

Inquiry Report

Raleigh Limited

Registered Charity Number 1123687



A statement of the results of an inquiry into Raleigh Limited (registered charity number 1123687).

Published on 6 February 2015.

The charity

Raleigh Limited ('the Charity') was registered on 16 April 2008. It is governed by a memorandum and articles of association dated 15 December 2006 as amended by special resolution dated 9 July 2010.

More details about the Charity are available on the [register of charities](#).

Background

On 15 August 2011 the commission opened a regulatory compliance case into the activities of the Charity¹. At this stage the regulatory concerns identified related to the exceptionally low level of charitable activity, the accumulation of funds to an extent which appeared contrary to the Charity's reserve policy, the Charity's relationship with Rally Investments Limited, its subsidiary company ('the Subsidiary Company'), with particularly the loan to the Subsidiary Company which amounted at the time to over 50% of the Charity's total income since its inception.

Having engaged with the Charity on these issues additional regulatory concerns regarding the loan made by the Charity to the Subsidiary Company were identified. The submission of potentially false and or misleading information to the commission in the form of trustee minutes and the concerns regarding the timeframe of events surrounding the making of the loan acted as trigger for the commission formalise its engagement with the Charity.

Issues under inquiry

On 20 October 2011 the commission opened a statutory inquiry to investigate and examine the following key issues:

1. The administration, governance and management of the Charity by the Trustees
2. Management of conflicts of interest
3. Low level of charitable expenditure
4. Whether or not the Trustees have complied with and fulfilled their duties and responsibilities under charity law

The inquiry concluded with the publication of this report on 6 February 2015.

¹ The Charity came to the commission's attention during an Inquiry into the charity Delapage Limited. The Charity was the recipient of funds donated from Delapage Limited. The Inquiry into Delapage Limited remains ongoing and a report will be a report will be published on GOV.UK when the investigation has concluded.

Findings

1. The administration, governance and management of the Charity by the Trustees - with specific regard to the management and supervision of the Subsidiary Company

The Inquiry established that during the financial year ending 31 March 2009 the Charity made a loan to the Subsidiary Company to the value of £500,000. The Trustees² informed the Inquiry that this loan was for a three year period for the purpose of enabling the Subsidiary Company to make a “a guaranteed three year investment” that would ultimately benefit the Charity. The Trustees did not expect the Subsidiary Company to gift any profits to the Charity during that period.

On 12 September 2011 the Inquiry was provided with a minute of the trustee meeting where the decision to make the loan was agreed, this minute was dated 30 January 2009. The minute referred to the Trustees having received counsel’s advice before the decision was made by the Trustees. When the Inquiry asked to see a copy of the advice the Trustees informed the Inquiry that there had been a mistake and the commission had been provided with copy of the draft minute that had been signed by the Chair in error. The Trustees informed the Inquiry that the person who had drafted the minute had mistakenly believed that legal advice had been taken. On 27 September 2011 a copy of the minute which the Charity’s adviser, confirmed was the true copy was provided to the commission; this did not contain reference to counsel’s advice having been obtained.

The Inquiry established that the Deed setting out the terms of the investment was dated 24 December 2008; nearly a month prior to the decision to make the loan was agreed. When questioned why the investment was entered into before the decision to make the loan was agreed the Trustees’ response was that the decision had been taken previously to make the loan but had not been formally documented and the minute of 30 January 2009 was a retrospective record of the decision.

For the period of the Inquiry and since the establishment of the Subsidiary Company the loan and the investment were the only two transactions entered into. It carried out no other business.

