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unity trust bank

WRIGLEYS SOLICITORS

SocialEconomy

A bulletin of information for charities, voluntary organisations and social enterprises.

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Charities...

Schools and fee charging...

From those who have much (or charge much), much will be expected; from those who have less (or charge less), less will be expected. This is the gist of the decision of the Upper Tribunal after considering the dual questions of what fee-charging schools must do to satisfy the public benefit criteria and whether the Charity Commission guidance on the subject is lawful.

The key point is that **all** charitable independent schools must make more than a token provision for those children whose families cannot afford to pay the full fees ('poor' children). Clear this hurdle, and the education provided to full fee-paying children is also charitable; stumble at this hurdle and none of it will be regarded as charitable.

What counts? Bursaries count, but there is no set percentage or amount of bursaries which a school must provide to clear the hurdle. Indirect benefits also count, so independent schools may choose to collaborate with local state schools to count towards the public benefit requirement. Schools must ensure, however, that such activities do fall within their objects. Opening playing fields and sports facilities to the community as a whole would not count towards providing public benefit in terms of advancing education. Ultimately, the decision on how to help 'poor' children is one for the governors of each independent school, taking into account the circumstances of their school and level of fees charged, etc.

The Charity Commission will be updating its guidance in the light of the decision.

The CIO – is the horizon getting closer?

We keep mentioning the CIO (the new vehicle for charities, the 'Charitable Incorporated Organisation', for those who have not been paying attention for the past six years) only for it never to appear. At the risk of tempting fate, then it is looking increasingly possible that the CIO Regulations will finally find their way onto the statute books in the New Year, with commencement in the first quarter of 2012.

What does that mean? It means that the CIO could, at long last, be an option for new charities. For existing unincorporated charities wishing to incorporate, the wait will be slightly longer. For existing charitable companies wanting to 'convert', it will be at least another year.

At the time of going to print, the regulations are in relatively final form but have not been published. We are told that some of the 'paperwork' offences (such as late filing) have been removed and the key change is that there will be no electronic register of charges, because the Charity Commission simply cannot afford it. It was going to cost millions of pounds to set up and maintain and, given the cuts to the Charity Commission's funding, that money could not be found. The CIO is likely to be less attractive to large charities as a result.

For those who are interested, the model documents have been produced and published by the Charity Commission and are available on the Commission's website.

When can you use the CIO?

It is expected that the first registrations will be for new charities only. The next phase will be looking at conversions of unincorporated charities to CIOs. This will be phased in by income level, so that larger charities will be allowed to convert first (the threshold is likely to be charities with income levels of around £100,000). Once the Commission have seen what demand that creates, they will open the vehicle up to smaller charities.

The authorities are still ironing out difficulties with conversions from companies, and it is likely to be at least 2013 before companies can convert to the CIO.

Conclusions

Given the changes to the regulations, it seems clear that the CIO will not be the vehicle of choice for larger charities or any charities which may engage in secured borrowing, unless banks can be convinced not to worry about the lack of a register of charges. Because the charity will not exist as a legal entity until it has been registered on the register, the decision to use a CIO as a vehicle will also be dependant upon how urgent it is for the organisation to be set up as a legal entity. At present, all charities exist as legal entities and then have to be registered with the Charity Commission, so it does not matter if it takes several months to achieve this. With the CIO, the charity will not be able to operate at all until it has been registered with the Charity Commission.
The option of setting up a trust, unincorporated association or company and then turning that into a CIO will need some thought, given the current timetable for phasing in the CIO. So there will be a lot to think about both in terms of electing for the CIO in the first place or the timing for converting to a CIO.

Lessons for charities which give overseas aid

The Charity Commission published its inquiry report into emergency relief charity Crescent Relief (London) at the end of September. Although the Charity Commission found no evidence that the trustees had diverted funds for unlawful or non-charitable purposes, it raised concerns about the management and administration of the charity. The charity's procedures were not sufficiently robust for the type of work it was engaged in. The checks on partners and beneficiaries were inadequate and although there were some procedures in relation to bank accounts and cheque signing, they were not followed.
The take-home message for other charities is threefold: know your partners and your beneficiaries; assess risks and put policies in place to manage them; and remember that it is not enough merely to have the policies – you must also follow them and ensure that they remain up to date and relevant for the charity.

