 2006 at sections 170-177.
- The duties are similar to those of trustees and include:
 - duty to act within the powers of the charity's governing document (section 171);
 - duty to achieve the charitable purposes of the company but also, having regard to other factors, such as the employees (section 172);
 - duty to exercise independent judgement (section 173);
 - duty to exercise reasonable care, skill and diligence (section 174);
 - duty to avoid conflicts of interests (section 175);
 - duty not to accept benefits from third parties by reason of being a director/ trustee (section 176); and
 - duty to declare interests in proposed transactions or arrangements (section 177).

Delegation of trustees responsibilities

- Trustees should refer to the charity's governing document and its position on delegation of trustees responsibilities.
- Trustees can generally delegate certain powers to agents or employees but will, and must always, retain the ultimate responsibility for running the charity.
- If a trustee does decide to delegate, they should set out the terms of the delegation in writing, for example in the minutes of a trustees meeting. The following information should be recorded:
 - details of the powers delegated;
 - to whom the power is delegated;
 - procedures for reporting back to the trustees should be established; and
 - the trustees should keep the decision to delegate under constant review.

Delegation of trustees responsibilities

- Extract from a charity's governing document taken from the Charity Commission:

The directors may delegate any of their powers or functions to a committee of two or more directors but the terms of any delegation must be recorded in the minute book.

(2) The directors may impose conditions when delegating, including the conditions that:

(a) the relevant powers are to be exercised exclusively by the committee to whom they delegate;

(b) no expenditure may be incurred on behalf of the charity except in accordance with a budget previously agreed with the directors.

(3) The directors may revoke or alter a delegation.

(4) All acts and proceedings of any committees must be fully and promptly reported to the directors.

Trustees – points to consider when running a charity

- The purpose of a charitable trustee is to ensure that the charity's resources are used to further the charity's charitable aims. The charity's aims and objects will be set out in its governing document.
 - the charity's resources should be used in a way that will promote its objects;
 - trustees should be aware that if they use the charity's resources for a purpose outside of its objects they can be held personally liable; and
 - trustees need to ensure that the charity's governing document is kept up to date so that it reflects the current objects of the charity.

Considerations when amending a charity's governing document

- All charitable companies can amend their articles of association. There are certain regulated alterations which require the Charity Commission's approval such as:
 - a) any change to the statement of the objects of the charity;
 - b) any change to what happens to the charity's property on winding up; and
 - c) any change which authorises the charity's funds or property to be used to benefit the directors or members, or people or organisations connected with them.
- Many unincorporated charities with incomes of £10,000 or less can change their governing document, even if there is no power to do so in the governing document. Generally speaking the Charity Commission's involvement is only needed where the changes involve the charity's purposes or powers which will result in a benefit for the trustees or people connected with them. Further guidance can be obtained from the Charity Commission.
- Trustees of unincorporated charities with incomes of more than £10,000 can change the powers they have to administer the charity and related procedures. If the governing document provides specific powers, the trustees can also change the charity's purposes.

Financial Procedures

- Proper financial procedures should be in place. This will not only protect the charity but also the trustees.
- The following should be considered:
 - formal processes should be in place for authorising payments such as the requirement for multiple signatories for authorisation of all payments made by the charity; and
 - the trustees should produce regular monthly budgets and keep robust financial records.
- If assets of the charity are lost as a result of fraud, the trustees will be expected to explain to the Charity Commission what steps they took to prevent fraud and how the steps broke down.
- It is possible for trustees to be held personally liable for losses.

Benefits to trustees

- In the absence of express legal authority, trustees cannot receive any benefit from their charity.
- This means that they cannot generally be paid for acting as a trustee although reasonable expenses, such as those incurred traveling to a trustees meeting, can usually be claimed.
- There are some exceptions to the above however, they are limited and trustees are advised to seek guidance from the Charity Commission before accepting any payment from a charity of which they are a trustee.

