



## Legal underpinning

# Charities and litigation: the legal underpinnings

## Preliminary statement

- (a) This document is intended to be a summary of the Charity Commission's ('the commission') view of the law underpinning its publication Charities and litigation - a guide for trustees (CC38) ('the guidance') and necessarily uses more technical language.
- (b) This analysis is not intended to be a comprehensive legal digest, but a useful reference point for trustees, their advisers and the public. It is intended to reflect law and practice at [March] 2015. It is not binding in law. It should be borne in mind that it offers a general analysis of the law but whether the analysis is appropriate in a particular case will depend on all the facts of that case.
- (c) The commission will take the same approach as the courts and the Tribunal in applying the law.
- (d) References to 'the Act' mean 'the Charities Act 2011'.
- (e) Please see the Charity Commission's policy on restitution and the recovery of charitable funds misappropriated or lost to charity in breach of trust.

## 1. What this guidance is about

There is a wide range of legal proceedings in which a charity may become involved, for example:

- taking or defending civil proceedings
- proceedings ('charity proceedings') concerned with the internal affairs of the charity
- test cases to further or facilitate the charity's work
- legal challenge to a decision of the commission (see guidance to First-tier Tribunal (Charity))

This guidance explains the legal principles which govern decisions by trustees about whether or not to take or defend civil proceedings. It discusses the alternative courses of action that may be available to them. It also deals with the rules for bringing the special class of cases called 'charity proceedings'. Finally, it describes the various sorts of proceedings that may be brought against the commission.

## 2. Taking or defending legal action - general principles for charities

### Summary

Trustees should take legal advice before taking or defending legal proceedings. They must consider:

- the merits of their case
- the prospects of success
- the value of the claim
- the costs (in monetary and other resources) of pursuing the case whether they win or lose
- the ability of the other side to pay costs or damages
- the likely harm to the charity (in financial and reputational terms) whether it wins the case or not

2.1 Trustees have a general duty to act in the best interests of their charity. They have a duty to protect and, where necessary, to recover, assets belonging to the charity.

These duties arise under:

- common law
- statute (see, in particular, the Trustee Act 2000<sup>1</sup> and the Companies Act 2006<sup>2</sup>)
- the charity's governing document

For further details on trustees' duties see new guidance on trustees' duties and legal underpinning

2.2 Those duties will be engaged where there are issues of alleged breach of trust by one or more trustees, alleged breach of contract, or negligence, or disputed boundaries, or claims by former employees, or claims by trustees to recover monies lost to the charity. In any cases of this sort, trustees may need to consider whether or not they should take, or defend, legal proceedings.

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1. Section 1 of the Trustee Act 2000 is in the following terms:

"(1) Whenever the duty under this subsection applied to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

(2) In this Act the duty under subsection (1) is called the duty of care."

2. Section 170 of the Companies Act 2006 is in the following terms:

"(1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.

..

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

2.3 The decision about whether or not to initiate or defend proceedings on behalf of a charity is a matter for the charity trustees, acting exclusively in the best interests of the charity, having considered whether or not some other course of action may be open to them. The commission has no jurisdiction to resolve civil disputes between charities and third parties. In addition, it has no jurisdiction to determine legal or equitable title as between charities and third parties (see section 70(1) of the Act).

2.4 Its permission is not required for the taking of legal proceedings by or against a charity (other than 'charity proceedings' relating to the internal affairs of a charity - see section 5)).

2.5 Where charity trustees are confronted with the decision whether or not to initiate proceedings, they must take and consider appropriate legal advice about the merits of their case and its prospects of success. They may need to obtain other specialist advice, for instance from accountants or surveyors, to provide the information necessary to make a proper decision. They must balance the value of the asset which they are seeking to protect or recover against the risks of litigation. They must take into account such matters as the relative strengths of their case and of any defence or counterclaim which might be raised; the ability of the proposed defendant to meet any judgement which might be obtained against him; and the adequacy of the funds of the charity to meet costs and damages which might be awarded against them.

2.6 The charity trustees must then consider whether 'an ordinary prudent man of business' would take those risks in managing similar affairs of his own.

"As a general rule, a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own".

***Speight v Gaunt*** (1883) 9 App Cas 1, 19 per Lord Blackburn. 2

2.7 Legal proceedings involve a greater or lesser degree of risk and the consequences of losing a case can be very expensive, not only financially, but also in terms of damaged reputation and disappointed donors. These consequences may arise even if the charity concerned wins the case.

Prospective donors may share the dismay expressed by Robert Walker J, in ***British Diabetic Association v Diabetic Society Ltd [1995] 4 All ER 812*** at 816, who described a passing off action between charities as:

"a deplorable, even scandalous thing to occur. Charities solicit donations from the public (and for a charity such as the association fund-raising is quite big business, as its accounts show) in the expectation that donations will be spent on furtherance of the charity's purposes".

2.8 The fact that trustees have received legal advice that they have a strong case is not in itself enough to justify taking proceedings. Equally, proceedings should not be taken on the basis of personal sentiments and interests nor as a 'matter of principle'. The decision to take proceedings is essentially a decision founded on a clear view of where the interests of the charity lie.

2.9 Charity trustees must be able to demonstrate how all decisions about taking legal action are in the charity's best interests and further the purposes of the charity.

"Trustees of a charity within the limits of their authority, whatever they might be, should be guided only by a desire to promote the lasting interest of the charity."