2. Management of conflicts of interest - with specific regard to the management of the Charity’s loan to the Subsidiary Company and the Subsidiary Company’s investment

The Inquiry found that on 24 December 2008, the Subsidiary Company entered into a legal agreement with an individual (‘the Individual’)³, whereby the Subsidiary Company agreed to pay £500,000 to the Individual and in return the Subsidiary Company acquired a quarter of the beneficial interest in certain shares owned by the Individual personally in a private company⁴. The arrangement was such that the Individual would continue to hold legal title to the shares on a trust in favour of the Subsidiary Company and agreed to pay the respective share of any dividends due on the shares to the Subsidiary Company. If the distributions paid over a period of three years did not total £500,000 (the total sum on the initial investment) the obligation on the Individual was either to pay the shortfall and the Subsidiary Company would retain its interest in the shareholding or, alternatively, if the Subsidiary Company elected within two months of any final distribution to repay the Subsidiary Company the £500,000 together with compound interest, with the Subsidiary Company giving up its interest in the shareholding. The potential liability of the Individual being unable make good the repayment was secured by the right to acquire second mortgages over various properties owned by the Individual.

² The Trustees changed during the Inquiry two independent Trustees were appointed during the course of the Inquiry.

³ Mr Andrew Thornhill QC.

⁴ Ethos Energy (Worldwide) Limited.

The Inquiry established that the Individual had been known to the Trustees for some time and had been providing advice, albeit informal, to them in their personal capacity since 2006. In September 2008 the Trustees, in their personal capacity, entered into a formal agreement with the Individual regarding their personal financial arrangements with other members of their family. This arrangement was subsequently revised in June 2009. That arrangement is referred to as the Way Forward Agreement(s).

The Inquiry's view was that as a result of the Individual entering into a private arrangement with the Trustees there may have existed a conflict of interest because of this arrangement and because of their position as trustees/directors of the Charity at the same time, which required consideration and subsequent management.

During a meeting held on 19 March 2012 with the Trustees and their advisers, the Inquiry was informed that the Trustees did not consider a conflict of interest existed. When given the opportunity to comment on the factual accuracy of this report the Individual advised the Inquiry that they *"did not regard [themselves] affected by any conflict of interest in acting under the Way Forward Agreement entered into with [the Trustees and their additional family members.]"*

The Inquiry understood, based on the information provided to it, the investment opportunity was first brought to the Trustees' attention in 2006 in their personal capacity, which predated the Individual's formalised role in Way Forward Agreement. The Individual brought the investment opportunity to the attention of one of the Trustees after it was not taken up by another party to the Way Forward Agreement who was not a Trustee of the Charity but was a related family member. It is not clear whether the investment was offered to the Trustees' in their personal capacity or as Trustees of the Charity.

During the same meeting on 19 March 2012, when asked by the commission whether independent advice was sought on the investment, the Trustees advised that a particular multi-disciplinary firm *"were the only ones in a position to provide such advice as it was/is a new technology and as a new technology it is difficult to ascertain a value"*. During the Inquiry the commission was not informed that legal advice on the investment had been sought. However, in September 2014 when responding to the commission's invitation to comment on the factual accuracy of the draft version of this report the Trustees informed the commission that in 2008 the Charity obtained independent legal advice on the contractual documentation entered into between the Subsidiary Company and the Individual.

The Trustees' view is that they were entitled to make up their mind about the merits of the investment without the need for separate advice, as there was nothing that the Subsidiary Company could do which could prejudice the Charity.

Repayment of the investment

In April 2012 the Inquiry was informed by the Charity's adviser that a repayment plan for a sum equivalent of £500,000 and compound interest at a rate of 7.5% had been agreed with the Individual pursuant to the deed, and was to be paid by the end of July 2012. The Inquiry was provided with copies of the letter proposing this agreement from the Charity to the Individual, dated 4 April 2012, and the Individual's acceptance of this agreement dated 19 April 2012.

After some delay, on 21 September 2012 the Charity's adviser informed the Inquiry that a further agreement had been reached with the Individual whereby he would make monthly instalments of £75,000 until the amount owed had been repaid. On 1 October 2012 the Charity's adviser emailed the Inquiry to state that the first payment of £75,000 had been made to the Charity.

The Inquiry wrote to the Charity on 10 October 2012 and requested monthly updates of the repayments and evidence of each instalment in the form of a bank statement. Despite contacting the Charity again on 28 November 2012 to again request evidence of the repayments this information was not received.

