

Border Patrol Around the World

Charities and Private Benefit: Drawing a Line in the UK*

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INTRODUCTION

This paper will examine the extent to which charities and private benefit may co-exist in the UK. The reach of charities and their diversity is so great that private benefit may occur in any number of contexts. This paper will divide the subject into three broad areas: private benefit to third parties who are not beneficiaries of the charity; private benefit to charity donors; and, private benefit to charity trustees. It will be seen that the principles that will apply in these areas are complex and charities may well find themselves falling foul of the ‘rules’. The consequences when they do so are not uniform. In certain circumstances, private benefits must be returned to the charity concerned. Alternatively, the financial sanction may be in the form of loss of tax relief. This may affect either the person in receipt of the private benefit or the charity that provided it. In other cases, the sanction may involve the intervention of the Charity Commission¹ which may exercise one or more of its supervisory powers over the charity concerned.² The ultimate sanction is the loss of charitable status as a result of the extent of the private benefit that is being enjoyed.

Before turning to the three broad areas of private benefit and a consideration of where the line is drawn, the paper will commence with a word about public benefit.

¹ In England and Wales. Future references to the Charity Commission or the Charities Acts refer to the situation in England and Wales. For constitutional purposes, charity law is a devolved matter in the UK, for purposes other than tax. In the past, provisions for regulating charities have differed significantly in each jurisdiction, but Scotland now has a similar regulatory regime to that in England and Wales, as a result of the implementation of the Charities and Trustee Investment (Scotland) Act 2005, and reforms in Northern Ireland, through the implementation of the Charities Act (Northern Ireland) 2008, have also introduced a similar regime.

² See e.g. the Commission’s recently published report, Charity Commission (2011) *Charities Back on Track 2010-2011*, London: Charity Commission, in which it describes a number of cases where intervention was required.

PUBLIC BENEFIT

Public benefit has always been an essential element in charities. It is this factor that distinguishes charitable trusts from private trusts, and it is the public benefit that is often said to justify the advantageous taxation treatment afforded to charities.³ The Charity Commission describes it as a kind of covenant that charities have with society: charities bring public benefit and, in their turn, are accorded high levels of trust and confidence and the considerable benefits of charitable status.⁴ As well as significant tax advantages and certain legal privileges, charities can access funds which others – even other voluntary organisations – cannot; volunteers and donors give, respectively, time and money.

The Charities Act 2006 now provides the first statutory definition of charity and this includes the need for a charitable purpose to be for the public benefit.⁵ There have always been two essential elements of the public benefit requirement: first, the pursuit of an organisation's purposes must be capable of producing a benefit which can be demonstrated and which is recognised by law as beneficial;⁶ and, secondly, that benefit is provided for, or available to, the public or a sufficient section of the public.⁷ In addition, there should be no undue private benefit. A charity may provide private benefits so long as those benefits directly contribute towards achieving its charitable purposes (e.g. paying a bookseller for books that are given by the charity to children where the charity is set up for the advancement of education) and/or are a necessary result of carrying out those purposes (e.g. where local businesses benefit from increased trade as a result of a charity undertaking projects to regenerate the area).

The fact that every charity's main aims must be exclusively charitable does not mean that the sole effect of the activities of the body must be to promote charitable aims. It *does* mean that any benefits to individuals of a non-charitable character, which result

³ See e.g. dicta of Lord Cross in *Dingle v Turner* [1972] AC 601 (HL).

⁴ Charity Commission (2008) *Charities and Public Benefit*. The Charity Commission's general guidance on public benefit, London: Charity Commission, 3.

⁵ See now the statutory definition of charitable purposes contained in Charities Act 2006 (CA 2006) s.2.

⁶ See e.g. *Gilmour v Coats* [1949] AC 426 (HL).

⁷ *Verge v Somerville* [1924] AC 496 (PC).

from its activities, must be of a subsidiary or incidental nature. There is a distinction between a private benefit which is a substantial part of the aim (i.e. an end in itself, which is not legitimate for a charity), and one which is given or promoted only with a view to carrying out a main charitable aim (which may be given by a charity). This involves a question of degree, which will need to be considered in the circumstances of each case.

PRIVATE BENEFIT TO THIRD PARTIES WHO ARE NOT CHARITY BENEFICIARIES

Whilst English charity law is strict in requiring a public benefit in order for a purpose to be charitable, the converse proposition may also be relevant. Any private benefit derived from a 'charitable' purpose may detract from its charitable nature. Difficulty arises when the pursuit of a charitable purpose has the result that people who are not beneficiaries happen to reap some benefits. Where third parties benefit from a charity, then those sorts of 'private' benefits must be incidental, which means they are a necessary result, or by-product, of carrying out the charity's aims. Where private benefits are more than incidental this might mean that the organisation is set up for private, rather than public, benefit and so might not be charitable.

In order for a private benefit to be countenanced, it must be shown to be an incidental consequence of the pursuit of a public benefit. For example, in *Incorporated Council of Law Reporting for England and Wales v AG*,⁸ the fact that publication of law reports supplies lawyers with tools of their trade did not destroy the charitable basis of the exercise, which was inherently educational. Buckley LJ commented that the private advantage was, 'incidental to or consequential on the primary scholastic function of advancing and disseminating knowledge of the law, and [did] not detract from the exclusively charitable character of the council's objects'.⁹

Similarly, the Court of Appeal has decided that the Royal College of Nursing exists for the advancement of nursing - a charitable object - and not the advancement of the nursing profession, even though the improvement of nursing services might well have

⁸ [1972] Ch 73 (CA).

⁹ *Ibid*, at 103.

involved better pay and conditions for nurses.¹⁰ However, it has also been held by the House of Lords that the nurses' professional body, the General Nursing Council, which was formed to regulate the profession of nursing and to make rules for admission to the profession, is not a charity.¹¹ This is despite the fact that ultimately public advantages could be expected to result from the Council's activities. Here, protection and advantage to those practising nursing - a private advantage - was held to be the primary object. Conversely, any charitable benefit to the community at large was merely incidental.

In general, an acceptable private benefit is a necessary result, or by-product, of carrying out a charity's aims if it follows from some action that is taken, and is only taken, with the intention of furthering the charity's aims. In addition, the amount of private benefit should be reasonable in the circumstances.¹² In the words of Rowlatt J,¹³ 'the question which emerges in all these cases is: Is there so much personal benefit ... as to be incapable of being disregarded? ... It is a question of degree and a question of fact'.