Fund-raising perils

The Charity Commission has published a regulatory report concerning charitable funds held in the name of 'Sunrise Radio South East Asia Disaster Appeal'.

The report provides a useful lesson on fund-raising in relation to appeals generally and how funds raised for disaster appeals should be administered. It is also interesting as confirmation that funds raised for charitable purposes in England and Wales, even if they are not raised by a charity, fall within the Commission's regulatory jurisdiction. People who manage and are responsible for appeals for charitable purposes (including those created by non-charitable organisations) hold the position of trustee and have the legal duties and responsibilities of trustee.

http://tinyurl.com/dy23k6r

Gift Aid – changes to HMRC's approach?

There have been some unannounced changes to HMRC's more detailed guidance on Gift Aid. The guidance has not been updated in a comprehensive and open way, but rather through a series of piecemeal changes.

The key changes to be aware of are as follows:

- It now appears that HMRC view a private dinner for a donor as a benefit, regardless of the various reasons for which such a dinner may take place. For example, would it now be a benefit to take a donor out to dinner in order to discuss how the charity might contact the donors' friends, family or acquaintances with a view to raising more funds?
- Charities offering life membership now appear to need to keep complete records of all the 'discounts' received by its members.
- HMRC now set out which charity literature is deemed as having no financial value and which does not. Charities who provide their members with literature should consider the guidance to ensure that their treatment of it is as they expect.
- HMRC now require that for split payments, the benefit has to be capable of being purchased separately. It is likely that a number of charities will be operating in breach of these new provisions.
- In addition, a charity is now expected to keep evidence of the split payment arrangements (for example an exchange of letters). This is likely to present a number of practical difficulties, not least for charity auctions.

If any of these changes affect your charity, please let us know using the contact details on the back page, as we will be feeding comments back to HMRC through the Charity Tax Group.

Complaint has important legacy

Following the complaints of Marcus Watkins, head of finance and administration at Christian Medical Fellowship, Barnado's and Mencap have altered their legacy fundraising policies, and PDSA and Mind have confirmed that they are reviewing their approach.

Mr Watkins is an executor of his late mother-in-law's will, which specified that £20,000 should be left to the charities named on a signed list. Barnados, Mencap, PDSA and Mind were among 58 charities which contacted Mr Watkins to request donations, having been alerted to the fact that the will contained donations to charitable causes. This type of rather enthusiastic fund-raising has been viewed by a number of executors as akin to harassment and could be detrimental to the reputation of the charities in question. Charities should always consider carefully how any of their fund-raising activities might affect people's willingness to give.

A new Governance Code for smaller charities

The Governance Code Steering Group (which comprises ACEVO, the Institute of Chartered Secretaries and Administrators, NCVO and the Small Charities Coalition – with support from the Charity Commission) has produced a 'Good Governance Code for Smaller Organisations' **www.goodgovernancecode.org.uk**

New Code of Fundraising Practice – are you handling your cash correctly?

In October, the Institute of Fundraising published a new fundraising code which offers general guidance on handling cash and other financial donations. To download the code, please see **www.institute-of-fundraising.org.uk**

New Guidance on Investment

The Charity Commission published updated Guidance on Charities and Investment CC14 in November. Whilst much of the Guidance is simply an updating of earlier guidance the Charity Commission has introduced a new concept of "mixed motive investment".

It suggests that the concept covers an investment which is partly commercial and partly social (programme related) investment. The former is what trustees traditionally understand by investment in shares, bonds etc, whilst the latter is from a charity's grant budget.

