The court's benevolence to charity trustees

As the charity sector marks Trustees Week, celebrating the achievements of charity trustees, it is an apt time to highlight the court's comparative restraint or benevolence when they with the best intentions get things wrong. The court will avoid coming down harshly on honest breaches of duty, against the background of the public worth of the office of charity trustee and the personal sacrifices that individuals make, and risks they assume, by taking on usually unpaid trusteeship.

As Falk J explained most recently in *Re Keeping Kids Co*. [2021] EWHC 175 (Ch), the court's benevolence *"reflects the real risk that any other approach would deter individuals who would otherwise be well suited to becoming charity trustees from doing so. It also reflects the court's recognition of the public service that charity trustees provide." (para. 978)*

The term "charity trustee" is statutorily defined for the purposes of the Charities Act 2011 as meaning "the persons having the general control and management of the administration of a charity" (s.177, Charities Act 2011). As the definition reflects, both in the legislation and in practice, it is an umbrella term for different categories of fiduciary with responsibility for the management of different kinds of charity (the trustee, the company director etc.). The law of charity trusteeship is therefore not unitary, and the particular legal structure of any charity is always the starting point for considering a charity trustee's powers and duties. However, the court's benevolent approach is common to all forms of charity trusteeship.

The Charity Commission's own regulatory approach mirrors this comparative generosity to unpaid charity trustees (see e.g. its *Policy on restitution and the recovery of charitable funds misappropriated or lost to charity in breach of trust*, 23 May 2013). It is the Commission's duty, in performing its functions, to act in a way which is compatible with the encouragement of voluntary participation in charity work (s.16(2)(b), Charities Act 2011). The Commission also has the power under s.191, Charities Act 2011, to relieve charity trustees (among others) of personal liability for breach of trust or duty where they have acted honestly, reasonably, and ought fairly to be excused for the breach. This of course mirrors the powers of the court under s.61, Trustee Act 1925 in respect of trustees generally, and under s.1157, Companies Act 2006 in respect of company officers.

The classic starting point for the consideration of the court's benevolence is the historic exercise of the court's discretion to mitigate the period or extent for which a trustee of a charitable trust was compelled to account for breaches of trust. In *Attorney General v Exeter* Corporation (1826) 2 Russ. 45 the trustees had honestly misapplied charitable funds in circumstances where the trust was difficult to construe. Lord Eldon LC refused to order them (by that time a corporation) to account for past mistakes, only giving directions to ensure the proper administration of the fund in the future. He said: *"If the administration of the funds, though mistaken, has been honest, and unconnected with any corrupt purpose, the court, while it directs for the future, refuses to visit with punishment what has been done in time past."*(p.54)

At this time, claims for breach of charitable trust were frequently brought by the Attorney General – the Charity Commissioners were established later in the 19th century - and the court expected restraint on the Attorney's part. The law remains as stated by Lord Langdale MR in *Attorney General v Brettingham* (1840)) 3 Beav 91 at p.95 that it is not the duty of the Attorney General to contend strictly

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for the rights which the law may give the Attorney as the protector of charities, but to act considerately and with forbearance in all proper cases. This would presumably also apply to the Charity Commission bringing a claim under s.114, Charities Act 2011, exercising the same power as the Attorney General.

In modern times, the court's discretion to mitigate the period or extent for which a charity trustee compelled to account for mistakes continues to be relevant, and was exercised by Fox J in *Re Freeston's Charity* [1978] 1 W.L.R. 120 in favour of University College, Oxford University where it had honestly misapplied charitable funds.

More recently, the Supreme Court referred to Lord Eldon's judgment with approval in *Children's Investment Fund Foundation (UK) v Attorney* General [2022] AC 155 at 221 per Lord Briggs JSC; 211-212 per Lady Arden JSC, in the context of a charitable company limited by guarantee.

The court's benevolence was extended most recently in *Re Keeping Kids Co.* [2021] EWHC 175 (Ch) to applications for the disqualification of the directors (charity trustees) of a charitable company under s.6 of the Company Directors Disqualification Act 1986. In holding that they were not unfit to be concerned in the management of a company, Falk J held that the fact that the company was a charity could be taken into account (para. 982), and held that the policy reasons for the court's benevolent approach to charity trustees apply with the same force whether the charity is incorporated or not, and are not restricted to cases where the court is concerned with the potential personal liability of a charity trustee to account for losses of the charity (para. 984).

The scope of the court's benevolence extends for example to the removal of charity trustees, as Falk J noted. In two unreported judgments of the 1990s, Neuberger J emphasised the need for comparative leniency on appeals from removal orders made by the *Charity Commissioners: Scargill v Charity Commissioners*, 4 September 1998, pp.98-99 (considered by Falk J at para. 985); and subsequently Weth v Attorney General (29 April 1999, pp.142-143).

Falk J's review of the authorities does in my respectful view need a minor, cautionary gloss. Among the cases her Ladyship mentioned (at para. 980) is *Stanway v Attorney General,* an unreported judgment of Scott V-C (5 April 2000) on a claim for Beddoe relief in respect of a contemplated claim by the receiver of a charity for breach of charitable trust. Her Ladyship quoted Scott V-C as saying:

"I do think that individuals who have given long periods of their time to unpaid public service – and that is what becoming a trustee of a charity involves – do deserve to have their efforts recognised by not being sued for mismanagement unless the proposed action against them is one which anyone can see cannot be resisted."(p.8, transcript)

Falk J commented no further specifically on this passage, but it does risk misleading if taken out of context. It should not be taken as laying down a threshold for bringing a claim for breach of duty against a charity trustee, as if they should not be sued unless "anyone can see the claim cannot be resisted". It seems much more likely that Scott V-C was remarking on the appropriate test in the particular case before him; elsewhere in his judgment, he said the case was "a long way from being the sort of case that can be recommended to be brought against honest, honourable trustees who have made errors of judgment."(p.15)

This is not to conclude by inadvertently encouraging claims against charity trustees. To the contrary, the court's benevolence in respect of the honest mistakes of charity trustees properly reflects not only the value of their work to society, but arguably also, at least indirectly, the undesirability of charity money being frittered away in pursuing litigation relating to internal disputes (as to which, see e.g. *Bhamani v Sattar* [2021] EWCA Civ 243 at para. 56; s.115, Charities Act 2011).

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