***AG v Kerr (1840) 2 Beav 420, 428***

“A charity trustee, whether an individual or corporation, owes the charity an obligation of undivided, disinterested loyalty, to act solely for the benefit and in the best interests of the charity.”

**Mountstar (PTC) Limited v Charity Commission for England and Wales** First-tier Tribunal (Charity) General Regulatory Chamber CA/2013/0001 and 0003

2.10 The courts will look at the following when reviewing decisions made by the trustees:

- did the trustees act within their powers?
- did they act in good faith and only in the interests of the charity?
- did they make sure they were sufficiently informed?
- did they take account of all relevant factors?
- did they ignore any irrelevant factors?
- did they manage any conflicts of interest?
- did they make decisions that are within the range of decisions that a reasonable trustee body could make?

For further details on trustees’ decision making see the commission’s guidance [It’s your decision: charity trustees and decision making](#).

2.11 An incorporated organisation (for instance a company, corporation or CIO) has a legal personality separate from its members and directors.

In 1612, Sir Edward Coke remarked in the **Case of Sutton’s Hospital** (1612) 10 Rep 32; 77 Eng Rep 960, 973:

*“the Corporation itself is onely in abstracto, and resteth onely in intendment and consideration of the Law; for a Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law; and therefore it cannot have predecessor nor successor. They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by Attorney. A Corporation aggregate of many cannot do fealty, for an invisible body cannot be in person, nor can swear, it is not subject to imbecilities, or death of the natural, body, and divers other cases.”*

A company will, as a separate legal person, be liable for any obligations its directors and employees create on its behalf. This would include any liabilities arising from a legal challenge or defence. A very early case demonstrating this is **Edmunds v Brown and Tillard** (1668) 83 ER 385-387.

2.12 An unincorporated organisation (for instance a trust or unincorporated association) does not have an individual legal personality and legal action against the charity must be taken or defended in the name of the charity’s trustees. For example **North London Mosque v Policy Exchange and another** [2010] [2010] EWCA Civ 526).

2.13 When considering taking legal action, trustees should have regard to the position regarding indemnity for costs( see section 4).

## 3. Alternatives to taking or defending legal action

### Summary

- trustees have power to compromise a legal claim
- before taking or defending legal proceedings, they should consider the possibility of alternative dispute resolution (ADR), especially negotiation or mediation
- trustees may need the assistance of the commission in putting into effect a solution that has been negotiated or mediated
- charities should consider including in their governing documents procedures for dealing with internal disagreements and disputes

3.1 It may be possible for a charity to protect or recover property without going to court itself. For example, if an individual is convicted of theft from a charity, the criminal court has power to order that individual to pay compensation. In such a case, the trustees would need to ensure that they tell the police. They will need to give the police details about the loss or damage the charity has suffered and be able to evidence this. The police will give this information to the Crown Prosecution Service, who will then make the request in court.

3.2 Litigation should be regarded as a last resort when other possible courses have failed. That does not mean, however, that litigation should be avoided at all costs. The success of other courses of action may well depend on being able to convince the other side of the charity's determination to fight its corner, if necessary through the courts. Filing a claim at court may also be necessary for a charity to preserve its cause of action if there are issues of limitation<sup>3</sup>. Litigation may be avoided through a negotiated compromise or through one of the various forms of ADR.

### Entering into a legal compromise

3.3 Trustees of an unincorporated charity have a statutory power to compromise legal claims under section 15 of the Trustee Act 1925<sup>4</sup>. The articles of a charitable company usually contain an express power to compromise. Even when they do not, in the commission's view, the wide powers of management conferred upon company directors by the articles of association may be taken to include such a power. The power must be exercised in accordance with the duties of the directors under sections 170 to 177 of the Companies Act 2006 which include a duty to exercise reasonable care, skill and diligence.

3.4 Compromise involves the exercise of discretion. Trustees cannot claim to have compromised a claim by simply adopting a passive attitude of leaving matters alone.

3.5 The commission may give its formal advice under section 110 to a charity in respect of the 'terms' of a compromise. Section 110 advice does not confer any power on the trustees to make the decision to compromise nor authorise any decision made.

<sup>3</sup> Limitation periods impose time limits within which a party must bring a claim, or give notice of a claim to the other party or parties. Limitation periods are imposed by statute, primarily the Limitation Act 1980. There are different periods for different types of cause of action. When disputing parties are in settlement discussions and the expiration of the limitation period is near, a claimant may commence proceedings which are then put on hold for on-going settlement negotiations to continue.

<sup>4</sup> As amended by the Trustee Act 2000, s 40(1), Sch 2, Pt II, para 20.

## Alternative Dispute Resolution (ADR)

3.6 The 2 most common forms of alternative dispute resolution are:

- ‘negotiation, in which the parties try to settle the dispute between themselves, or via their advisers
- ‘mediation’, where an independent third party acts as facilitator between the parties

3.7 Provisions requiring the parties to resolve disputes through ADR are a common feature of commercial contracts. They reflect the attractiveness of ADR where a dispute is capable in principle of being resolved by a financial transaction, and where only the parties to the contract are interested in the outcome.

