

LEGAL ALERT

OCTOBER 2002

CHARITY BULLETIN

CONFLICTS OF INTEREST FOR CHARITY TRUSTEES

GENERAL RULE

The general rule is that a trustee cannot enter into any transaction which might conflict with his duty as trustee. This is enshrined in general trust law. The essential point is that a trustee is primarily answerable to his beneficiaries.

In the case of a charitable trust, there may not be individual beneficiaries but rather objects or purposes for a whole range of possible beneficiaries. In this sense, a charity trustee is more publicly accountable and that accountability is in no way diminished but comes into even sharper focus.

It follows from the general rule that a trustee must not place himself in a position where his private interest might conflict with his fiduciary duties.

EXAMPLES OF CONFLICT

Trustees are expected to act gratuitously and not make any profit from their trust. Therefore generally a trustee cannot be paid for any work he carries out on behalf of the trust or services he renders, unless it is actually authorised by the trust itself. Commonly, of course, trust deeds or companies' constitutions do allow professional trustees (such as solicitors or accountants) to charge fees for services actually rendered to the trust.

There are situations, however, where the potential conflict is more difficult to discern. For example, if a trustee has an interest in a company or a business it might be highly undesirable for the charity to enter into any contract with that company or business. The reason is that the trustee might indirectly benefit as a result of the contract and his duty towards the charity might be compromised by his personal interest.

Perhaps a more obvious example is the case of a trustee wishing to buy some item of property from the trust or indeed to sell property to the trust. The "self dealing rule" as it is known, is that if a trustee sells trust property to himself the sale is voidable (i.e. can be set aside) by any beneficiary, however fair the transaction may have been. In many cases the rule has been stated to be absolute: even if a third party fix the purchase price the transaction could be set aside. The rule does not act so harshly as to prevent any transaction between a trust and a company in which a trustee is a mere shareholder. Nevertheless, there would be a conflict of interest in such a case and if any complaint were made about such a transaction the onus would lie on the company to prove that the trustee had taken all reasonable steps to secure a purchaser at the best price.

If as a result of his position a trustee is able to exploit some opportunity which gives rise to a profit, then he is bound to account for that profit to the trust. Similarly, if he uses his position to secure a directorship in a company for which he receives

a salary or fees, he is accountable to the trust for that remuneration.

There may be cases where the charity trustees believe that a transaction which they would like to enter into is expedient in the interests of their charity. Since this is likely to offend the self dealing rule, they can apply to the Charity Commissioners for an Order under Section 26 of the Charities Act 1993 to sanction the transaction in question. Protection can also be sought under the general provision for trustees contained in the Trustee Act 1925.

Other instances where a conflict could arise may be where the charity employs as a member of its staff someone connected with a trustee. Clearly, in such a case the terms of employment must be such as would be negotiated on purely arm's length basis without any such connection. A very obvious case of conflict would arise if the charity conferred any benefit on one of its trustees.

CONSEQUENCES OF BREACH

In a case where a trustee has been paid or remunerated without express authority under the trust, or otherwise within the express permission granted by the trust, he is liable to reimburse the trust for that remuneration of the excess.

As indicated above, if there has been a transaction which breaches the self dealing rule, the transaction can be set aside. In the case of a private trust any beneficiary could take action for this to be done. In the case of a charity, the action is likely to be taken by the Charity Commissioners or the Attorney General as a protector of charities.

If a trustee's actions in conflict of his fiduciary duties have resulted in loss to the charity, he may be liable for damages.

PREVENTION BETTER THAN CURE

How is conflict to be avoided? Potential conflict of interest may be quite obvious, or may be subtle. The conflict may only readily be recognised after it has actually arisen. It is therefore necessary for charity trustees at all times to be vigilant about the possibility of conflict, and to apply a stringent test at all times: am I acting in the best interests of the charity, and could my actions be impugned by anybody examining critically the circumstances of any particular transaction?

If any danger of conflict is perceived, openness is the best policy. A disclosure of personal interests is vitally important where they may come into conflict with one's fiduciary duties.

Charity trustees as a body ought regularly to review the position of individual trustees to see whether any disclosure is necessary or desirable. As an absolute minimum, new trustees coming into office should declare any interest they have.

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CHARITY TRUSTEES



CASE LAW UPDATE



IN BRIEF

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CASE LAW UPDATE

His Beatitude, Archbishop Torkom Manoogian, Armenian Patriarch of Jerusalem v Yolande Sonsino and Others 5 July 2002.

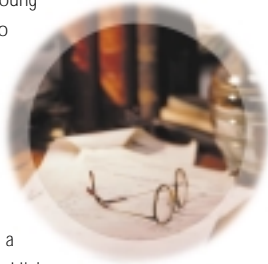
FACTS

This case dealt with whether a settlement created a valid charitable trust, and if so, what were its precise purposes and who was the trustee. It was the Armenian Patriarch of Jerusalem who sought the determination of the court. The defendants were Mrs Y Sonsino (the residuary beneficiary under the settlor's Will), National Westminster Bank Plc (the named trustee of the settlement) and H M Attorney General (representing the Crown as protector of charities).

Without going into all the complicated details of this case, the main points which arise from it and which make it a useful decision are as follows:-

It was held that the "advancement in life" of young people i.e. providing training to enable them to earn their own living, is a charitable purpose and it is not necessary to prove that those young people are poor. The Judge cast doubt, although he did not decide the point in the case, on the misapprehension that the majority of trustees of the charity must be resident in England and Wales for a charity to be with in the "control" of the High

Court. In addition, the Judge did confirm the approach that the trustee which is responsible for the administration and the holding of the trust fund does remain the trustee of the charity even if there is someone else who makes decisions relating to the application of income and has the power to direct certain investment decisions.



ACCOLADE FOR LEADING CHARITY LAWYER

A survey of the country's leading law practices has once again acknowledged Rollits as one of the top law firms in the region.

The 2002 edition of 'The UK Legal 500' this year recommends the firm for its work in 13 areas of law - corporate and commercial, commercial litigation, commercial property, employment, charities, planning, housing associations, intellectual property, licensing, health and safety, personal tax, trusts and probate, personal injury (defendant) and agriculture and estates.



Once again the publication recommends Rollits for its work in the Charity sector with partner Ros Harwood singled out for special mention. It says: "At Rollits, the impressive specialist knowledge of Ros Harwood, secretary of the Charity Law Association, continues to strengthen the firm's client base. Her 'huge energy' attracts a wide spectrum of national and international charities. Her team recently acted

on a £50m joint venture between a charity, local authority and university."

IN BRIEF

Chancellor Gordon Brown has announced that voluntary organisations will be eligible to apply to a £125 million fund set up to help the sector deliver "world class public services". It is not known at this stage how the fund is to be spent but further announcements are expected and Rollits will let you know as soon as further information is to hand.



The Performance and Innovation Unit's long awaited review of the voluntary sector (now renamed the Strategy Unit Review) was published on 25 September. Tony Blair states that this report sets out a package of measures which will modernise the law and enable a wide range of organisations to be more effective and innovative, whilst maintaining the high levels of public trust and confidence which are vital to the continued success of the sector. The report is a consultation document with the consultation period lasting three months.

Ros Harwood, has been re-appointed as the Honorary Secretary of the Charity Law Association (CLA) for a further three years. The CLA, with nearly 700 members, is an educational organisation at the forefront of the understanding and development of charity law.

INFORMATION

If you have any queries on any aspect of Charity Law please contact:
Ros Harwood on 01904 625790

This bulletin is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form.

Action should not be taken without obtaining specific advice.

We hope you have found this bulletin useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 1 October 2002
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