It is regrettable that the Charity Commission did not give a fuller explanation in this part of the Guidance because it leaves many questions unanswered. In particular, the Guidance did not point out that the taxes acts applying to charities make explicit distinctions between commercial investment activity and grant making social investment activity of a charity. Very explicit minuting of the trustees' decision will be needed where either commercial investment monies are used for mixed motive investment or grant monies are used for mixed motive investment so as to separate out financially, for accounting purposes, the division in which the investment was made. This is essential to permit the charity's auditors to provide the appropriate taxation treatment (CC14).

www.charitycommission.gsi.gov.uk

Social Enterprise...

Major Heath-Robinson Reform for IPSs

Continuing HM Treasury's long established tradition of only making Heath-Robinson-esque reforms to industrial and provident societies the Legislative Reform (Industrial and Provident Societies and Credit Union) Order 2011 2687 was made on November 8th.

The most significant reform for IPS's will be the abolition of the £20,000 limit on transferable share capital. The limit will be kept for withdrawable share capital. The period for annual accounts and annual returns will now become a matter for the discretion of the society as with a company. The minimum age for becoming a member of an IPS will be dropped to 16 years. There will also be a reform for credit unions to permit corporate supporters to become investors in a credit union.

Co-operative Energy

Co-operative Energy is a new consumer co-operative established by Mid-Counties Co-operative Society in the Summer of 2011. It is the first democratically licensed independent energy supplier and serves customers nationally. Customers, as members, will be able to share the benefits of purchasing their energy from the co-operative.

It has currently one simple tariff. It does not aim to be a fully green energy supplier like Green Energy or Ecotricity but it aims to provide 50% less carbon content than the average energy company. For this reason it will be a purchaser of community renewable energy. (REA News).

Unshackling Good Neighbours

Unshackling Good Neighbours is a report of the Task Force to consider the cutting of red tape for small charities, voluntary organisations and social enterprises.

Chaired by the Conservative Party spokesperson in the House of Lords on charities and the voluntary sector, Lord Hodgson, the report tried to address areas of regulation which had become or were becoming unnecessary. It also tried to tackle the overbearing view of risk as a bad thing and its ability to destroy trust.The document provides many useful illustrations of inappropriate regulation and sensibly sets out its recommendations in a thought provoking way such as "What stops people giving time?"

Clearly, Government legislation around job-seeking by the unemployed has that effect as numerous reports over the years have noted. The CRB check system can prevent volunteering and the Government has started looking at that – seeking to get a balance between protection and over-regulation.

What stops people giving money is the second main heading of the report. It looks at issues such as charities making mixed motive investments reported above in the new Charity Commission Guidance CC14. It also looks at licensing of small raffles and the Guidance on it and how it might be improved.

Regrettably, whilst the Report makes mention of obstacles in the way of social investment, it did not refer to the abolition of unnecessary regulation of deposit taking by Industrial and Provident Societies. Not only is this covered by Financial Services regulation, but it is covered in the Industrial and Provident Societies Act too – this prevents charitable Industrial and Provident Societies accepting deposits which charitable companies limited by guarantee may do.

Social Investment...

What links Westminster, Hammersmith and Fulham, Birmingham and Leicestershire? With the support of the Office for Civil Society, each of these local authorities is designing a social investment bond aimed at helping 'problem' families.

Social investment bonds are designed to attract charitable investors to fund new initiatives by purchasing bonds. Charities and social enterprises bid for target-based contracts awarded from the money made available by the bond issue. The contracts focus on outcomes designed to reduce social problems, with the aim of consequently reducing public expenditure. Where the projects are successful, these savings are used to pay back investors, and can then be put to additional use.

The contracts used by the four pilot schemes will focus on outcomes such as reducing anti-social behaviour, increasing attendance at schools, and tackling drug addiction and Nick Hurd, minister for civil society, hopes that the bonds could raise up to £40m from investors. Each council will decide whether to go ahead with their bond issue in December 2011.

Wrigleys have been engaged in bond issues for charities for many years and will be happy to explore this concept with charities.

Investing in Civil Society

This well intentioned document, published by NESTA, suffers from an incomplete presentation of the legal obstacles to growing social investment and a bias towards the community interest company and against the industrial and provident society which appears misguided and insufficiently evidence based.