3.8 Of course, disputes ‘within’ charities often raise legal and regulatory issues of concern to the commission (and perhaps to others). Even so, mediation can be very effective in such cases, since wider issues of reputation and commitment to the charitable cause can be accommodated in the process, which is able to deal with all the issues in the dispute rather than solely with legal or financial issues. ADR is also not focused on winning or losing but on resolving the underlying problem, taking into account short and long term aims. It allows the parties to be proactive and positive about resolving the dispute rather than reactive and defensive, which tends very often to be the case in litigation.

3.9 A court may refuse to consider an issue until mediation or ADR has been tried and may make an order that parties try ADR first whether or not they are willing to do so.

*“In this case very substantial sums of money have been spent: on litigation without achieving a resolution. The spending of money on this kind of litigation does not promote the religious purpose of this charity. It is time for mediation. No more money should be spent from the assets of this charity until:*

*(1) the Charity Commissioners have authorised the proceedings and counterclaim and*

*(2) all efforts have been made to secure a mediation of this dispute in the manner suggested”*

**Muman and others v Nagasena [1999]** 4 All ER 178

3.10 The court may criticise parties who have not been willing to try ADR.

*“Without the need for the vast costs which must have been incurred in this case.... the parties should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today, sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible.”*

**Cowl v Plymouth City Council [2001]** EWCA Civ 1935

### The commission’s role

3.11 Compromise, mediation and ADR may throw up solutions that are inconsistent with the charity’s constitution. If the charity lacks the power either in its governing document or in the general law, it may be able to confer the relevant power upon itself or modify an existing power. Alternatively, the commission’s intervention may be necessary by scheme or (more frequently) by an order under section 105 of the Act<sup>5</sup>.

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5. “(1) Subject to the provisions of this section, where it appears to the commission that any action proposed or contemplated in the administration of a charity is expedient in the interests of the charity, the Commission may by order sanction that action, whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity”.

3.12 Solutions which involve disposals of real property, will need to comply with Part 7 of the Act. If an order of the commission is required, it is likely to be supportive of a solution which is accepted by the disputants. More difficult are cases where the proposed solution is inconsistent with a legal principle, such as the rule against trustees profiting from their trust in the absence of the necessary authority.

3.13 In some cases, including cases of high public interest, loss through sufficiently serious breaches of trust and those involving very large sums of money, the commission may have a regulatory interest<sup>6</sup> or wish to consider bringing legal proceedings in the public interest with the Attorney General's consent to recover funds lost to charity<sup>7</sup>. The Attorney General as 'parens patriae' and therefore, the protector of charities and charity in general may also wish to take further action.

### Ex-gratia payments

3.14 Charity trustees may, with the consent of the commission under section 106 of the Act, decide that they are under a moral obligation to make a payment to a third party or to waive a legal entitlement even though there is no potential legal claim or defence on the part of the third party. This section gives the commission the same power as the Attorney General to authorise a charity's trustees to apply charitable property, or to waive the charity's entitlement to receive property, where they have no power to do so<sup>8</sup>. The commission exercises this power under the supervision of the Attorney General and it is subject to his/her directions and supervision<sup>9</sup>.

Cross J. in **Re Snowden** [1970] Ch.700 confirmed that the court and the Attorney General had this power:

*"I am satisfied that the court and the Attorney-General have power to give authority to charity trustees to make ex gratia payments out of funds held on charitable trusts. It is, however, a power which is not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment."*

For further information on ex-gratia payments and the commission's power under section 106 see its guidance Ex gratia payments by charities (CC7) and Operational Guidance Ex-gratia payments by charities - OG539.

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6. This may include giving regulatory advice to trustees on the discharge of their duties and responsibilities; consider opening a statutory inquiry and using its powers of protection and remedy; directing the trustees to take legal advice about what steps might be available to them; appointing replacement trustees who are not involved or conflicted who can consider how to recover the property; appointing an interim manager to identify the loss and to consider the recovery of property or freezing or restraining the disposal of charity property.
  7. Under section 114 of the Act.
  8. In order to give itself the power to disclaim, the organisation had to prepare and promote a Bill which became the Alcoholics Anonymous (Dispositions) Act 1986; See Appendix D, Report of the Charity Commissioners [1986].
  9. Section 106(3) of the Act.

## 4. Protection against liability for costs

### Summary

Where a charity is out-of-pocket as a result of taking part in legal proceedings, the trustees may be personally liable for the loss. Trustees can obtain some protection against liability in advance by:

- asking the court for a **Re Beddoe** order
- asking the commission to authorise them to take (or defend) the proceedings

4.1 Trustees are able to use the charity's funds only to meet costs which have been properly and reasonably incurred in administering the charity.

In **Re Grimthorpe** [1958] Ch. 615 Danckwerts J. stated:

*"It is a commonplace that trustees, who take the onerous and sometimes dangerous duty of being trustees, are not expected to do any of the work at their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain: they are entitled to be paid back all that they have had to pay out."*

As regards trusts, the position is now provided for in section 31(1) of the Trustee Act 2000:

*"A trustee -*

*(a) is entitled to be reimbursed from the trust funds, or*

*(b) may pay out of the trust funds*

*expenses properly incurred by him when acting on behalf of the trust.*

4.2 Trustees who litigate unsuccessfully may have greater difficulty in demonstrating that their legal costs have been properly incurred. They are likely to have even more difficulty in showing that costs awarded against them personally have been properly incurred. The fact that they have taken, and acted in accordance with, legal advice is not in itself sufficient to show that the costs were properly incurred (the decision to litigate was, after all, theirs rather than their legal adviser's)<sup>10</sup>. In the absence of insurance cover, or a provision in their governing document limiting or excluding liability, the trustees risk being personally liable for the costs. On occasion, the judgement of the court will reflect that the payment of costs is reserved to the judge for example it is not an automatic process by which the costs of legal action are covered by the charity's funds. The court may order that the trustees pay such costs personally<sup>11</sup>.