Any misuse of charity assets for private benefit can damage public confidence in a charity, can affect the charity's ability to operate for the public benefit and is likely to amount to mismanagement or misconduct.¹⁴ If it is determined that the balance between public and private benefit has swung too far in the wrong direction, the body will be denied charitable status by the Charity Commission. If the body is already a registered charity, the Charity Commission will endeavor to ensure that the balance in favour of public benefit is regained. Ultimately, the Commission will remove an organisation from the register of charities if it no longer appears to it to be a charity.¹⁵

From a taxation point of view, charities may claim exemption from tax on most forms of income and capital gains, provided that they are applied to charitable purposes

¹⁰ Royal College of Nursing v St Marylebone Corporation [1959] 1 WLR 1077 (CA).

¹¹ General Nursing Council for England and Wales v St Marylebone Borough Council [1959] AC 540 (HL).

¹² Charity Commission (2008), Charities and Public Benefit. The Charity Commission's general guidance on public benefit, London: Charity Commission, 27.

¹³ The Midland Counties Institution of Engineers v IRC (1928) 14 TC 285 (CA) at 293.

¹⁴ See e.g. the case studies detailed in Charity Commission (2011) Charities Back on Track 2010-2011, London: Charity Commission.

¹⁵ Under Charities Act 1993 (CA 1993) s.3(4).

only.¹⁶ So, in *IRC v Educational Grants Association Ltd*,¹⁷ evidence showed that 76-85% of the association's income had been applied to educate the children of persons connected with an associated commercial company. Tax relief was lost in this case, as the association had failed to apply its funds for charitable purposes.

Under complex tax rules on non-qualifying expenditure, which were first introduced in 1986 and then re-written in the Finance Act 2006,¹⁸ tax relief may be restricted where:

- an item of expenditure is incurred wholly for non-charitable purposes;
- an item of expenditure is incurred partly for charitable purposes and partly for non-charitable purposes; or,
- a charity is treated as incurring non-charitable expenditure.¹⁹

Now, non-charitable expenditure by a charity leads to a restriction of equal amount on the amount of its income that is tax exempt. The revised rules presume that non-charitable expenditure is funded from income on which tax relief has been obtained, so that there is a corresponding restriction in the exemption. The income and gains eligible for tax relief are restricted by £1 for every £1 of non-charitable expenditure. Under the previous rules, the effect of non-charitable expenditure on the tax exemption was calculated in a more complex, but generally less far-reaching, manner.

PRIVATE BENEFIT TO CHARITY DONORS AND CONNECTED PERSONS

This is heavily regulated by complex tax regulations so that the tax effectiveness of charitable donations is lost if there is private benefit to donors and connected persons, beyond that allowed by the legislation.

¹⁶ See e.g. the exemption for property income, in Income Tax Act 2007 (ITA 2007) s.531.

¹⁷ [1967] 2 All ER 893.

¹⁸ The rules are now repeated in the tax legislation three times: once for income tax - ITA 2007, ss.539-564; once for capital gains tax - Capital Gains Tax Act 1992, ss.256(3)-(5), 256A, 256B; and, once for corporation tax - Corporation Tax Act 2010 (CTA 2010) ss.492-517.

¹⁹ This will apply where a charity makes certain payments to overseas bodies and non-qualifying investments or loans.

Gift Aid Rules re Private Benefit

Under the Gift Aid scheme,²⁰ any cash donations (of any sum with no maximum or minimum) that a taxpayer makes to a charity (after making a declaration that they are a UK taxpayer and that they wish their donation to be subject to Gift Aid) are treated as being made after deduction of income tax at the basic rate.²¹ The recipient charity can then reclaim the basic rate income tax paid on the gift from Her Majesty's Revenue & Customs (HMRC). For a basic-rate taxpayer, this adds approximately 25% to the value of any gift made under Gift Aid. In addition, higher-rate taxpayers can claim income tax relief, amounting to the difference between the basic rate and the higher rate of income tax.²²

Tax relief for donations given under the Gift Aid scheme is subject to a number of conditions,²³ one of which is that there are no 'benefits associated with the gift'²⁴ beyond those authorised by statute.²⁵ For illustrative purposes, the provisions on income tax will be explained.²⁶ Benefits associated with a gift are *not* authorised for the purposes of satisfying the definition of a qualifying donation if either:²⁷

- (1) the total value of the benefits associated with the gift exceeds the variable limit, which is:
 - (a) 25% of the amount of the gift, where the amount of the gift is £100 or less,
 - (b) £25, where the amount of the gift is between £100 and £1,000,
 - (c) 5% of the amount of the gift, where the amount of the gift is more than £1,000; or

²⁰ ITA 2007, pt.8, ch.2 contains the relief for individual donors. CTA 2010, pt.6 contains the relief for corporate donors. The position of the receiving charity is governed by ITA 2007, pt.10 for charitable trusts and CTA 2010, pt.11 for charitable companies.

²¹ Currently 20%.

²² Currently 40%.

²³ For income tax purposes, a 'qualifying donation' is defined in ITA 2007, s.416.

²⁴ Defined in ITA 2007, s.417.

²⁵ See *ibid*, ss.418–421.

²⁶ Similar conditions apply to corporation tax relief. See CTA 2010, pt.6, ch.2.

²⁷ ITA 2007, s.418, as amended. See also *ibid*, s.419 for a modified version of these rules where gifts and benefits are linked to periods of less than one year.

- (2) the sum of:
 - (a) the total value of the benefits associated with the gift, and
 - (b) the total value of the benefits (if any) associated with each relevant prior gift,²⁸ is more than £2,500.

Where the value of benefits might exceed these limits, the donor may specify that part of the payment is to be treated as payment for the benefits and part is to be treated as a donation.²⁹ This treatment can only apply where the item has a readily ascertainable value and the excess has a clear donative purpose. Provided that the donor specifies this before or at the time of making the donation, the part of the payment that is specified as a donation may qualify as a Gift Aid donation, as long as it satisfies all the conditions for the tax relief. The charity and donor should keep evidence of how the payment was to be split: a copy of a dated letter accompanying the payment, for example. Alternatively, separate payments could be made. Failure to comply with either of these conditions will result in the gift not being a ‘qualifying donation’.

A benefit consisting of a ‘relevant right of admission’ is ignored, so that a donation to a charity with which such a benefit is associated may be a qualifying donation regardless of the value of the benefit.³⁰ ‘Right of admission’ means a right which:³¹

- (1) benefits the donor or the donor and one or more members of the donor’s family (whether or not the right must be exercised by all of them at the same time);
- (2) authorises admission to premises or property to which the public are admitted on payment of an admission fee; and
- (3) authorises admission to those premises or that property without payment of the admission fee or on payment of a reduced fee.

A right of admission is a ‘relevant right of admission’ if:³²

²⁸ Defined in *ibid*, s.418(4) to mean any other qualifying donations to the same charity in the same tax year.

²⁹ See HMRC, Detailed Guidance Notes for Charities, ch.3, Gift Aid, para.3.34.