It completely fails to address the long standing obstacles to an effective use of the industrial and provident society as a tool for democratic investment in social enterprise whilst ignoring the obvious deficiencies of the promotion of a potentially debt laden social enterprise in the form of a community interest company limited by guarantee. It consequently reaches conclusions which create an inappropriate ordering of priorities for Government in assisting investment in social enterprise.

It is clear that the community interest company has been successful. It was efficiently established by the Department of Business, with modern law and a modern registry and a Registrar to not only register but promote the legal form - (everything which the industrial and provident society does not have). It has Government Departments recommending it over other legal forms and briefing against other legal forms which may be appropriate.

It is disheartening, that three out of four community interest companies are established as companies limited by guarantee – a legal form which restricts full risk capital options to grants and retained profits. The Government is largely to blame because it has not briefed Departments that if they wish to encourage sustainable social enterprise that they must permit them to obtain outside share capital. More could also be done to ensure that the Big Lottery Fund and the Charity Commission give clear guidance on how charities can support asset locked bodies which are not charities.

Whilst the thrust of the paper seems to be that industrial and provident societies have Financial Services and Markets Act exemptions which community interest companies do not, which is correct, it ignores exemptions which charitable companies have which charitable societies do not. Importantly, it does not explore the obstacle set by the Companies Act 2006 that private companies limited by shares are not permitted to offer shares to the public. The effect of that prohibition is that private community interest companies limited by shares can only raise private funds through social enterprise business angel networks such as Ethex, Resonance and Clearlyso until such stage as they become public limited community interest companies.

> **"Whilst the thrust of the paper seems to be that industrial and provident societies have Financial Services and Markets Act exemptions which community interest companies do not, which is correct, it ignores exemptions which charitable companies have which charitable societies do not."**

Community interest companies limited by guarantee may offer bonds to the public but this provides only debt and therefore can limit other borrowings such as bank debt , and does not provide effective risk capital for the social enterprise.

There is a debate to be had, particularly when the libertarian model of shareholder capitalism has demonstrated such spectacular failure, whether replicating that in the social enterprise sector is really appropriate and whether support for more democratic forms of social enterprise ownership might reinforce more prudent models of capitalism which are so clearly needed. If so the priorities suggested in this paper should be re-examined and some of the other underlying problems explored more deeply.

www.nesta.org.uk
(Malcolm Lynch)

Employment...

Charities, overseas activities and unfair dismissal

The Rev P Walker v Church Mission Society (EAT/0036/11) concerned a regional manager who worked in Africa for Church Mission Society (CMS), a Christian mission based in Oxford. Ms Walker was made redundant and claimed this was unfair.

But the question was whether the employment tribunal had jurisdiction to hear her claim. CMS works with Anglican and other Churches of England, Scotland and Wales involved in mission work with people of Africa, Asia, the Middle East and Europe through the exchange of personnel, ideas, project funding and scholarships. Ms Walker was a regional manager who frequently worked abroad. For the last eight years she had worked in Africa and the Sudan, the intention being to de-centralise CMS's work in Africa away from Oxford, the claimant reporting to a line manager based in Africa.

According to the House of Lords in Lawson v Serco Limited [2006] ICR 250 there are four gateways to jurisdiction to hear a claim by an employee who is not working in Great Britain at the time of dismissal:

