Balancing Personal Risk against Personal Reward: The Challenge of Charity Trusteeship

By Kirsty McEwen

Overview of Today's Session

- Nature of charity.
- Trustees' fiduciary and statutory duties.
- Risk of personal liability – impact of structure.
- Avoiding, managing and mitigating risk.
- Increased role of regulation of Third Sector.
- Charity trusteeship – rewards and benefits.

HIGGS
&SONS
SOLICITORS

Nature of Charity

Nature of Charity

- Section 1 Charities Act 2011 (**"CA2011"**) defines a charity as an institution (in England & Wales) which is:
  - established for a charitable purpose only; and
  - subject to the jurisdiction of the High Court.

- Section 2(1) CA2011 provides that a charitable purpose must fall within a *defined* charitable purpose and be for public benefit.

- Section 3(1) CA2011 defines various purposes capable of being charitable.

- Public benefit is a legal requirement – no definition in CA2011 – Charity Commission (**"CC"**) responsible for guidance

Nature of Charity

- Charities can be:-
  - Unregistered
  - Registered
  - Exempt
  - Excepted

- CC is principle regulator for charities in England & Wales which are unregistered, registered or excepted.

- Registration is a regulatory requirement – it does not define charitable status.

- Exempt charities – regulated by primary regulator – but subject to charity law.

Nature of Charity

- Charities in Scotland – OSCR.
- Charities in Northern Ireland – CCNI.
- Charities are subject to a raft of legislation.
- Primary statute applicable to charities is CA2011 – a consolidating act.

Nature of Charity

Advantages of charitable status:

- Usually exempt from income/corporation tax (in the case of some types of income), capital gains tax, or stamp duty.
- Gifts to charities are free of inheritance tax.
- 80% mandatory business rates relief – 20% discretionary – on buildings used and occupied to further charitable aims.
- Special VAT treatment in some circumstances.
- Ability to raise funds more easily from public, from grant making trusts and from local government.
- Able to give public assurances that they are monitored, regulated and advised by CC.
- (Limited ability) to get information from and seek advice from CC.

Trustees' Duties

Charity Trustees?

- People who have general control and management of a charity's administration.
- Ultimately responsible for the charity.
- Definition in statute – section 177 CA2011.
- May also be known as the board, the management committee, or the directors.
- Title 'trustee' is helpful because it gives a sense of trust that law places in them.

Trustees Duties - General

- Overriding duty is to advance purposes of charity.

- In doing so they have several basic responsibilities:-
  - Responsible for proper administration of their charity.
  - Accept ultimate responsibility for everything charity does.
  - Act reasonably and prudently in all matters relating to charity.
  - Safeguard and protect assets of charity.
  - Duty to act collectively.
  - Act in best interests of charity.
  - Avoid any conflict of interest between personal interests and those of charity.

Trustees Duties - Fiduciary

- Charity trustees subject to a general fiduciary duty.
- Must act in good faith.
- Duty encompasses principles of no conflict, no profit, undivided loyalty and confidentiality.
- Duty applies to all charity trustees, irrespective of structure.

Trustees Duties – Statutory

- Statutory duty of care under section 1 Trustee Act 2000.
- Trustees must act with reasonable care and skill.
- Higher duty applicable to Trustees who are acting in the course of business or profession, or who hold themselves out as having a special knowledge or experience.
- Applies to trusts, other unincorporated bodies.
- Considered in principle to be as applicable to corporate bodies e.g. companies limited by guarantee.

Trustees Duties – Statutory

Companies Act 2006 – defines directors duties which apply to trustees of charitable companies.

- Duty to act within powers.
- Duty to promote success of company.
- Duty to exercise independent judgment.
- Duty to exercise reasonable care, skill and diligence.
- Duty to avoid conflicts of interest.
- Duty not to accept benefits from third parties.
- Duty to declare interest in proposed transaction or arrangement

HIGGS &SONS SOLICITORS

Structure – Impact on Personal Liability

Structure & Liability

Trusts

- Unincorporated structure – no legal personality – traditional structure.
- Commonly used by organisations that do not deliver services, do not have staff, own property etc. (e.g. grant making foundations).
- Trust operates by Trustees acting in their own name, but using charity funds.
- Potential unlimited personal liability – on a joint & several basis – to extent that assets insufficient to meet liabilities.

Structure & Liability

HIGGS & SONS SOLICITORS

Unincorporated Associations

- Unincorporated structure – no legal personality.
- Membership organisations.
- Association operates by Trustees acting in their own name, but using charity funds.
- Potential unlimited personal liability – on a joint & several basis – to extent that assets insufficient to meet liabilities.