The Inquiry exercised its powers under section 52 of the Charities Act 2011 to obtain the relevant information from the Charity's bank directly. The Inquiry was concerned to note from the bank statements that there was no evidence of any monthly repayments having been made by the Individual. There was an attempt by the Individual to make a payment of £75,000 by way of cheque dated 28 September 2012, but this was not successful, and the full debt remained outstanding. The Inquiry wrote to the Charity on 10 January 2013 to inform the Trustees of its serious regulatory concerns as a result of this and requested a response to those concerns.

The Charity advised the Inquiry on 23 January 2013 the Individual had now made two payments of £75,000. The Charity's adviser also contacted the Inquiry on 20 March 2013 to confirm that a further third payment of £75,000 had been made on that date.

On 25 April 2013 the Inquiry wrote to the Trustees setting out its understanding that the Charity was due to recover complete repayment of the remaining debt together with the interest by the end of April 2013 and requested an update as to the status of the repayment.

On 30 April 2013 the Inquiry was informed by the Trustees of its intention to assign the Deed of Agreement between the Subsidiary Company and the Individual to a company in which two of the Trustees have an interest in their personal capacity. They also submitted an application for consent under section 201 of the Charities Act 2011 ('the Act') to the commission to approve this transaction⁵. The purpose of the proposed transaction was to enable this other company to pay the Charity the debt owed under the Deed of Agreement, thereby releasing the Individual of his liability to the Subsidiary Company.

Following the completion of the Deed of Assignment the Inquiry received confirmation from the Charity that all monies owed to the Charity had been repaid.

3. Low level of charitable expenditure

The exceptionally low level of charitable expenditure was one of the regulatory concerns that triggered the opening of the regulatory compliance case and subsequently the statutory inquiry.

As the table demonstrates since the Charity was established only 18.6% of the Charity's overall income has spent on charitable activity.

⁵ Under the Companies Act 2006 certain actions by directors have to be authorised by the members of the company. In the case of charitable companies under section 201 of the Charities Act 2011 the consent of the members to certain actions of the company with directors (such as substantial property transactions with directors) is ineffective without the prior written consent of the Charity Commission.

Year	Income (£)	Charitable expenditure (£)	
2008	0	0	
2009	799,152	27,697	
2010	125,000	19,035	
2011	0	25,288	
2012	0	47,371	
2013	0	52,942	
Total	924,151	172,333	Total charitable expenditure as a % of income 18.6%

In September 2011 the Charity informed the Inquiry that the Trustees did not consider the charitable activity to be low as it was part of the Charity's long term strategy to retain its income so that the continued support to a number of charitable projects in future years. The Inquiry was initially advised that the Trustees acknowledged that this strategy was not in line with the Charity's published reserves policy and agreed to amend it, however, as part of the Decision Review process⁶ the Trustees clarified their view on this issue and advised that the strategy was not contrary to the Charity's reserves policy but that the wording of the reserves policy was imprecise.

The Trustees were advised that, charity trustees have a duty to apply a charity's income in furtherance of its purposes and in most cases, within a reasonable period of receipt. Trustees should not allow a substantial amount of the charity's income to generally accumulate unless there is a specific use for it in mind which can be properly demonstrated to the commission as part of an established reserves policy⁷.

The Trustees maintain the view that the charitable expenditure of the Charity was not low.

4. Whether or not the trustees have complied with and fulfilled their duties and responsibilities under charity law

Trustees have and must accept ultimate responsibility for directing the affairs of a charity, and ensuring that it is solvent, well-run, and delivering the charitable outcomes for the benefit of the public for which it has been set up. This includes ensuring that the charity does not breach any of the requirements or rules set out in its governing document and that it remains true to the charitable purpose and objects.

⁶ On 17 November 2011 the Charity applied for an internal review of the commission's decision to open the statutory inquiry the outcome of which was that the decision was upheld as a lawful, proportionate and reasonable decision properly taken.

⁷ Detailed information about charities and reserves can be found in the commission's guidance Charities and reserves (CC19) available on GOV.UK.

