

SocialEconomy

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voluntary organisations and social enterprises

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Charities...

Lessons for trustees from the pensions world



Two cases in the last 12 months involving trustees of defined benefit schemes have shown the onerous nature of being a pension fund trustee and act as a reminder to charity trustees of the importance of following their governing document. The first case was a determination by the Pensions Ombudsman in the matter of Adams and Others (M00358). The case essentially involved three pension scheme trustees of a company which became insolvent in 2000. The Chairman of the pension scheme trustees was a director of the employing company and by the time the examination by the Pensions Ombudsman took place he had emigrated to New Zealand.

The pension scheme trustees had invested part of the pension fund in a company which was in the participating employer's group and that money had been lost on winding up. They had also kept scheme assets in cash and had lost income as a result. The Ombudsman found that the trustees had not followed the requirements of the pension trust deed regarding investments since, in the first instance, they had not

taken independent advice before making an investment in a scheme company, and in the second matter they had not followed a suitable investment strategy. The ombudsman also found that the trustees were not protected by an indemnity provision in the trust deed designed to protect trustees against this type of negligence. The ombudsman found one of the trustees personally liable in the first matter and all trustees jointly

and severally liable in the second matter. They will have to contribute to the pension scheme's shortfall.

The second pensions case was in the High Court where the claimant is a professional trustee company established by a firm of solicitors (Walker Morris Trustees Ltd v Masterton and another 2009 EWHC 1955). The case involved the company Yorkshire Chemicals plc which went into receivership in 2004. Benefits under the pension scheme of that company had been varied several times over a number of years. The question arose as to whether the amendments had been made properly. The provisions to permit the variation of benefits under the trust deed required that actuarial advice should be taken by the trustees before the trustees agreed to the

amendments. In all but one variation such advice had not been taken. The court therefore found that without the required advice the variations had not been effected properly.

Whilst these two cases may not be generally applicable to charity trustees, and the consent of the Charity Commission is required before action can be taken against trustees for a breach of trust; the cases reinforce that trustees should follow their governing document and need to consider and decide matters individually in accordance with the governing document to avoid personal liability. If there is a breach of trust a trustee will need to resign so as not to be held liable for the continuing breach of the trust which exists until the breach is remedied.

Charities and the economic downturn

The fourth quarter reports are beginning to come in from investment managers. They record commentary on how the markets have been responding to previously unseen amounts of financial propping up from Governments, to both the banking/financial sector in particular and economies generally. While interest rates are still low, some of the institutions willing to take cash for investment are seeking to encourage charities and not-for-profit organisations

to place spare cash on deposit for periods of one to three years and, in the current context of low interest rates, reasonable returns are beginning to be available once again – this is an improvement from the mad world of negative interest rates on some accounts which charities were experiencing only a few months ago.

The summer edition of *Charity Commission News* was used by Dame Suzi Leather to encourage charities to be resilient in

a recessionary period. The Commission's economic survey reported at that time that the impact of the recession was deepening and widening amongst charities. To assist, the Commission issued with that newsletter a separate checklist which trustees can use as a set of practical suggestions to raise governance issues and options for charities. This is still a useful exercise and a copy of the checklist can be found at www.charitycommission.gov.uk/tcc/ccnews29.asp



The Charity Commission – its role as regulator

The Commission has recently published its second annual report on themes and wider issues arising from its regulatory and compliance work. A copy is available via the Commission's website.

It is intended that this report will be issued each year, to build up a record of the common problems and challenges facing charities and how the Commission has guided charities through them. The aim is to try to avoid similar situations

from happening in the future by learning the lessons of the past. The report also serves a purpose for the Commission in showing the wider public something of its work, policies and priorities. The case studies in the 2008/9 report cover

a wide range of issues including financial management, governance and allegations of links to terrorism. The report can be found at: www.charitycommission.gov.uk/Library/investigations/pdfs/track09.pdf



Faith in good governance

This is the title of the just published guidance from the Commission on those aspects of the legal and good practice framework put forward by the Commission, which are most likely to be of relevance to faith based charities.

It seeks to draw on the Commission's experience of charities operating in and from faith based communities.

It contains a number of useful illustrative examples of issues that have been tackled by the Commission in connection with a variety of religious organisations. This is a document that any charity working within this aspect of our society would be well advised to download and consider as part of its good governance programme and it can be found at: <http://www.charitycommission.gov.uk/tcc/faithgov.asp>

Guide to giving for business

The Cabinet Office has just re-issued its 2005 guidance on tax efficient giving for businesses. It provides a summary of the ways in which businesses can give to charities and is well worth reading if you are looking to attract funds from businesses. It sets out the tax reliefs available and the different ways of giving. The guidance can be found here: <http://www.cabinetoffice.gov.uk/media/308478/guide%20to%20giving%20for%20business.pdf>



The Charities Statement Of Recommended Practice (SORP)

The accounting framework for charities that sprang to life in 1995 has been revised twice since then, in 2000 and 2005. In August the Accounting Standards Board (ASB) issued a consultation entitled: "Future of UK GAAP". This is all about making UK accounting standards tie up with the International Financial Reporting Standards (IFRS).