³⁰ ITA 2007, ss.420–421.

³¹ *Ibid*, s.420(2).

³² *Ibid*, s.420(3)-(5), (7)-(8). See also HMRC, Detailed Guidance Notes for Charities, ch.3, Gift Aid.

- (1) the opportunity to make a gift and to receive the right of admission in consequence is available to the public; and,
- (2) the right of admission is a right granted by the charity for the purpose of viewing property³³ preserved, maintained, kept or created by a charity for its charitable purposes;³⁴ and,
- (3) either:
 - (a) the right of admission applies, during a period of at least 12 months, at all times at which the public can obtain admission;³⁵ or,
 - (b) a member of the public could purchase the ‘same right of admission’,³⁶ and the amount of the gift is greater by at least 10% than the amount the member of the public would have to pay.

If donations are made and benefits are received in exchange which do not fall within the authorised limits, the donations will not qualify for Gift Aid tax relief. This will impact upon both the donor (if a higher rate tax payer) and the charity recipient.

Tainted Donations Rules re Private Benefit

Under the onerous Substantial Donor Rules, introduced in the Finance Act 2006 without prior consultation, charities were liable to face a charge to tax when they entered into ‘relevant transactions’ with ‘substantial donors’.³⁷ The rules were originally introduced because HMRC appears to have become concerned that the various tax reliefs available for donations to charities could be open to abuse where the donor enters into a subsequent transaction with the charity on terms beneficial to the donor. It was not clear that such abuse was widespread and the rules had the potential to impinge upon many

³³ The ‘property’ includes, in particular: buildings; grounds or other land; plants; animals; works of art (but not performances); artefacts; and property of a scientific nature: ITA 2007, s.420(6).

³⁴ Originally, this concession only applied to admission to property belonging to conservation and heritage charities.

³⁵ When private event days could be held to interrupt the public availability of a right of admission, reducing it to a period of less than 12 months, the condition is still satisfied if there are no more than five event days in it: ITA 2007, s.421(2)-(4).

³⁶ See *ibid*, s.421(5) for the definition of the ‘same right of admission’.

³⁷ The rules were ultimately found in CTA 2010, ss.502-510 (for charitable companies) and ITA 2007, ss.549-557 (for charitable trusts).

perfectly legitimate transactions. Charities and their professional advisers increasingly found many anomalous results arising from the operation of the rules which could effectively penalise entirely innocent transactions. The rules had the greatest impact on charities established by private individuals and families, but they have also been of wider application.

The rules placed the onus on the charity to regulate its dealings with any of its ‘substantial donors’ (defined below) since it was the charity that paid the penalty for breach of the rules. Charities were denied their usual reliefs against income and capital gains tax to the extent that the rules were infringed. There were exemptions for transactions on full arm’s length terms, but these applied inconsistently and did not adequately cover all the relevant scenarios.

A ‘substantial donor’ was defined as a person (including a company³⁸ or a trust) who made ‘relievable gifts’³⁹ to a charity in excess of £25,000 in any 12 month period or a total of £150,000 over any six year period. Any person who qualified as a substantial donor under these tests continued to be treated as a substantial donor of that charity for a further five tax years.⁴⁰ The definition of a ‘substantial donor’ also included anyone broadly defined as connected⁴¹ to that donor, casting the net so that the rules embraced a wide range of transactions. Relevant transactions for the purposes of the rules were:

- the sale or letting of property (not confined to land) by a charity to a substantial donor or vice versa;
- the provision of services by a charity to a substantial donor or vice versa;
- the exchange of property between a charity and a substantial donor;
- the provision of financial assistance (including the provision of any loan, guarantee or indemnity) by a charity to a substantial donor or vice versa; and,

³⁸ This does not include a wholly-owned subsidiary of the charity.

³⁹ These were gifts attracting tax relief under various provisions.

⁴⁰ In some cases, charities were obliged to retain records of substantial donors for an 18 year period.

⁴¹ Including spouses, siblings, ascendants and descendants, and also trusts and companies associated with the individual concerned.

- the investment by a charity in the business of a substantial donor (although not if the business is listed on a recognised Stock Exchange).

There were a number of exemptions, so as to exclude arm's length transactions. If a charity infringed the rules by entering into a relevant transaction (unless specifically exempted) with one of its substantial donors, the charity would be penalised by denial of its tax relief. The payment made by the charity to the donor as part of the transaction, or any benefit received by the donor from the transaction (to be determined by HMRC), was treated as non-charitable expenditure by the charity. This meant that tax relief was denied to the charity by restricting its income and gains eligible for tax relief by £1 for every £1 of non-charitable expenditure incurred.

The rules were heavily criticised by charities and advisers, the main criticisms being: the unintended consequences on charities and donors; increased administrative burden; and, the potential to discourage large but wholly legitimate donations to charity.

Eventually, new anti-avoidance rules to replace⁴² the problematic rules were developed, after a period of both informal and formal consultation. The new rules, introduced in the Finance Act 2011,⁴³ focus on a 'purpose test' which is aimed at catching 'tainted charity donations'. Tax relief is denied where the main purpose, or one of the main purposes of the donor in being party to arrangements is to receive an advantage for the donor or connected person directly or indirectly from the charity. In these circumstances, the donation⁴⁴ is deemed a 'tainted donation'. Key to this test is whether the donation and the 'arrangements' would have been entered into independently of one another. The concept of a 'substantial donor' has now disappeared and technically, a donation of any size can be caught as a 'tainted' donation. If a donation is considered to

⁴² No new 'substantial donors' can arise from 1 April 2011, but there are complex transitional provisions in place for existing substantial donors.

⁴³ These are now inserted in CTA 2010, pt.21C (for charitable companies), ITA 2007, pt.13, ch.8 (for charitable trusts) and Taxation of Chargeable Gains Act 1992, s.257A (in relation to capital gains tax).

⁴⁴ Donations from 'qualifying charity-owned companies' are excluded from the ambit of the provisions. Also, benefits which are acceptable under the Gift Aid scheme are ignored.

be a tainted one, tax relief is denied in relation to the whole donation, however small or large the linked advantage may be.

Following significant criticism of the fact that the burden of breaching the old substantial donor rules fell entirely with the charity not the donor, under the new rules, liability for breach falls primarily upon the donor, with the donor losing any tax relief that they would have been entitled to claim. However, the new scheme does not entirely shift the burden from charities, which can remain jointly and severally liable for a new tax charge in circumstances where the charity was party to, and aware of the arrangements.⁴⁵ A new concept of ‘associated donations’⁴⁶ is also introduced. A donation of this sort is connected to the ‘arrangements’ and can become ineligible for tax relief by association even if not in fact ‘tainted’ itself.