Liability of trustees

- The extent of a trustees liability depends on the legal form of the charity.
- Incorporated charities:
 - it is common for charities to be set up as companies limited by guarantee;
 - a charity set up in this way has its own legal personality therefore, it is free to enter into contracts and relationships in its own name;
 - it is the charity rather than the trustees, which is liable for the charity's debts (except in breach of trust); and
 - the trustees may become liable in the event the charity becomes insolvent and there has been 'wrongful' or 'fraudulent' trading.
 - The trustees may also be liable if they give personal guarantees to support the charity's obligations.

Liability of trustees

- Wrongful trading:
 - wrongful trading is defined under Section 214 of the Insolvency Act 1986;
 - wrongful trading applies when:
 - (a) the company has gone into insolvent liquidation;
 - (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and
 - (c) that person was a director of the company at that time.
- Fraudulent Trading:
 - fraudulent trading is defined under Section 213 of the Insolvency Act 1986;
 - if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose.
- Trustee directors who are found guilty of either of the above offences may have to personally account to the charity's liquidation.

Liability of trustees

- Unincorporated charities:
 - has no legal personality;
 - the trustees themselves enter into contracts and relationships on the charity's behalf; and
 - The trustees liability is potentially unlimited.

Liability of trustees

- Trustees are potentially exposing themselves to two types of liability:
 - Liabilities to 3rd parties that occurs in the course of running the charity:
 - the extent of these liabilities will depend on the legal form of the charity (incorporated or unincorporated as previously mentioned).
 - All charity trustees are potentially subject to claims instigated by the Charity Commission, Attorney General or other trustees if they are found to be in breach of trust.
 - It is very rare for trustees to be found personally liable for breach of trust when they have acted in good faith.

Liability of trustees

- Charity Commission policy - "restitution and the recovery of charitable funds misappropriated or lost to charity in breach of trust"
- (<https://www.charitycommission.gov.uk/our-regulatory-work/how-we-regulate-charities/how-we-ensure-charities-comply-with-their-legal-requirements/our-policy-on-restitution-and-the-recovery-of-charitable-funds-misappropriated-or-lost-to-charity-in-breach-of-trust/>)
 - The policy reassures trustees that they will not be pursued for any loss incurred as a result of an honest mistake.
 - When property has been lost as a result of a serious breach of trust, however, the trustees should be expected to take steps to recover the loss.
 - The Policy makes it clear that when serious losses have occurred, trustees should seek legal advice, consider what steps they can take to recover the property, the likelihood of successfully recovering the property and the possible effects of their actions.
 - In cases where trustees are unwilling or unable to take the necessary steps to recover the loss, the Charity Commission will consider stepping in and bringing enforcement action.

Questions

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Seamus Clifford – Partner
Head of Corporate and Commercial



Career

Seamus obtained an LLB (Hons) degree in Law and Politics from Cardiff University and a commendation in the Legal Practice Course from Cardiff Law School. Seamus joined Ellisons in 1996 as a trainee Solicitor, qualifying into the Corporate and Commercial team in 1998. In 2000 Seamus left Ellisons to join the London corporate finance team at Berwin Leighton Paisner where he remained until 2006 working primarily within the highly regarded hotel, leisure and restructuring teams. Seamus re-joined Ellisons as a Partner and head of the Corporate and Commercial practice in 2006.

- Corporate Finance
- Mergers & Acquisitions
- Joint ventures
- Shareholder arrangements
- Corporate re-organisations
- Corporate recovery
- Commercial
- Hotel & Leisure

Paul Forsyth – Solicitor
Corporate and Commercial



Career

Paul trained at a London based firm and qualified in January 2009. He joined Ellisons in September 2010. Paul specialises in mergers, de-mergers and acquisitions. He is also experienced in drafting shareholder, partnership and general commercial agreements.

Areas of Specialism

- Mergers, de-mergers and acquisitions.
- Shareholder and partnership agreements.
- General commercial agreements