The pressure is on to bring to an end a situation in which there are two sets of standards – UK GAAP and IFRS. Out of this consultation there is a possibility that there will be an IFRS-compliant not-for-

profit accounting standard. This new standard might be described as a public benefit accounting standard, and could be in place for some time if it comes to pass. It is encouraging to see recognition amongst the accounting standard regulators that what suits commercial organisations may not be the answer for charities and not-for-profits. The Charity Commission has recently run a series of SORP Round Table events. They say that these have indicated support for a charity SORP as a "one stop shop" for charity accounting and reporting. The Commission believe that the need for a future charities

SORP as well as what the SORP might say will be dependent on the decisions made by the ASB in this current consultation. The Commission will be publishing a response to the consultation and in the meantime urges anyone with an interest in charity finance reporting to read the consultation now and to offer their own comments – www.frc.org.uk/asb/press/pub2054.html The Charity Commission has published a considerable amount of guidance on the current rules, which can be found at: <http://www.charitycommission.gov.uk/investigations/sorp/default.asp>



Investment management fees – VAT recovery

HMRC appears to have accepted claims for partial recovery of input tax on charities' investment management fees. The claims were made on the back of the 'Church of England Children's Society' case, in which charities were allowed to look through to the actual application of the funds generated.

The outcome of this is that if investment income is used to fund a charity's VAT taxable business activities, the VAT on the costs of managing those investments

is recoverable, either by direct attribution or as part of the pot recovery for general overheads. This is not applied across the board, however, as HMRC take the view that in the case of restricted or endowment funds, the look through can only be to the permitted activities in question.



Surviving the downturn

The Charity Commission has recently published a document described as a snapshot of how trusts and foundations are responding to the economic downturn in 2009. This is available from the Charity Commission website: www.charity-commission.gov.uk/publications/foundation.asp

The overall conclusion is reasonably reassuring for those in this sector of the not-for-profit world. Long standing investment expertise and a cautious approach seem to have stood these charities in good stead in the current

difficult situation. This is not a sector that often attracts attention and it is good to have properly commissioned comments and analysis from the Commission. This is a report well worth a read.



Companies...

Director's conflicts of interest

Whilst director's duties of good faith to the company which they direct has been codified by the Companies Act 2006, this did not affect the underlying case law. The no profit and no conflict rules which apply to directors have been examined by the Court of Appeal in O'Donnell v Shanahan in the context of a relatively rare shareholder's unfair prejudice petition.

A property development opportunity was brought to the attention of some of the directors

of the company, in the course of their activities as directors. The business of the company was financial advice. These directors did not bring this to the attention of the board of directors of the company. The Court of Appeal held that even though the property development was not the focus of the company's activities it should have been disclosed to the company so that the company could decide whether it wished to take advantage of the opportunity or not. **O'Donnell v Shanahan 2009 BCC 517**



Employment...

Are you treating your volunteers properly?

At a time when employees have more legal rights than ever before, a recent legal case against the Citizens Advice Bureau (CAB) is all the more surprising for denying a disabled volunteer the right to sue the CAB for alleged disability discrimination. It also provides a timely reminder, to volunteers and organisations alike, about the rights afforded to volunteers.

In the X v Mid Sussex Citizens Advice Bureau case, the Tribunal ruled that X was a volunteer in the true sense; although she had pledged to work 4-5 hours per week, she regularly failed to work those hours. She had signed a volunteer agreement but, this did

not compel her to work a minimum number of hours and the CAB did not enforce a minimum number of hours. The fact that she was not forced to work a minimum number of hours was relevant to the Tribunal's finding that she was a mere volunteer and not a worker or employee, and that the Disability Discrimination Act does **not** extend protection to unpaid voluntary workers.

This ruling is reassuring for charities who have volunteers, as many of the conclusions will apply across the whole spectrum of anti-discrimination legislation. It is also a reminder of the wider issues of volunteers' rights and

employment status. Although an individual worker may be categorised as a 'volunteer', the actual status of the volunteer may be closer to a 'worker', or even an 'employee'. If this is the case, that individual is entitled to a whole range of legal rights that do not apply to volunteers.

There are many recognised categories of employee and worker ranging from full time/part time/fixed term employee to apprentices to temporary workers and agency workers. All have basic legal rights such as holiday pay and limits on working time regardless of whether they are 'employees' or mere 'workers'. However, these

categories of employees and workers must be contrasted with the self employed, volunteers and office holders (e.g. trustees) who have comparatively few rights beyond those afforded to the public generally (for example in relation to health and safety).

With the distinctions in 'employment status' discussed above in mind, we advise that charities clearly establish and document the extent of the working relationship with each individual to avoid misunderstandings or disputes in the future.