It is difficult to envisage the sort of transactions which will be caught by these rules, since other provisions (e.g. those that apply to Gift Aid⁴⁷ or those that require charitable funds to be applied to charitable purposes only) would catch those cases where private benefit is gained from a charitable ‘gift’ and would thereby deny relief in any event.⁴⁸

The financial consequences of breaking the tainted donation rules largely fall on the donors, rather than the charity recipients.

PRIVATE BENEFIT TO CHARITY TRUSTEES AND CONNECTED PERSONS

Conflicts of Interest and Duty

The basic principle is that trustees must not put themselves in a position where their personal interests conflict with their fiduciary duty to act in the interests of the charity, unless authorised to do so. As a result, the general rule is that trustees cannot enter into any transaction which might conflict with their duties as trustee. It follows

⁴⁵ ITA 2007, ss.809ZN-809ZO.

⁴⁶ ITA 2007, s.809ZM and CTA 2010, s.939F.

⁴⁷ Under ITA 2007, s.416 (discussed above) for a donation to be a qualifying donation for the purposes of Gift Aid, there must (inter alia) be no benefits associated with the gift.

⁴⁸ See the critique of these provisions in Kessler, J and Brown, H (2011) *Taxation of Charities and Non-Profit Organisations*, 8th ed, 2011-2012, London: Keyhaven 2011, ch.7.

from the general rule that trustees are not to make any profit from their trust. This has a number of implications. The most obvious form of profit for a trustee is payment, either for being a trustee or for carrying out additional tasks for the charity. In general, trustees are expected to act gratuitously but there are a number of exceptions which will be considered.

Before turning to payments to trustees, there are other situations where potential conflict might arise. For example, if a trustee has an interest in a company or a business and the charity enters into any contract with that company or business, the trustee might indirectly benefit as a result of the contract. The trustee's duty towards the charity might then be compromised by the trustee's personal interest.

Self-Dealing

The purchase of the trust property by a trustee is a breach of the duty not to profit from the trust. The 'self-dealing rule' provides that if trustees sell trust property to themselves, the sale is voidable (i.e. can be set aside) by any beneficiary, however fair the transaction may have been.⁴⁹ Likewise, trustees must not sell or loan their own assets to the trust.⁵⁰ Moreover, trustees will be obliged to account as constructive trustees for profits received by virtue of their position as trustee, including any gains acquired through the exploitation of some opportunity arising out of the trust office. A charity trustee who renews a lease in the trustee's own name will be held as a constructive trustee of that acquisition.⁵¹

In any case where the trustees consider that a transaction into which they seek to enter is expedient in the interests of the charity, but may or will otherwise fall foul of the

⁴⁹ The transaction is voidable at the instance of the Attorney-General: *A-G v Earl of Clarendon* (1810) 17 Ves 491 at 500 (lease); and see *Holder v Holder* [1968] Ch 353 (CA) (private trust). On the self-dealing rule, see e.g. *Tito v Waddell (No 2)* [1977] Ch 106 (HC) at 240-241; *Re Thompson's Settlement* [1986] Ch 99 (HC) (see Sherrin, CH 'The Shepherd Must Not Become a Wolf' [1986] TL & P 66); *Movitex Ltd v Bulfield* [1988] BCLC 104 (HC).

⁵⁰ *Gilbert v McLeod Infirmary* 64 SE 2d 524 (1951).

⁵¹ *Keech v Sandford* (1726) Sel Cas Ch 61.

self-dealing rule, they can apply to the Charity Commission for an order⁵² sanctioning the transaction in question. If need be, they can apply to the court for its approval of the relevant transaction either under its statutory jurisdiction⁵³ or under its inherent jurisdiction to supervise and if necessary intervene in the administration of trusts.⁵⁴

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 Commission or the Attorney General as protector of charities. The trustee may also be liable to the charity for any loss caused by their actions.

Directors Fees

Similarly, a charity trustee who uses the position as trustee to secure a directorship may not keep the directors fees without express authority to do so.⁵⁵ Where trustees are trying to make out a case for acting as remunerated directors of a non-charitable trading subsidiary, they must show that this course is necessary in the interests of the charity and that the level of remuneration, if necessary at all, is reasonable having regard to the services that they have to render.⁵⁶ It may not be desirable to have all the trustees acting as such directors.

Trustee Payment

Generally a trustee cannot be paid for any work carried out on behalf of the trust unless this is authorised by the trust itself. Commonly, of course, a charity's governing documents will allow professional trustees (such as solicitors or accountants) to charge fees for services actually rendered to the trust. In a case where a trustee has been paid or

⁵² Under CA 1993, s.26.

⁵³ Under Trustee Act 1925, s.57.

⁵⁴ For a recent discussion of the court's inherent jurisdiction, see *Schmidt v Rosewood* [2003] 2 AC 709 (PC).

⁵⁵ *Re Francis* (1905) 92 LT 77 (HC); *Re Macadam* [1946] Ch 73 (HC). Cf *Re Dover Coalfield Extension Ltd* [1908] 1 Ch 65 (CA); *Re Gee* [1948] Ch 284 (HC).

⁵⁶ See e.g. *Smallpiece v AG* (Unreported) [1990] Ch Comm Rep.,36-37.

remunerated without express authority, the trustee is liable to reimburse the trust for that remuneration.

Ever since the case of *Robinson v Pett*⁵⁷ in 1734, it has been ‘an established rule that a trustee ... shall have no allowance for his care and trouble: the reason of which seems to be, for that on these pretenses, if allowed, the trust estate might be loaded, and rendered of little value’. The voluntary principle of trusteeship has been one of the defining characteristics of the charitable sector. There are over 900,000 charity trustees in England and Wales, and a significant majority act without payment of any kind, or with only their basic expenses covered.⁵⁸ This is an important principle, contributing greatly to public confidence in charities. The Charity Commission (and indeed, in the main, the charity sector) is of the view that it is, and should remain, the norm. Any departure from it is a significant step requiring careful deliberation and proper authority.

There is statutory provision enabling trustees to reimburse themselves or pay out of the trust funds all expenses properly incurred (e.g. travel expenses) when acting on behalf of the charity.⁵⁹ In such circumstances, of course, there is no question of trustees profiting from the trust: they simply recover what is owed to them. Paying reasonable expenses is a good way of ensuring that the whole trustee board participates in running the charity and, more generally, of ensuring that being a trustee is open to all. This might be particularly relevant when seeking to recruit younger trustees or to ensure that people on low incomes can participate. Unless by personal choice, no trustee should be ‘out of pocket’ as a result of carrying out their normal duties and responsibilities.

The principles relating to payment or benefit to a trustee cover a number of different situations:

- payment for being a trustee;
- payment as compensation for loss of earnings;

⁵⁷ (1734) 3 P Wms 249 at 251.