4.3 Trustees can protect themselves from this risk in advance of litigation by:

- applying to the court for a **Re Beddoe** order, or
- requesting that the commission exercises its discretion to provide advice under section 110 of the Act

10. See *Re Beddoe*. *Downes v Cottam* [1893] 1 Ch. 547, referred to at paragraph D4 below.

11. For example *Attorney General v Daugars* [1864]22 Beav. 622.



4.4 A **Re Beddoe** order authorises trustees to take or defend proceedings and to use the charity's funds for that purpose.

In **Re Beddoe. Downes v Cottam [1893] 1 Ch. 547** Lindley J. stated:

*"The principle of law to be applied appears unmistakeably clear. A trustee can only be indemnified out of the pockets of his cestuis que trust against costs, charges, and expenses properly incurred for the benefit of the trust - a proposition in which the word "properly" means reasonably as well as honestly incurred. While I agree that trustees ought not to be visited with personal loss on account of mere errors in judgment which fall short of negligence or unreasonableness, it is on the other hand essential to recollect that mere bona fides is not the test, and that it is no answer in the mouth of a trustee who has embarked in idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong-headed and perverse. Costs, charges, and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person who was in fault. No more disastrous or delusive doctrine could be invented in a Court of Equity than the dangerous idea that a trustee himself might recover over from his own cestuis que trust costs which his own solicitor has unreasonably and perversely incurred merely because he had acted as his solicitor told him.*

*If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money that belongs to other people."*

No order will be made where the litigation can be of no benefit to the trust.

4.5 In **Weth v Attorney General [2001] EWCA Civ 263** Mummery LJ. said in dismissing an appeal in relation to a costs' indemnity:

*"In brief, the position was that, even if the appeal against the appointment of the receiver was not hopeless, it was pointless. It was clearly not in the best interests of the charity to spend its funds on pointless litigation."*

4.6 The judge may grant an order covering all or part of the proceedings (for example, up to discovery). The Attorney General has to be a party to an application for such an order and the commission must consent to the application, as these are "charity proceedings" (see further at section 5 of this guidance).

4.7 In deciding whether or not to give the necessary authority for the application, the commission would need to know:

- what relief would be sought in the proposed proceedings
- what advice the trustees have received about the merits of their case

- the basis on which the trustees have concluded that it was in the interests of the charity to take or defend the proceedings
- why the trustees want to obtain the order

4.8 The commission is bound to withhold authority (without a special reason) if the case is one that the commission can deal with itself (section 115(3) of the Act). In recent years, the commission has refused authority to apply for a **Re Beddoe** order where it felt able to authorise the use of charity funds for litigation by way of an order under section 105 of the Act, or by advice under section 110. However, in adopting that approach, the commission nonetheless follows the practice of the court. The commission will need to be satisfied that taking the proceedings will serve the interests of the charity. That will involve consideration of a range of issues including:

- the strength of the trustees' case, the purpose which will be served by taking or defending the proceedings
- whether the trustees have considered other ways of achieving that purpose
- the charity's ability to meet the costs
- the risks of litigation (not only in financial terms, but also in terms of reputation and deflection of the charity from pursuit of its charitable purposes)

The commission is likely to follow the lead of the court in authorising sequential and separate steps in litigation.

4.9 Neither a section 105 order nor section 110 advice can have retrospective effect. Authority from the court or the commission to take proceedings may not be absolute protection if the litigation is nonetheless carried out negligently.

4.10 In **Stanway v Attorney General [2000]** (unreported) the Rt. Hon Sir Richard Scott V.C. distinguished Beddoes' application by a charity compared with that in respect of a private trust:

*"The public interest comes into play in considering what directions should be given on a Beddoes application involving a charity in a way which is absent where ordinary Beddoes' applications regarding private trusts are concerned."*

## 5. Charity proceedings

### Summary

Legal proceedings that relate to the internal or domestic affairs of a charity ('charity proceedings') can be taken only with the permission of the commission or the court and only by the charity itself, any of the charity trustees, or any person interested in the charity. In the case of a local charity such proceedings can be taken by any 2 or more inhabitants of the area of the charity.

The commission will authorise the proceedings if it is of the view that it is in the interests of the charity that the issue is adjudicated by the court.

The commission is bound to refuse permission (in the absence of special reasons) if it decides that it can deal with the issue itself using its statutory powers.

The commission may also refuse permission for the proceedings if it decides that the proceedings are not in the charity's interest.

An application for permission to bring proceedings is treated as confidential although if an order under section 115 is granted, the commission will inform the Attorney General who must be made a party to charity proceedings.

If the commission refuses permission, it is possible to appeal to a High Court judge for authority to commence charity proceedings.

Permission to take charity proceedings does not carry with it permission to use the charity's funds to pay the costs of taking those proceedings.