Volunteer Rights Inquiry

Volunteering England has responded to the concerns that are increasingly being raised by volunteers about their limited rights in law by creating an independent Volunteer Rights Inquiry which will explore these issues in more detail.

The Volunteering website states that it wants to hear from a wide range of people and is especially keen to hear of specific examples and experiences of good and bad practice concerning volunteering

as well as more general thoughts and opinions. Volunteering England has a website where you can learn more about this inquiry and find out how to take part if you wish.

www.volunteering.org.uk





Top tips on the legalities of engaging volunteers

For many volunteers, the very essence of voluntary work is the flexibility. It is often that freedom that allows volunteers the luxury to help out their chosen organisation in the precious time that they have to spare. Equally, and it is often remarked that, many charities and social enterprises would flounder or fail without the armies of volunteers willing to help out in those sectors.

For these reasons, volunteers rarely claim employment or worker rights (such as the discrimination claim in the Mid Sussex CAB case detailed overleaf) since they don't want the restrictions that employment or other contracted work entails.

Organisations who accept voluntary help must be aware of the need for a structured environment for volunteers regardless of the

informal approach that is commonly applied to voluntary work as compared to, say, employed work. Volunteers are often working alongside employees carrying out similar tasks in similar environments. Accordingly the rules on data processing, occupiers' liability, health and safety, immigration, protecting children and vulnerable adults, equality, respect and many other legal and regulatory safeguards apply to volunteers equally as they do to employees.

At Wrigleys, we are increasingly advising clients on this area and providing resources such as Volunteer Policies, Volunteer Arrangements and other general policies aimed at volunteers specifically rather than applying existing policies and agreements that are more appropriately aimed at employees or workers.

Environment...

From telecoms to turbines

Not swords into ploughshares but, with telecoms operators negotiating with landlords to put leases of telecoms sites into names of joint operators, there is likely to be a substantial reduction in telephone masts in future. T-Mobile and H3G have already started this process and Vodafone and O2 are exploring it. This will mean a reduction in income for landlords unless they are able to find alternative uses for the telecoms mast site.

Leases should contain a clause requiring the operator to reinstate the land upon termination. However, there may be an alternative use of the site for example with planning permission a small turbine on a purpose built tower, say 50kW might be installed on a telecoms mast base. There is already a connection to the grid for the telecoms mast which helps

reduce the installations costs. This might supply electricity to a farm as well as permit export to the grid under the guaranteed renewable energy feed-in tariff coming into effect from April 2010. **Extract from Robert Paul, Head of Strutt & Parker's Telecoms Group Land Business Autumn/Winter 2009** robert.paul@struttandparker.com



Energy neutral buildings requirement

New buildings across Europe from 2020 will need to plan to generate as much energy as they consume under a new European Union Energy Performance of Buildings Directive passed in late 2009.

Early drafts of the law, which amends Directive 2002/91/EC, had proposed that the implementation date should be the end of 2018 and that it should also apply to existing buildings where renovation costs were more than 20% of the building's value. These

proposals were dropped in the course of the year and national Governments will be left to consider their own limits for these matters. Already the UK is requiring that new homes from 2016 should be carbon-neutral and new commercial buildings should be carbon neutral by 2019. It suggests that existing buildings are likely to feel the effect of similar changes in the decade commencing 2020 and that the proposed renovations costs yardstick might be resurrected at a later date. www.newenergy.info

Local Government...



Remedies for poor procurement practice

The Public Contracts (Amendment) Regulations 2009 came into force on 20 December 2009. They introduced the Remedies Directive (2007/66/EC) into UK law. The effect of the Regulations is to provide for a new court remedy which can make the further operation of any proposed procurement contract (even if entered into) ineffective.

The remedy has to be applied for within strict time limits from the date when the contract was awarded and permits a court to decide that the contract agreement should be amended; the decision overturned or damages awarded to a party which has suffered if the contract agreement has not been entered into. It also provides that where the contract has been entered into

it can be ineffective going forward and that future obligations should not be performed. The court may then decide what remedy is applicable in the circumstances.

These are far-reaching provisions and will require organisations which must apply public procurement regulations to be far more careful in future.

Social Investment...

Citylife launches East London Investment Bond



Citylife, the Cambridge social investment charity which specialises in funding regeneration has launched a second London Bond, this time focusing on East London. Citylife's approach is quite unique.

It asks interested businesses and individuals to subscribe for a five year bond paying zero interest to the investor. Approximately 80% of the proceeds of the Bond are then lent to a housing association operating in the area of proposed

benefit which applies the proceeds for housing. The balance of 20% (less issue costs) is then donated to local charities. In the case of the East London Bond to Community Links and Bromley by Bow Centre which apply it for their regeneration

work. Finally, after five years the housing association repays the Bond to Citylife and the interest which has been compounded over five years brings the proceeds back up to the 100% for repayment to investors. www.citylifeld.org

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