⁵⁸ Charity Commission (2008) *Trustee Expenses and Payments*, CC11, London: Charity Commission, 2.

⁵⁹ Trustee Act 2000, s.32.

- payment for being an employee of the charity at the same time as being a trustee – for example, acting as a trustee and as paid chief executive; and,
- payment for services or goods that they provide to the charity.

1. Payment for Being a Trustee

Unpaid trusteeship has always been a distinctive feature of charitable activity, and greatly enhances public confidence and trust in charities. There is a general expectation that charity assets should be used directly for the purposes of the charity. As a consequence, a charity will need specific authority to pay a trustee for serving as a trustee. This may be found in its governing document,⁶⁰ or it may be provided by the Charity Commission, or, more rarely, by the courts. The equitable rule may only be overridden where this is clearly in the interests of the charity and where it provides a significant and clear advantage over all other options.

Where the promoters of a new charity include a charging clause in the governing document, then, provided that it is limited to a reasonable sum for services provided by a trustee and it can be shown to be justified, the Charity Commission is likely to accept the charity for registration.⁶¹ With an existing charity that has no charging clause in its governing documents, authority to add one will be needed: the trustees cannot use the amending powers in the document to confer a benefit upon themselves.⁶²

Trustees need to be clear that they can justify a decision to pay one or more of their trustees, and that they can also manage the risks involved in doing this. A major risk area will be the need to manage conflicts of interest, and the more trustees who stand to benefit, the bigger the risk and potential disadvantage, particularly in terms of conflicts of interests. Trustees should consider carefully whether there is likely to be any adverse effect on the reputation of the charity amongst its supporters and users - the charity might

⁶⁰ Ibid, s.29 creates an implied professional charging clause applicable to all non-charitable trusts which do not make provision for remuneration of professional trustees.

⁶¹ See McCall, C 'Remuneration of Trustees' (1993) CL & PR 192–201 and Picarda, H 'Remuneration of Charity Trustees' (1987) NLJ Annual Charities Review 24 for further detailed critique.

⁶² Re French Protestant Hospital [1951] Ch 567 (HC).

attract criticism if payment appeared to be excessive and widespread. An open and transparent approach to explaining the reasons for payment, and to accounting for them, will help to reduce the level of risk.

The Charity Commission will normally only approve trustee payment where a charity's complexity of operation has led to an unusually high burden of trusteeship. This will usually involve a trustee exercising a higher degree of responsibility and supervision in a complex field of activity, perhaps because of the breadth and range of activities undertaken by the charity.

It is often argued that payment can overcome difficulty in recruiting new trustees. There are, however, many methods of recruitment, including targeted advertising and online publicity, use of specialist agencies and trustee brokerage services, and use of open selection processes. Before considering payment, charities should review the effectiveness of their recruitment mechanisms, since the Charity Commission will be looking for evidence that there is a lack of volunteers with the right skills.

It is likely that a charity will expect a trustee who is paid to have special knowledge and experience and that consequently the level of care and skill expected of that trustee will be higher than for someone who is not paid.⁶³

In those cases where it is necessary to apply to the Charity Commission to obtain authority to remunerate the trustees in individual cases, the trustees must make out a detailed case. They will need to show:⁶⁴

- what steps have been taken to recruit trustees without payment - if none, then reasons should be given;
- why it considers that there are clear and significant advantages to the charity in paying a trustee rather than, for example, spreading duties among other

⁶³ See Trustee Act 2000, s.1.

⁶⁴ Charity Commission (2008) *Trustee Expenses and Payments*, CC11, London: Charity Commission, 40.

- trustees, or increasing the number of unpaid trustees (if the governing document allows it);
- whether the functions to be carried out are genuinely those of a trustee - as distinct from functions of an employee or a consultant. Has the charity made the right balance between its executive and non-executive functions?
 - that the payment can be shown to be reasonable and affordable, and will not affect the charity's ability to carry out its objects;
 - what risks they have identified and how they will manage them;
 - how the unpaid trustees will be able to review performance (including dealing with poor performance), judge value for money and, if necessary, bring the payments to an end; and,
 - how the conflicts of interest will be managed, so that the 'conflicted' trustee can still take an effective role in the governance of the charity.

The Charity Commission would normally expect to give its authority where the number of trustees benefiting is in a minority.⁶⁵ Where a charity has a single trustee (which might be an individual or a corporation such as a local authority, or a bank or insurance company), payment decisions cannot be taken without a conflict of interest. It will be significantly more difficult to make a case for payment, particularly where statutory funds might also be available to administer the charity.

The Charity Commission includes several case studies in its guidance on trustee payment⁶⁶ and these are illustrative of its approach to requests to approve payment. For, example, a large grant-making charity applied for remuneration for future chairs and certain trustee posts on the basis of the high level of time and commitment involved. The charity felt that, without offering payment for the time commitment and for the responsibilities that come with oversight of a multi-million pound organisation, it could not attract the right caliber of candidate, and would be likely to attract only those who were retired or wealthy. It provided evidence that, even with a well-targeted recruitment

⁶⁵ Ibid, 40.

⁶⁶ Ibid.

campaign, it was struggling to attract the right caliber of candidate. The Commission approved payment for chairs, but rejected an application for payment of five other trustee posts, for which the charity wished to attract experts in its field. There was little similarity in time commitment compared with the chair, and no evidence that these posts were difficult to recruit for; indeed, previous recruiting campaigns suggested the opposite was the case, as a number of well-qualified candidates had come forward.

The written agreement to pay a trustee must be kept as part of the charity's records as required by law and the payments should be disclosed in the charity's accounts. For charitable companies and other types of charity with a gross yearly income of more than £100,000, that must prepare their accounts on an accruals basis, the SORP 2005⁶⁷ requires them to give details of payments and other benefits to charity trustees and connected persons - including family members and businesses. They are also required to say under what legal authority the payment is made, together with the reason for it. Although there is no legal requirement for this in the case of charities that prepare accounts on a receipts and payments basis, the Charity Commission recommends, as best practice and to enhance transparency, that similar details are provided.⁶⁸

The court also has an inherent jurisdiction to authorise the payment of remuneration to a trustee either prospectively or retrospectively,⁶⁹ and whether the trustee is appointed by the court or out of court.⁷⁰ This inherent jurisdiction 'should be exercised only sparingly and in exceptional cases'.⁷¹ Apart from its inherent jurisdiction, the court also has a qualified statutory power to authorise remuneration where it has appointed a corporation to be a trustee.⁷² Lastly, a common investment scheme may make provision

⁶⁷ Accounting and Reporting by Charities: Statement of Recommended Practice (Revised 2005), para.230.