5.1 Charity proceedings are defined in section 115(8) of the Act, being

*"proceedings in any court in England or Wales brought under-*

*(a) the court's jurisdiction with respect to charities, or*

*(b) the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes."*

5.2 Charity proceedings have included proceedings to determine whether a charity's AGM has been properly conducted, for example, or whether the trustees have been properly appointed. On the other hand, matters concerning the charity's relations with third parties will usually not constitute charity proceedings, for example, proceedings brought by a former employee of a charity before the employment tribunal, or a boundary dispute with a neighbour. On occasion, whereas the claim itself is not 'charity proceedings' the counterclaim may raise issues that are. An example of this is **Muman and others v Nagasena [1999]** 4 All ER 178. Issues relating to charitable status are not 'charity proceedings' within the Act's definition.

5.3 In cases of uncertainty, the commission will form a view as to whether the proceedings are charity proceedings and proceed accordingly. However, in the last resort, only the court can determine whether proceedings are charity proceedings.

5.4 In **Rai and others v The Charity Commission for England and Wales** [2012] EWHC 1111 (Ch) Norris J. articulated the commission's approach:

*"although the Chancery judge is exercising his or her own original (and not an appellate) jurisdiction, the fact that the Charity Commission has refused permission to bring the proceedings is part of the evidence. The prior decision of the Charity Commission is entitled to be accorded in an appropriate degree of respect because of the weight of expertise brought to bear on evaluating what is obviously a multi-factorial decision."*

5.5 Having determined whether or not the litigation is 'charity proceedings' under the Act, the commission has a screening role in the exercise of this power which is based on 2 concerns. The first is that charities should not be harassed by a multiplicity of hopeless cases. The second is that, if there is a dispute about the internal affairs of a charity which can be dealt with through the powers given to the commission, resort to the court is an unnecessary and unjustifiable expense.

The purpose of the test was explained in **Scott v National Trust** [1998] 2 All ER 705:

*"This protective filter is intended to protect public officers, public bodies and charities from being harassed by a multiplicity of hopeless challenges ... The efficacy of the protective screen is, of course, enhanced by the need for the complainant to have a sufficient interest or an interest in the charity."*

5.6 Proceedings brought by the Attorney General do not require authorisation by the commission (see section 115(6) of the Act which also disapplies section 115 to proceedings brought by the commission in accordance with section 114 of the Act).

5.7 Charity proceedings in respect of exempt charities which have a principal regulator require authorisation by the commission in the same way as for registered and excepted charities. The previous exclusion of exempt charities from the charity proceedings provisions no longer applies except to exempt charities which do not have a principal regulator<sup>12</sup>.

5.8 The commission exercises its discretion in light of its statutory objectives, functions and duties as detailed in section 14, 15 and 16 of the Act and its approach generally to the use of its regulatory powers.

5.9 Factors usually taken into account:

- are the proceedings really charity proceedings and is the disputed matter properly pleaded?
- are there proper parties and does the person who wants to take the proceedings have a legitimate interest in the internal affairs of the charity?
- does the proposed action raise issues of substance which should be addressed through the court?
- has the matter in dispute been brought in good faith?
- are there alternative ways to resolve the issues, and if so, have they been explored? Can the underlying problem be resolved by the commission using its own powers?
- what are the costs of the litigation?
- what values do the assets involved (financial, reputational or otherwise) have?

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12. Charities Act 2011 Schedule 9 paragraph 21.

- would to grant or refuse an order authorising the proceedings interfere in a disproportionate or unjustified way with rights protected by the Human Rights Act 1998?
- is it in the interests of the charity for the case to go to court?

### Who can bring charity proceedings?

5.10 Charity proceedings may be taken only by:

- the charity
- any of the 'charity trustees' (the persons having the general control and management of the administration of a charity)
- any 'person interested in the charity'
- any 2 or more inhabitants of the area of the charity if it is a local charity<sup>13</sup>
- the Attorney General, or the commission acting in accordance with section 114 of the Act

5.11 Neither the Act nor the courts have provided a comprehensive definition of the phrase a 'person interested in the charity'.

See Lord Justice Nicholls in *Re Hampton Fuel Allotment Charity* [1989] Ch 484, sub nom *Richmond upon Thames London Borough Council v Rogers* [1988] 2 All ER 761, CA:

*"If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public as described above, that interest may, depending on the circumstances, qualify him as a 'person interested'."*

5.12 In **Haslemere Estates Ltd v Baker** [1982] 3 All ER 525, [1982] 1 WLR 1109 Sir Robert Megarry V.-C. held that a company which claimed to have a binding contract for the grant of a lease of land of a charity was not a 'person interested' in the charity for the purpose of charity proceedings:

*"Now I do not aspire to define the meaning of the phrase 'any person interested in the charity' in this context. That I shall leave for others; I am merely concerned to find a safe resting place for my decision in this case. In my judgment the phrase, in its context, does not bear the wide meaning for which Mr. Scott and Mr. Burton contend. Many a person may be interested in the property of a charity without, for this purpose, being interested in the charity. I do not think that to contract with the trustees of a charity turns the contractor into a 'person interested in the charity,' even if the contract relates to land or other property of the charity. I do not think that the phrase includes every tenant of charity land, or those who have easements or profits or mortgages or restrictive covenants over charity land, or those who contract to repair or decorate charity houses, or those who agree to buy goods from the charity or sell goods to the charity. An interest which is adverse to the charity is one thing, an interest in the charity is another. Those who have some good reason for seeking to enforce the trusts of a charity or secure its due administration may readily be accepted as having an*

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13. Under section 293 of the Act:

"'local charity' means, in relation to any area, a charity established for purposes which are-

(a) by their nature, or  
(b) by the trusts of the charity

directed wholly or mainly to the benefit of that area or part of it."