Structure & Liability

Company Limited by Guarantee

- Incorporated body – separate legal personality .
- Trustees = directors; Members = separate; or same as trustees
- Company liable for debts, except in certain circumstances.
- Liability of members / trustees limited to amount of guarantee.
- Regulated by both Companies House and CC.

Structure & Liability

Charitable Incorporated Organisations (CIO)

- New structure post 2006 – exclusive to charities – two types: Foundation and Association.
- Separate legal personality
- CIO liable for debts, except in certain circumstances.
- Liability of members / trustees limited.
- Registered with and regulated solely by CC.

Structure & Liability

Other structures for charities not covered here:-

- BenComs.
- Charities established by Act of Parliament.
- Charities established by Charity Commission Scheme.
- Charities established by Privy Council Charter.
- Charities established by gift / by Will / on transfer of land.

Other Structures

Not for Profit Structures – not Charitable

- Community Interest Companies (CIC).
- Community Amateur Sports Clubs (CASCs).
- Co-operatives (which are not BenComs).
- Other forms of mutual e.g. credit unions, unregistered and registered friendly societies, etc.

Structure & Liability

- Trustees are naturally concerned about liabilities they may assume on becoming a charity trustee.

- Two types of potential liability:-

- Liabilities to third parties that occur in the course of running charity e.g. breach of contract etc.
  - Extent to which trustees are personally liable will depend on legal form of charity.

- All charity trustees are, in principle, vulnerable to claims instigated by CC or AG (or other trustees) in case of a breach of trust or duty e.g. breach of governing document etc.
  - These claims are not affected by legal form of charity.

Structure & Liability

HIGGS &SONS SOLICITORS

Trusts / Associations / other unincorporated forms

- Assets insufficient to meet liabilities.
- Trustees personally liable on a joint & several basis.
- i.e. any Trustee may be sued for whole amount.

Companies / CIOs / other incorporated forms

- Assets insufficient to meet liabilities,.
- X will miss out because charity will be insolvent.
- Trustees are not personally liable .
- Except in circumstances of wrongful or fraudulent trading.

Structure & Liability

Statutory Relief

- Section 191 CA 2011 – CC can relieve trustees of liability, if it considers trustees have acted honestly and reasonably.

- Section 110 CA2011 – Trustees who seek advice from CC are protected from liability if they are later discovered to have committed a breach of trust.

- Court has powers to relieve which mirror those of CC.

- NB. CC has far-reaching powers to supervise and intervene in charity activity – including to appoint an Interim Manager.

- Those powers are being extended by statute

HIGGS &SONS
SOLICITORS

Avoiding, managing and mitigating risk

Avoiding, Managing and Mitigating Risk.

- Robust governance.
- Effective and organised internal administration and management
- Implementation of internal policies and procedures.
- Rigorous mechanisms for financial control.
- Clear management structures.

Avoiding, Managing and Mitigating Risk

HIGGS & SONS SOLICITORS

Insurance

- Covers various risk – important to check terms to understand extent of cover.

Trustee Indemnity Insurance

- Frequently misunderstood.
- Protects Trustees in event of claims against them personally.
- Precise cover will depend on terms of individual policy.
- Generally speaking covers breach of trust claims and wrongful trading.
- Often covers associated legal costs.
- Personal liability of trustees for debts to third parties not covered.
- Policy almost certainly restricted to cases where Trustees have acted in good faith.

Avoiding, Managing and Mitigating Risk.

Trustee Indemnity Insurance

What is not covered?

- Deliberate dishonest acts.
- Fines and penalties imposed in criminal proceedings or of a regulatory nature (s.189(2)(a) CA 2011).
- Liability incurred by trustee where trustee knew or ought reasonably to have known that conduct was not in the best interests of the charity.
- Liability associated with defending criminal proceedings brought against trustee for fraud or dishonesty.

Avoiding, Managing and Mitigating Risk.

HIGGS & SONS SOLICITORS

Incorporation

- Best way for Trustees to protect themselves from personal liability.
- Advantages:-
  - Legal personality.
  - Limitation of risk.
  - Clear ownership structure/governance.
  - Developing a sense of ownership.
  - Public accountability.
  - Recognition by financial institutions and investors.
  - Availability of Equity finance.

Avoiding, Managing and Mitigating Risk.