⁶⁸ Charity Commission (2008) Trustee Expenses and Payments, CC11, London: Charity Commission, 33.

⁶⁹ Boardman v Phipps [1967] 2 AC 46 (HL).

⁷⁰ Re Freeman's Settlement Trusts (1887) 37 Ch D 148; Re Masters [1953] 1 WLR 81 (HC).

⁷¹ Re Worthington [1954] 1 All ER 677 (HC) at 679; Re Barbour's Settlement [1974] 1 WLR 1198 (HC); Re Duke of Norfolk's Settlement Trusts [1982] Ch 61 (CA); Foster v Spencer [1996] 2 All ER 672 (HC).

⁷² Trustee Act 1925, s.42.

for remunerating persons appointed as trustees, even for trustees of a participating charity.⁷³

Using charity funds to pay someone more than is reasonable or without authority may constitute a breach of trust, with the consequence that the trustee who has been paid may be made liable to repay all or part of the payment. The Charity Commission is also of the view that unauthorised payments may be evidence of misconduct or mismanagement.⁷⁴ To continue to be exclusively charitable, all the powers that a charity has must be used solely in the interests of its proper beneficiaries, and not those of its trustees. Trustee payment must only be incidental to the purposes of a charity, and if a charity appears to be becoming a vehicle for trustee payment, the Charity Commission will use its powers to protect its assets. Excessive levels of payment might suggest one of the charity's purposes is to provide an unjustifiable profit to someone other than a proper beneficiary. Such a purpose is not charitable. Consequently, in an extreme case, charitable status could be placed in jeopardy.

2. Payment as Compensation for Loss of Earnings

Ensuring that the opportunity to be a trustee is open to all is one of the keys to achieving strong, effective boards of trustees. Clear policies on payment of reimbursement of expenses can help with this. Other forms of payment, including compensating individuals for loss of earnings, can also be used as a tool to attract trustees from a wide variety of age ranges and social and economic backgrounds, who might otherwise be unable to afford to serve. Where a charity wishes to compensate a trustee for loss of earnings to enable them to attend meetings during working hours, it must ensure that it has the necessary authority. This type of payment is not a routine expense and must be treated as a trustee payment. Unless a suitable power exists in the charity's governing

⁷³ CA 1993, s.24(4)(a).

⁷⁴ Charity Commission (2008) Trustee Expenses and Payments, CC11, London: Charity Commission, 36.

documents,⁷⁵ the Charity Commission will need to provide authority for such payments, and will need to be satisfied that payment is in the interests of the charity.

The Commission encourages charities to have a diverse board of trustees⁷⁶ and recognises the advantages of recruiting and retaining trustees who have a particular knowledge of the communities and areas in which their charity operates. Having a range of people from different backgrounds and with an assortment of skills, knowledge and experience leads to more effectively-run charities. It also helps to ensure that charities are fair and open in all their dealings, including, for example, in grant giving or delivery of services. As charities are increasingly called upon to provide a greater range of services to a wider diversity of people, this is more important than ever. Creating a diverse board can also help to increase accountability and public confidence. The Charity Commission supports the view that people should not be excluded from trusteeship because of their economic circumstances.⁷⁷ Where it is clear that the potential loss of earnings is preventing suitable candidates from applying, charities may seek authority to compensate trustees for loss of earnings.

3. Payment for Trustee or Connected Person Becoming an Employee

Normally an employee should not be a trustee because a trustee should not be in a position where there is a conflict of interest. However special authority may provide otherwise. This may come from the charity's governing document, a scheme or order of the Charity Commission or statute. The Commission will not usually object to a new charity providing for an employee to be eligible as a trustee if certain safeguards are in place with regard to their compulsorily absenting themselves from any discussion of the terms of their employment.⁷⁸ The same concerns arise where a former trustee, or person

⁷⁵ The Charity Commission notes that whilst some charities do have a suitable power to compensate for loss of earnings, this is still relatively uncommon in governing documents; *ibid*, 59.

⁷⁶ Charity Commission (2007) *Finding new trustees - What charities need to know*, CC30, London: Charity Commission, para.C3.

⁷⁷ Charity Commission (2008) *Trustee Expenses and Payments*, CC11, London: Charity Commission, 42.

⁷⁸ See generally *ibid*, 49-58.

connected with a trustee (e.g. a spouse or a partner where they are financially interdependent) takes up paid employment with a charity.

If decisions about the recruitment or appointment of an employee were made while the individual was (or continues to be) a trustee, Charity Commission approval to the employment must be obtained if there is no other express authority for it. Any decision to employ a trustee or former trustee must be completely justifiable, and must be made without favouritism or improper influence. A trustee may be in a strong position to provide the necessary skills and experience, but because charities rely on the confidence of the public (donors and beneficiaries alike) it is essential they are open and transparent about the processes and decision-making which lead to the employment.

If the individual trustee's salary and benefits are, or will be, below £50,000 per annum, the trustee board (other than the person benefiting) can apply for Charity Commission approval (in advance of making any payment) using a pro forma declaration and application form.⁷⁹ The declaration form asks the trustees to either confirm that an open recruitment process has been used, or to declare that there are good minuted reasons why they have decided to proceed without one. Brief details of those reasons should be supplied. Whether completing the form or making out a separate case, trustees need to show that the post is genuinely required for the effectiveness of the charity, and has not been created or tailored to meet the needs of the trustee or former trustee. The person appointed should not have gained any 'inside track' advantage in securing the post, and there should not have been any lobbying, undue influence, or collusion in relation to the appointment.

Trustees should ensure that their collective decision can be justified as being clearly in the interests of the charity and a good use of the charity's resources. The declaration requires trustees to confirm they have complied (or will comply) with these conditions.

⁷⁹ Charity Commission (2009) Contract Employment: Declaration and application for authority for payment (not exceeding £50,000 per annum) of a trustee, former trustee, or connected person. CSD-1381C.

They should be satisfied on all the following points – which they must record in the charity’s books:

- the contracted employment of a trustee, ex-trustee or connected person is in the interests of the charity, and paying for it will have no adverse affect on the charity’s ability to carry out its stated objects;
- the amount is reasonable in relation to the employment, and the charity can afford it; and,
- the trustee, ex-trustee or connected person is fully able to carry out the task;
- a majority of the trustees is acting without payment by the charity;
- the trustee concerned (including a trustee connected with a person being employed by the charity) will withdraw from any meeting of the trustees at which the paid employment is discussed, and must not be counted for the purpose of deciding whether a quorum is present at such a meeting;
- the payment(s) will be declared in the charity’s accounts; and,
- the trustees have submitted the charity’s annual report, accounts and annual return within the required timescales.