*interest in the charity, whereas those who merely have some claim adverse to the charity, and seek to improve their position at the expense of the charity, will not. The phrase, I think, is contemplating those who are on the charity side of the fence, as it were, however much they may disagree with what is being done or not being done by or on behalf of the charity. The phrase does not refer to those who are on the other side of the fence, even if they are in some way affected by the internal affairs of the charity.”*

5.13 Nor are the executors of the will of the founder of a charity persons interested in the charity:

**Bradshaw v University College of Wales, Aberystwyth** [1987] 3 All ER 200, [1988] 1 WLR 190. Mr Justice Hoffman said:

*“In my judgment, it is plain that the executors have no interest in this charity. Neither they nor the estate of Miss Lewis could in any sense be regarded as beneficiaries under any of the charitable purposes, nor could the land comprised in the conveyance in any circumstances revert to Miss Lewis’s estate. The executors, therefore, have no more interest in the charity than any other member of the public... Without, as Sir Robert Megarry V.-C. said in the Haslemere case, in any way wishing to essay a definition of ‘any person interested,’ I do not consider that a person who could not in any circumstances be a beneficiary of the charity or take any interest under the trusts applicable to the property of the charity can be within that expression.”*

5.14 See also **Gunning v Buckfast Abbey Trustees** (1994) Times, 9 June, where charity proceedings were brought by parents of children attending an independent school run by a charity; although the parents had a contractual relationship with the school, they were not suing on these contracts but seeking the proper administration of the charity. Even though the parents were neither subscribers nor beneficiaries, they were persons interested in the charity because they had a moral and legal duty regarding the education of their children and thus had a concern that the charity should fulfil its functions properly which was greater than the concern of an ordinary member of the public.

5.15 The decided cases show that a person who makes an adverse claim against a charity (for example, someone trying simply to enforce a contractual claim against the charity) is not a ‘person interested’. Being a beneficiary of the charity, or a member ‘may’ be enough to make someone a ‘person interested’. See **R (Heather) v Leonard Cheshire Foundation** [2001] EWHC 429 (Admin). However, much depends on the circumstances and the subject-matter of the proceedings. A person who provides modest financial support for a major national charity may not have sufficient standing. On the other hand, a person who founds and finances a local charity almost certainly would have standing.

### Other matters relevant to charity proceedings

5.16 Does the proposed action raise issues of substance which should be addressed through the court? This question raises the issue of whether the problem which has prompted the proceedings really needs to be solved. If the problem is not disrupting the operations of the charity, and if the charity is being administered by individuals who appear to have a good claim to be trustees and who are discharging the duties laid on trustees, there may be no very good reason for subjecting the charity to legal proceedings. Providing consent under section 115 of the Act does not in itself confer any view as to the merits of a particular case. However, if the commission considers that the case is not made out in the papers and on the evidence it may not give its authority.

5.17 In **Amrik Singh v Virender Pal Singh Sikka and others** [1998] LTA 98/6925/3 the court found that section 115 authority is required for all the reliefs sought:

Gibson LJ said *“It is simply not good enough to say that proceedings generally have been authorised, still less that an allegation of fraud should be covered by a paragraph referring to further or other relief.”*

5.18 Section 115(4) provides:

*This section does not require an order for the taking of proceedings-*

*(a) in a pending cause or matter, or*

*(b) for the bringing of any appeal*

In the case of **Ford’s Charity [1855] 3 Drew 324**, Sir Richard Kindersley VC<sup>14</sup> held that a new scheme for the development of a new school which had not previously been considered by the court did not amount to a matter pending, even though another scheme in respect of the same charity funds had been so considered. The case decided that a matter pending for the purposes of the 1854 Act (the provision subsequently found in section 115 of the Act), meant a continuation of something directed by the court.

In **Young Geun Park v Tae Hyeon Cho and others** [214] EWHC 55 (Ch), the court held that in a case where the central matter had been decided and the outstanding issue, being the enforcement of costs awarded by the court, it was possible for the commission to authorise steps with existing proceedings, notwithstanding that the proceedings as a whole had not been authorised as charity proceedings:

Cousins DJ said *“In all the circumstances, I conclude that the order made by the Charity Commission was a permissible order, authorising the taking of a step in the existing proceedings, albeit that the order did not authorise the proceedings from their inception”*

5.19 For alternatives to litigation, see section 3.

5.20 Sometimes charity proceedings are taken to obtain an outcome of a kind that the commission itself has power to grant. For example, the commission shares the court’s jurisdiction to make orders appointing trustees or establishing a scheme<sup>15</sup>.

5.21 In other cases, the commission may not have power to grant the specific relief that the applicant seeks. For example, the commission cannot determine the validity of acts carried out in the administration of a charity, such as whether trustees have been validly appointed at a disputed election at an annual general meeting. However, if the underlying problem is really a serious doubt about whether the governing body has been properly-appointed, the commission may be able to deal with the case through the use of its own powers (for example, by facilitating the holding of a further annual general meeting at which trustees can be validly elected). That approach would not resolve the question of whether the disputed election was legally valid. However, if the trustees are elected annually, it would be difficult to justify spending time, effort and resources on determining that question.

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14. Under section 17 of the Charitable Trusts Act 1853.