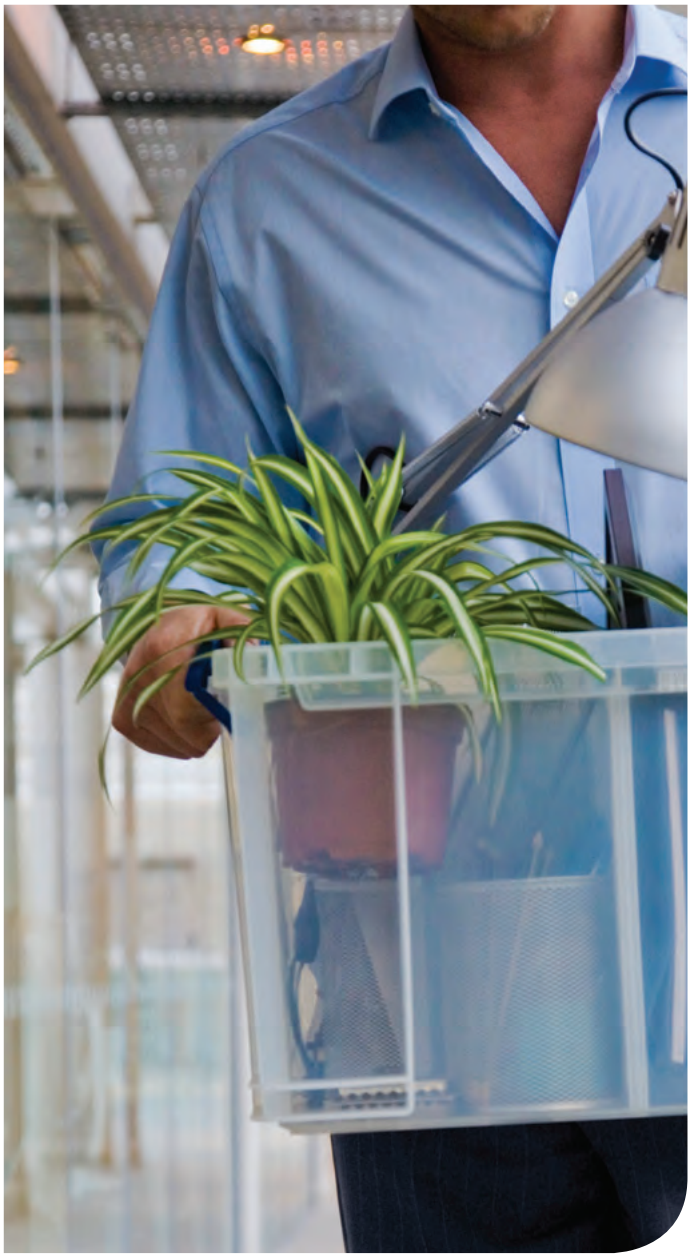
(i) The Peripatetic Employee - the employee whose base is in Great Britain.

(ii) The Expatriate (1) meaning an employee who works and is based abroad and who is the overseas representative, posted abroad by an employer for the purpose of a business carried on in Britain (the so-called "foreign correspondent of the Financial Times"example).

(iii) The Expatriate (2) being an employee who works in a "British enclave" abroad. Here, the tribunal has jurisdiction provided the employee was recruited in Britain.

(iv) The Expatriate (3) the employee who has equally strong connections as the above two expatriate examples with Britain and British employment law.

The employment tribunal felt that Ms Walker fell within example (ii) (the expatriate who is based abroad representing a British based 'business', eg the foreign correspondent of the Financial Times). The EAT disagreed. She was not the foreign representative of an Oxford based organisation but was conducting her work and engaging in her duties overseas. Nor did she have otherwise strong connections to Britain and British employment law. The employment tribunal could not therefore hear her unfair dismissal claim.



Discrimination claims

When an organisation and its trustees can be liable for the acts of its employees or agents even when they were not authorised to discriminate

In Bungay v All Saints Haque Centre (EAT 331/2011) the EAT confirmed the principle that agents of an organisation can make it vicariously liable for acts of discrimination liable under the Equality Act 2010 even though they have not been authorised by the principal to discriminate.

The appellants were members of the board of a religious centre. It was held by an employment tribunal that they had caused the unfair dismissal of the claimants, who were employees of the centre and that they had unfairly discriminated against them on ground of their faith.

The board members were authorised to run the centre even though they did this in a discriminatory manner. Under agency principles however their acts were treated as being done by the centre. The tribunal also found that board members were jointly and severally liable with the centre for discrimination damages on the ground they were "prime movers" in the campaign against the employees. Further, aggravated damages could be awarded in respect of the board members' post-employment conduct in taking a high-handed approach to disciplinary proceedings and making unfounded allegations to the police, which caused the employees much distress.