Where trustees are unable to provide supporting documentation to demonstrate the accuracy of the declaration, the Charity Commission may withdraw its authority within 12 months,⁸⁰ and treat the payments as unauthorised. It may also seek prosecution of trustees if it is clear that they have supplied misleading information.⁸¹

The Charity Commission is of the view that employment will be viewed as being transparent and ‘above-board’, and therefore no authority is needed, where a trustee:⁸²

- resigns ahead of a properly conducted open recruitment process;

⁸⁰ Under CA 1993, s.89(3).

⁸¹ In breach of CA 1993, s.11.

⁸² Charity Commission (2011) Guidance Note: Seeking Authority for Payment (Not Exceeding £50,000 per annum) for Contracted Employment of a Trustee, Ex-Trustee or Connected Person – CSD1381B, OG 92 D3.

- has had no involvement in a decision to create or retain a post for which the trustee subsequently applied;
- has had no involvement with devising the recruitment process or advertising, or with setting the terms and conditions of that post; and,
- has not lobbied or canvassed for the post, or otherwise identified him/herself to the remaining trustees as the most suitable candidate for it (this includes where the person concerned has been leading or heavily supporting arguments in favour of their employment, and/or actively canvassing the support of other trustees for the creation or retention of the post).

If an employee becomes a trustee, their employment usually occurs before their trusteeship and so is not a benefit arising from the trusteeship. Accordingly, there is no liability to repay any earnings received before the start of the trusteeship. In view of the potential conflict of interest after the start of the trusteeship, however, it can be helpful to obtain authority to permit the trustee-employee to retain any increases in payments made after that date where these are not within an agreed employee pay structure.

Whilst combining the role of trustee and employee can occasionally be advantageous for the charity, the benefits will need to clearly outweigh the difficulties that can come with this dual role. The trustees will need to be particularly clear why it is not sufficient for the relevant employee simply to attend board meetings (in a non-voting capacity) in order to contribute to discussion.

Without an express authority, there may be a liability for the employee-trustee to repay earnings to the charity or for the trustees who authorised the appointment to reimburse the charity. The Charity Commission notes⁸³ that this does not occur very often, but it can arise in the event of a legal challenge from a third party (either within or outside the charity), or as the result of a Commission inquiry. This is technically the position even where a trustee resigns as soon as the decision to appoint them to the post

⁸³ Charity Commission (2008) *Trustee Expenses and Payments*, CC11, London: Charity Commission, 50.

has been made. This is again because the employment may have been acquired by reason of the trusteeship, even though that trusteeship is no longer continuing.

4. Paying Trustees for the Supply of Services

The power to pay some trustees for the supply of additional services that they provide to their charity above and beyond normal trustee duties, and the conditions attached to using it, were introduced by the Charities Act 2006.⁸⁴ The power also applies to payments for services and goods provided by ‘connected persons’.⁸⁵ Payment for services includes the supply of goods, and payments include in-kind payments such as the use of free or reduced rate accommodation by a trustee or person connected with a trustee.

The decision to pay a trustee in this way must be made by those trustees who will not benefit and the legislation requires that they must comply with all the following conditions:

- there must be a separate written agreement between the charity and the trustee or connected person who is to be paid, setting out the amount to be paid;
- in order properly to manage the conflict of interest, the trustee concerned must not take part in decisions made by the trustee board about the making of the agreement, or about the acceptability of the service provided;
- the payment must be reasonable in relation to the service to be provided;
- the trustees must be satisfied that the payment is in the best interests of the charity;
- the trustees must follow the duty of care set out in the Trustee Act 2000;⁸⁶

⁸⁴ CA 2006, ss.36-37 insert new ss.73A-C in the Charities Act 1993.

⁸⁵ Connected person is defined in CA 1993, s.73B(5) and broadly means family, relatives or business partners of a trustee. It also covers businesses in which a trustee has an interest through ownership or influence. The term includes a trustee’s spouse or unmarried or civil partner, children, siblings, grandchildren and grandparents, as well as businesses where a trustee or family member holds at least one-fifth of the shareholding or voting rights. The full definition is contained in sch.5 to the 1993 Act.

⁸⁶ Trustee Act 2000, s.1 requires trustees to exercise all reasonable care and skill in reaching their decision allowing for any special knowledge or experience a person has or says they have and any special knowledge it is reasonable to expect from a business or professional person when acting in either capacity.

- the total number of trustees who are either receiving payment or who are connected to someone receiving payment must be in a minority; and,
- there must be no express prohibition⁸⁷ against payment of a trustee in the charity's governing document.

It is also a condition that, before entering into this type of agreement, trustees must 'have regard to' the Charity Commission's guidance on the subject.⁸⁸

When considering whether a payment is reasonable, trustees should consider:⁸⁹

- whether the charity can afford the payment;
- the value to the charity of the services provided by the trustee;
- the quality of the service and the reliability of the supplier;
- any costs previously paid by the charity in obtaining those services;
- how much other organisations pay for similar services in similar circumstances; and,
- the implications for the reputation of the charity with its donors, funders, members and supporters, and with the general public.

A particular knowledge of the charity and its working environment can sometimes be an advantage. A trustee board may decide that for less - or no more - than the market rate, it can use the skills of a trustee who knows the specific requirements of the charity, and is perfectly competent to do the work in question. Where there is an unfavourable financial comparison with an outside supplier, and no weight of special expertise or knowledge that would tip the scales, the charity should use the supplier who is not a trustee. There would be no clear advantage in using the trustee, because of the need to manage the conflict of interest.

⁸⁷ In the past, many charities had a power to pay trustees conditional upon the Charity Commission's prior written consent. The need for such consent has now been removed where charities can meet the conditions of the CA 1993 power.

⁸⁸ The relevant guidance is Charity Commission (2008) *Trustee Expenses and Payments*, CC11, London: Charity Commission, 16-34.

⁸⁹ Charity Commission (2008) *Trustee Expenses and Payments*, CC11, London: Charity Commission, 25.

The written agreement to pay a trustee must be kept as part of the charity's records as required by law and the payments should be disclosed in the charity's accounts.⁹⁰ The Commission advises that trustees may wish to include a statement to the effect that the payment is in the best interests of the charity, and is reasonable in relation to the service provided.⁹¹ This is not essential, but shows that these issues have been properly considered.

If the governing document prohibits trustee payment, payment can only be made after the prohibition has been removed by the Charity Commission⁹² or, in some cases,⁹³ by the charity itself.

5. Small Payments Policy

It has been seen that trustees cannot receive any benefit from their charity without proper authority. This is the case regardless of the value of the payment. However, in the interests of proportionality, and to make the best use of its powers and resources, the Charity Commission does not usually require charities to seek authority to make small payments to trustees. No authority is required where:⁹⁴

- the total of all payments to all trustees during the charity's financial year (not including the repayment of properly incurred expenses) will amount to less than £1,000;
- the non-conflicted trustees are satisfied that making the payment is in the best interests of the charity and that any conflicts have been avoided or managed effectively; and,

⁹⁰ See comments above on SORP.