15. See sections 69 and 80 of the Act.

5.22 Even if the case can, in principle, be dealt with by the use of the commission's powers, it may be desirable for the case to go to court. The court may be a more appropriate forum for resolving issues that are highly controversial and fundamental to the nature of the charity<sup>16</sup>. The case may raise a novel point of law or a fundamental dispute of fact that needs to be resolved once for all by the court. The urgency and importance of a matter may be enough to justify authorising the proceedings.

For example, where a decision of trustees to close an educational institution is challenged, the loss of confidence that the decision creates will quickly undermine any efforts to save the school.

5.23 If the exercise of the commission's powers is likely to be time consuming, that might be a special reason for authorising the proceedings (assuming that there is some basis for the challenge).

5.24 Under section 115(7) of the Act, the commission may decide that it is desirable for legal proceedings to be taken by the Attorney General.

5.25 The commission's role under section 115 of the Act is wider than merely screening out proceedings which are legally unfounded. The commission takes the view that it should be reluctant to give consent for proceedings which, although not unfounded in the legal sense, are 'hopeless' in the sense that there can be no benefit to the charity in pursuing them. In the example discussed previously, the charity may well have no interest at all in the legal validity of the disputed election of a trustee, if the period of office for which the individual was purportedly elected has already expired.

5.26 In dealing with applications for section 115 orders, the commission has to be able to justify its decision as striking a reasonable and proportionate balance between the need to protect charitable funds from unnecessary litigation and the right of access to the courts. The commission will only authorise proceedings if it is satisfied that they are in the interests of the charity.

5.27 Sometimes, a case raises the question of whether the court can really be expected to resolve the problem that has been raised. If the parties to a dispute are utterly unwilling to co-operate with one another, it may be that the charity has no future in its current form and some other outcome should be sought. (In some cases, it may be appropriate to ask the court to divide the charity's property between the parties - in **Varsani and Others v Jesani and Others** [1998] All ER 273 The circumstances surrounding a dispute between 2 factions in a charity supported the making of a scheme dividing the property of a charity).

5.28 Conversely, the parties need to be aware that the court may be much more concerned with securing the best interests of charity and securing its future effectiveness than with resolving all the issues in dispute. Occasionally, a case is adjourned because the judge has decided that the case involves charity proceedings and that the commission should be asked to give permission for the proceedings. In such cases, where it gives permission, it is often on the basis of an amendment of the claim to identify the charity law relief which is being sought.

5.29 Accordingly, in order to consider an application for a section 115 order, the commission needs to have copies of the following documents:

- the draft claim form
- supporting statements
- counsel's opinion or other legal advice on the merits of the claim and the prospects of success
- any other relevant documents

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16. See section 70(8) of the Act.



5.30 The commission will also need details of:

- the estimated costs of the proceedings
- the value of the asset(s) involved (if appropriate)
- information about the charity's finances (where the application is made by or on behalf of the charity)
- an evaluation of the benefits to the charity that are expected to flow from litigation
- an assessment of the risks to the charity from the litigation (including reputational risks)
- the steps that have been taken to compromise or mediate

5.31 The commission will query claims for relief which appear not to be properly drafted. The commission will also query legal advice about whose correctness or adequacy it has reservations. However, in making an order, the commission is not formally endorsing the proceedings or committing itself to a view about their likely outcome.

### Confidentiality

5.32 The commission will generally regard communications between applicants for section 115 orders and the commission as confidential. That is partly because it expects to be given details of the (legally privileged) legal advice which the applicant has obtained on the merits and prospects for success of the claim, partly because the commission wishes to encourage applicants to be candid about matters which, if disclosed to the prospective defendants, may prejudice their case. However, if consent is given, the commission must inform the Attorney General of this with all necessary and appropriate documentation.

### Role of Attorney General

5.33 Under Practice Direction 64A

*“The Attorney-General is a necessary party to all charity proceedings, other than any commenced by the Charity Commissioners<sup>17</sup>, and must be joined as a defendant if he is not a claimant.”*

5.34 The rationale for this rule of practice is that the AG represents the public interest in the due administration of charities. In cases where it seems that the AG is unlikely to be called upon to assist the court, or where the cost of his/her representation would be disproportionate to the amount at stake, he/she may be a party but not take an active part in the proceedings. Whether or not he/she is a party, the AG has power to apply to the court to stay charity proceedings which he/she considers to be oppressive or not in the interests of the charity.

5.35 The Attorney General has a duty where appropriate to intervene for the purpose of protecting charities and of affording advice and assistance to the court in the administration of charitable trusts. See for example per Lord Macnaghten delivering the judgment of the Privy Council in *Wallis v. Solicitor-General for New Zealand* [1903] A.C. 173 at pp.181-182:

*“It is the province of the Crown as *paterfamilias* to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities and affording advice and assistance to the court in the administration of charitable trusts.”*

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17. See footnote 15.

In order that the AG can perform such duties he will frequently need to be a party to legal proceedings concerning charities.

5.36 Categories of proceedings involving charities which the AG may be or be invited to be involved in and the roles which he may take in relation to them:

- disputed gifts in wills
- whether an institution/trust is a charity or whether property is held on charitable trusts
- construction of existing charitable obligations
- application for directions
- application for pre-emptive costs order
- amendment of existing constitution

5.37 Whether or not he is a party, the AG has power to apply to the court to stay charity proceedings which he considers to be oppressive or not in the interests of the charity.