HIGGS & SONS SOLICITORS

Incorporation

An unincorporated charity should consider “incorporation” if **any, some, or all** of the following apply:-

- Charity is or will be quite large;
- Charity is or will have employees;
- Charity does or will deliver charitable services under contractual arrangements;
- Charity does or will regularly enter into commercial contracts;
- Charity is or will be the owner of freehold/leasehold land or other properties.

- My recommendation – unincorporated status is only sensible if you are a grant making body.

Avoiding, Managing and Mitigating Risk.

HIGGS & SONS SOLICITORS

Process of Incorporation

- New organisation is set up and registered with CC.
- That organisation can be a company limited by guarantee or a CIO.
- Then all of assets and legal obligations of existing charity are transferred to new charity by way of transfer agreement.
- Then practical steps dealt with in terms of physical transfer of assets etc.
- “Merger” is registered with CC.
- (Usually) existing charity is dissolved.
- Complex process – specialist legal and accountancy advice will be required.
- But one off process and cost – and legitimate expense.

HIGGS &SONS SOLICITORS

Increased Role of Regulation

Increased Role of Regulation

- Shift towards more robust and aggressive regulation.
- In light of rise in high profile cases of malpractice, abuse of charity etc.
  - Olive Cooke
  - Kids Company
  - Cup Trust
- Trustees need to be more aware than ever of their duties and responsibilities.
- CC in particular – stated focus on its investigative and regulatory work – where it can have its biggest impact.
- Move away from being a “friend” to the sector.

The Fundraising Review

Background

- Conducted by Sir Stuart Etherington - Chief Executive of NCVO).

- Objective:
  - Review self regulation of charity fundraising
  - Conduct a detailed assessment of model of self regulation currently adopted in charitable fundraising.

- Due to rise in high profile cases of malpractice, panel would conduct assessment and provide a number of recommendations.

- Recommendations would be aimed at both restoring public confidence and ensuring protection of beneficial interests.

The Fundraising Review

Findings

- Review highlighted and critiqued existence of three main charitable bodies:
  - Fundraising Standards Board (“FSB”)
  - The Institute of Fundraising (“IoF”)
  - The Public Fundraising Association (“PFA”)

- Fundamental flaw in membership structure – low levels of resources, lack of sanctions and voluntary membership.

- Absence of a single code of conduct and overlap between codes of conduct contributed to a lack of public confidence.

- Significant failures in system of self regulation.

The Fundraising Review

Recommendations

- **New fundraising Regulator** – The Fundraising Regulator
- Independent of Government but accountable to Parliament.
- Regulate any type of fundraising activity in the UK – eliminating element of voluntary membership.

- **Co-Regulation**
- CC work alongside Fundraising Regulator.
- CC role in cases of potential breaches of trustees duties.
- CC involved where complaints raised in relation to fundraising activities of charity.

The Fundraising Review

Recommendations

- **Single code of practice**
- Collate and harmonise three codes currently utilised by IoF, Fundraising Promise and PRFA rule book.
- Incorporate principles set out in CC's CC20 Guidance.

- **Single professional institute of fundraising**
- IOF and PRFA should merge into a single professional fundraising entity.

The Charities (Protection and Social Investment) Bill

- The Bill passed its last substantive stage of debate on 2 February 2016 and is now set to receive Royal Assent.

- Overarching aim is to increase powers of CC, thereby tightening regulation of charities and their trustees.

The Charities (Protection and Social Investment) Bill

Key Provisions

- CC ability to issue an official warning to charity in case of a suspected breach of duty or other form of misconduct.
- Discretionary power for CC to disqualify people from trusteeship.
- Will apply to individuals with a criminal conviction for particular offences, including:
  - Money laundering;
  - Terrorism; and
  - Sexual offences.

HIGGS & SONS

SOLICITORS

Personal Reward – the Value of Charity Trusteeship

Personal Reward

- One of most important roles in voluntary sector.
- Give direction to a charity – ultimately responsible for its activities and development.
- Put your skills and experience to use – make a lasting difference to a cause you care about
- Learn about management and strategy side of charities by taking on a leadership role – develop transferable skills.
- Work with new and interesting people from diverse background
- Enhance your CV – may open doors to new career paths
- Increase your opportunities to network – this can grow both charity and your personal network.

Q & A

Contact details

HIGGS & SONS SOLICITORS

Kirsty McEwen

Head of Charity & Not for Profit Team

E-mail:
kirsty.mcewen@higgsandsons.co.uk

Direct dial: 01384 327322

Mobile: 07720 740966

Address: Higgs & Sons, 3 Waterfront Business Park, Brierley Hill, West Midlands, DY5 1LX

Website: www.higgsandsons.co.uk