⁹¹ Charity Commission (2008) Information Sheet for Trustees: New Power for Charities to Pay for Services Provided by a Trustee (CSD-1381A).

⁹² An unincorporated charity will either need to apply for a short scheme to remove the prohibition or to approach the Charity Commission for written consent if its governing document already contains a suitable power of amendment which can only be used with prior consent.

⁹³ A charitable company may remove a prohibition on payment by amending its governing document using the wide power of amendment in the Companies Act 2006, s.21, so long as there are enough members (who are not also trustees) to form a quorum to consider the alteration. Members who are also trustees should not vote on the resolution to remove the prohibition.

⁹⁴ Charity Commission (2011) Small payments to charity trustees, OG 515-7.

- there are no other reasons why authority might be appropriate, for example, where the Commission is addressing issues of mismanagement of the charity.

Where a charity relies on this policy to make payments to trustees, the charity must handle the payments in a way that is open and transparent and should report the payments in the charity's accounts.

This policy would apply where trustee boards wish to make a small one-off payment (honourarium) to a trustee or a retiring trustee, for which there is no strict legal entitlement and no agreed amount, but which represents a gesture of appreciation and goodwill for services rendered to the charity, perhaps for long service.

6. Trustee Payment - Time for a Change?

It has been seen that the principles in this area are strict, all encompassing and based on case law from the 18th century. The Charity Commission guidance remains heavily in favour of non-payment. Nevertheless, the question of whether or not trustees *should* be paid is a very live issue,⁹⁵ and one that is hotly debated. Some charities argue that they struggle to ensure that their trustee boards are fully staffed and filled with people offering the right skills and expertise to guide their organisations. They suggest that, as charities become increasingly professional and business-like, payment of trustees may well be appropriate. Often those with the expertise do not have the time to dedicate to charity, whilst those with the time fail to offer the required high level of skills and commitment. Research undertaken in 2009 found that almost one in five charities has a vacancy on its trustee board.⁹⁶ Is the solution to pay trustees? The drive to increase diversity (of age, gender, ethnicity, location, etc.) also contributes to the arguments in favour of paying trustees. However, while some believe it would help to attract the best candidates, others consider that it would erode the unique ethos of the charitable sector. There is much to be

⁹⁵ At a debate on charity regulation, which took place at the Charity Commission's open annual meeting, in September 2011, peers from the three main political parties agreed that more charities may well have to bow to pressure to pay trustees in the future; 'Peers agree that payment of trustees might spread' Third Sector 23 September 2011.

⁹⁶ Vernon, B and Stringer, E (2009) Board Matters. A review of charity trusteeship in the UK, London: New Philanthropy Capital.

said for the comfort and confidence that the public are said to feel when they volunteer or donate to charity, knowing that the ultimate decision-makers are not acting in any way in self interest. The presence of a voluntary board ensures a clear perception of a charity run by individuals who are committed to its mission, with no other incentive to doing what they do. Also, if the price for achieving diversity on a trustee board is payment of trustees, will this mean that only those charities that can afford to do so, will achieve such goals? As the Charity Commission has noted,⁹⁷ often the way to achieve diversity is through appropriate transparent recruitment procedures. Charities continue to recruit in their own likeness, with recruitment of trustees by word of mouth or personal recommendation, which spawns homogeneity, still very common. A recent survey found that around half of trustees are appointed through personal recommendations of existing trustees and that just 20% of charities usually advertised to fill their trustee vacancies.⁹⁸

It is probably true to say that the principle of voluntarism for charity trusteeship is still favoured by most in the charity sector.

CONCLUSION

The line between charities and private benefit appears on paper to be quite tightly drawn. A combination of both case law and legislative provisions – derived from trust law, charity law and tax law - all work together in an attempt to ensure that an appropriate balance is struck between allowing charities to pursue their legitimate activities, which may incidentally involve the conferring of some private benefit (be that for third parties, donors, or trustees) and preventing charities from straying too far into promoting private benefit that cannot be inherently charitable. For example, it has been seen that there is a fundamental equitable principle that no trustee shall receive any benefit (be it property, goods, services or money) from their charity without express authority. Statute has not provided much relief from this strict principle over the years. The new

⁹⁷ Charity Commission (2007) Finding new trustees - What charities need to know, CC30, London: Charity Commission.

⁹⁸ Malone, D and Okwonga, M (2011) The State of UK Charity Boards. A Quantitative Analysis by the Institute for Philanthropy, Institute for Philanthropy.

provisions in the Charities Act 2006 do not cover payment to trustees for being trustees, where an express power is still needed. Similarly, whilst there is now provision in the Trustee Act 2000⁹⁹ to imply a professional charging clause in all trusts which make no provision for remuneration of professional trustees, this specifically does *not* apply to charitable trusts.

HMRC has clearly had concerns about private benefit over recent years, but its attempts to deal with potential infractions in this area have been typically heavy handed. The experience of the ‘substantial donor’ rules is a case in point, with the phrase ‘sledgehammer to crack a nut’ coming to mind. The new ‘tainted donation’ rules which have replaced them are complex and experts in this area are still struggling to ascertain exactly which transactions fall within their purview.

Whilst the rules discussed in this paper appear to be strict, their practical application, however, does show signs of flexibility. Whereas HMRC tend to provide hard and fast rules, specifying exactly how much private benefit can be permitted (see e.g. the ‘benefits associated with a gift’ rules that apply to Gift Aid) the Charity Commission takes a more flexible approach, based on what is ‘reasonable’ and what is ‘in the best interests of the charity’. It has been seen that the Charity Commission is willing to authorise all kinds of trustee (or connected person) payments, provided that a good case can be made out. Even where the line is crossed and the balance has become significantly skewed in favour of private as opposed to charitable benefit, whilst the obvious outcome may appear to be that charitable status should be withdrawn, the Commission often deals with such situations by seeking repayment of any private benefits gained and replacement of trustee boards.¹⁰⁰

Although flexibility from the Charity Commission is good for the charitable sector, its trustees and donors, it does mean that identifying exactly where the lines are to be drawn is easier said than done. The HMRC approach, on the other hand, might be

⁹⁹ Trustee Act 2000, s.29.

¹⁰⁰ See e.g. Charity Commission (2011) Charities Back on Track 2010-2011, London: Charity Commission.

considered to be too rigid, with a very important criticism of the ‘substantial donor’ rules being that they actually discouraged legitimate donors from making large charitable donations. Whilst a sensible balance must be struck, the evidence from the UK reveals that drawing the line is not an easy task.