5.38 If, exceptionally, the commission is provided with material by the prospective defendant, it will take that material into account only if it is provided on the basis that it can be disclosed to the applicant.

## Refusal

5.39 Where the commission has refused an application for authority to bring charity proceedings, it may be possible for that decision to be reconsidered by the commission. This is not an appeal or review of its initial decision as the applicant will need to show, by fresh evidence or reasoned argument, that the application for a section 115 order should succeed as this would better promote the purposes of the charity concerned.

5.40 Where the commission has authorised charity proceedings, a person directly affected by that decision (which would include a prospective defendant) may be able to have the decision reversed if he or she can persuade the commission that the decision was made by mistake or on misrepresentation or otherwise than in conformity with the law.

5.41 Although the commission's refusal to authorise proceedings may be seen as a constraint on an individual's right of free access to the court which is guaranteed by Article 6 of the Convention Rights, there is a subsequent right to apply to the High Court under section 115(5) of the Act<sup>18</sup>.

## Under Part 64 of the Civil Procedure Rules:

*(1) An application to the High Court under section 33(5)[now section 115(5) under the 2011 Act] of the Act for permission to start charity proceedings must be made within 21 days after the refusal by the Commissioners<sup>19</sup> of an order authorising proceedings.*

*(2) The application must be made by issuing a Part 8 claim form, which must contain the information specified in Practice Direction 64A.*

*(3) The Commissioners<sup>20</sup> must be made defendants to the claim, but the claim form need not be served on them or on any other person.*

18. "Where subsections (1) to (4) require the taking of charity proceedings to be authorised by an order of the commission, the proceedings may nevertheless be entertained or proceeded with if, after the order had been applied for and refused, leaving to take the proceedings was obtained from one of the judges of the High Court attached to the Chancery Division."

19. Now 'the commission' under the 2011 Act.

20. See footnote 15.

*(4) The judge considering the application may direct the Commissioners<sup>21</sup> to file written statement of their reasons for their decision.*

*(5) The court will serve on the applicant a copy of any statement filed under paragraph (4).*

*(6) The judge may either -*

*(a) give permission without a hearing or*

*(b) fix a hearing.*

5.42 The commission has no power to extend the 21 day period as this is a matter for the High Court. This time limit applies whether or not the applicant has invoked the commission's internal review procedure.

5.43 The commission are defendants to the claim, but the claim form need not be served on them. In practice, the commission usually takes no part in the proceedings. It is the commission's practice to give reasons in writing for refusing authority for charity proceedings (and a copy of those reasons must be filed with the claim form. The judge may direct the commission to file a written statement of the reasons for the decision. The fact that trustees of a charity have obtained a section 115 order does not in itself entitle them to an indemnity from the charity's funds for the costs that they incur in the proceedings.

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21. See footnote 15.

## 6. Test cases

### Summary

A charity may bring a test case against a public body where:

- there is a particular legal issue which requires determination
- it will further the purposes of the charity for the issue to be determined by the court
- the charity has been advised by its lawyers that it has at least a reasonable prospect of success
- the trustees have weighed the prospects of success against the consequences of failure (financially, but also in terms of the impact upon the charity and its charitable purpose)
- the trustees have concluded, adopting a 'commercial' approach, that the potential benefits outweigh the risks

6.1 A charity may be able to justify bringing a test case to establish what the law is on a particular issue where there is uncertainty about the legal position and it will further the purposes of the charity to resolve the question in the way for which the charity contends.

6.2 Where any human right is to be advanced by means of litigation, this will be limited to establishing the primacy of relevant laws which either form part of the domestic law of the state concerned ( including for the avoidance of doubt legal proceedings before any Constitutional court ) or are binding on that law and where the state concerned has implemented the relevant treaty obligations so as to provide a competent domestic constitutional court empowered to determine this or where there is an international tribunal, the legitimacy of which has been recognised by the state concerned and whose decisions as a matter of domestic law bind the domestic law of the state concerned.

6.3 The charity trustees would need to be satisfied, on the basis of legal advice, that it has a reasonable prospect of success. They would need to have weighed the prospects of success (and the advantages that will follow from success) against the consequences of failure, both financially and in terms of the impact on the charity and its charitable purpose. And they would need to have concluded that a reasonable and prudent business person would think that the risk was worth taking.

6.4 A test case satisfying those conditions is not directed towards changing law or policy, but rather towards clarifying the law. The fact that the ultimate objective may be to change the behaviour of a public body does not make bringing the case a political act. The charity isn't trying to make a public body change its policy - it is trying to make it comply with the law.

6.5 However, if there really is not much chance of success - if what matters to the charity trustees is simply that the proceedings are brought - if the charity is really trying just to embarrass a public body into changing the law or its policy, then the charity is engaged in a political activity. The test for bringing such proceedings would be:

- how likely is it that the litigation will persuade the public authority to change its policy (given the unpredictability of litigation)?
- how likely is it that the case will end (or be widely reported) in a way that reinforces the current policy of the public authority?

- what is the risk to the charity's reputation if the litigation backfires?
- what is the risk that the charity will be criticised or penalised by the court for bringing proceedings that are hopeless, perhaps putting the public purse to unnecessary expense?
- are the costs and risks of litigation justified by the prospects of the public authority changing its policy?
- are there other ways of achieving the same result without incurring those costs or running those risks?