Environment...

The Green Deal

One year on from the Government's announcement of the Green Deal the 2011 Energy Act has been passed and the Government has started consultation on regulations to implement the Green Deal with a target date of Autumn 2012 for its introduction.

The purpose of the Green Deal is to remove the up-front costs of energy efficiency measures with the cost being repaid through the home energy bill through energy savings. It is a simple scheme and potentially effective. Private home owners may need to get used to buying a house where there could be a green deal in place so as to ensure it is repaid before they purchase the property.

In addition to energy companies providing the up-front costs for the home improvement a new finance company known as The Green Deal Finance Company has been pre-launched which aims to bring in banks and finance companies behind the scheme. The key, of course, is high quality assessors of energy efficiency and energy installation. Unfortunately, membership of a relevant association of energy installers does not appear to be a guarantee of the quality desired so ensuring a higher "quality mark" as a must.

The Government wants to extend the Green Deal to business premises and to buy to let premises. Landlords will need to ensure that business and domestic premises have at least an E energy efficiency rating from 2018.

www.decc.gov.uk

The Natural Environment White Paper

Published by the Department of Environment and Rural Affairs in June, this White paper sets out the Government's vision for the natural environment in the UK for the next 50 years. Directed primarily at landowners, businesses and conservation organisations it suggests that the balance between environmental sustainability and environmental harm is still towards harm and this needs to be remedied.

The Government believes it can be remedied by the greening of business which will protect the long term supply chains of business and by the greening of the economy for which the Government will publish a road map.

For farmers and land managers the issue is to have a competitive farming and food industry which ensures that its environmental impact does not affect long term sustainability of production.

The big idea here seems to be to create Nature Improvement Areas as show cases of land owners and land managers working together over larger areas to manage "ecosystems services" better. This rather academic term is intended to convey the economic benefits of, for example, upland farmers conserving soil and water companies benefiting from less silted water supplies, as well as appropriately priced visitor benefits which might result. There is some seed corn funding for the first 12 Nature Improvement Areas.

It is useful for the Government to set out the direction of travel because of the concern expressed in the Stern Report on Climate Change - "is enough being done sooner rather than later as it costs more in the long term to remedy environmental problems?" Only time will tell.

www.defra.org.uk

Local Government...

Ensuring equality remains crucial despite economic difficulties

Recent legal challenges against the allocation of budgets have continued a trend of claimant victories over public authorities. The legal challenges have largely relied on statutory equality duties, which are now consolidated in the Equality Act 2010.

The key duty requires every public authority exercising its functions to have "due regard" to a number of factors, including the need to eliminate discrimination, harassment and victimisation, and to advance equality of opportunity between persons who do and do not share a relevant protected characteristic.

Case law has focused on defining the requirements and limits of 'due regard', and on the practical principles that local authorities must follow when making decisions.

The courts have deemed certain procedural errors to be unacceptable, including failing to carry out consultation and impact assessments, flawed reports that contain little supporting data or that have "policy based evidence rather than evidence based policy" (R. (Rahman) v Birmingham City Council [2011] EWHC), and failure to consider and document specific questions raised by the duties, such as the impact of decisions on a defined section of a community. The cases have established key principles for legitimate decision making and have emphasised the importance of consultation, fair and impartial reporting, and the necessity of having "general regard to issues of equality" (R.(Meany) v Harlow DC [2009] EHC 559).

The courts have recognised the significant and onerous obligations that the duties impose on public bodies, particularly in light of the prevailing economic conditions, and note that judges should not be resolving issues of resource allocation. Nevertheless, they continue to set a high-bar for compliance and clearly demonstrate that public authorities cannot rely on the necessity of cutbacks to pay lip-service, or take a tick-box approach, to their equality duties.

Localism Bill

The Localism Bill is now the Localism Act 2011. Further information will be provided in the next edition of Social Economy.

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