Payment to private company

Upon examination of the Charity's accounts the Inquiry established that during the Financial Year ending 2009 a sum of £34,500 was paid to a company wholly owned in a private capacity by two of the Charity's Trustees ('the Private Company'). It is the commission's view that at the time the payment was made the then Trustees did not have the necessary authority to make this payment⁸. This is primarily because the director of the Subsidiary Company (and as Trustee of the Charity) could not have properly made the decision to make a payment to the Private Company due to the conflict of interests/loyalty that existed, and that were never identified or subsequently managed. Such a decision would also have conferred a personal benefit on them and such a benefit was expressly prohibited by the Articles of Association of the Charity.

In particular, Clause 5 of the Articles states, *"The income and property of the Charity shall be applied solely towards the promotion of the Objects and no part shall be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise by way of profit, to members of the Charity, and no trustee shall be appointed to any office of the Charity paid by salary or fees or receive any remuneration or any other benefit in money or money's worth from the Charity: Provided that nothing in this document shall prevent any payment in good faith by the Charity:*

(4) of fees, remuneration or other benefit in money or money's worth to any company of which a trustee may also be a member holding not more than 1/100th part of the issued capital of that company;"

This transaction could not have been authorised or properly approved by the Subsidiary Company's member (the Charity). The principle confirmed in the case of *Bartlett v Barclays Bank Trust co Ltd* [1980] Ch 515 that Trustees of a Charity which own a controlling interest in a company have a duty to the Charity to exercise that control as to safeguard the interests of the Charity, is applicable here.

The Trustees of the Charity, who are also directors of the Subsidiary Company and Private Company, owed separate duties to all these companies. Their duties to the Charity included a duty to consider what action would be in the Charity's best interests, and also to giving consideration to the prohibitions contained within its governing document.

The Inquiry took into consideration comments put forward by the Trustees that *"The fee was not remuneration or any other benefit received by a trustee"*. However, the fee paid was for work undertaken by the Private Company in relation to a potential investment by the Subsidiary Company. This would constitute remuneration for the Private Company, and the Trustees (as owners of the Private Company) would have therefore indirectly benefited from this transaction. The commission concluded that this payment was caught by the express prohibition contained in Article 5 which covers not only both direct and indirect payments but also benefits in money or money's worth.

On 21 September 2012 the Inquiry was advised that the monies paid to the Private Company would be repaid in full. The Inquiry monitored this action and examined evidence that the repayment was made on 12 October 2012. Notwithstanding the repayment the Trustees still maintain that the payment was proper and they do not agree with the Inquiry's findings on this point.

⁸ The Inquiry notes that two independent Trustees have been appointed during the course of the Inquiry.

Conclusions

Whilst the Trustees' decision to make the loan from the Charity to the Subsidiary Company may have been itself a reasonable decision for the Trustees to take the commission concludes that the Trustees failed to provide sufficient evidence that the decision to make the loan was adequately considered and taken prior to entering into the legal contract regarding the Investment. Furthermore, at the time the decision to make the loan was made there were no independent Trustees capable of objectively reviewing the decision to ensure it was in fact in the best interests of the Charity. As a result of this intervention independent Trustees have been appointed. The commission made clear should the Charity enter into a financial arrangement with the Subsidiary Company in the future, the Charity must ensure that it is the independent trustees that consider and make any decision in accordance with the steps laid out in the commission's updated conflicts of interest guidance.

The commission concludes with regards to the investment made by the Subsidiary Company and the Individual, whilst it may have been commercially viable, it fails to see how the Trustees could have validly concluded that it was ultimately in the best interests of the Charity. Whilst the Trustees had obtained a level of security within the investment as a result of the right to obtain charges over the Individual's property, the Trustees, neither in their capacity as directors of the Subsidiary Company or as Trustees of the Charity, took any steps to seek repayment or to renegotiate the terms of the Deed once the due date of 24 December 2011 arose. It only did so only after the commission sought an update as to the steps the Trustees had decided to take upon expiry of the deed term.

The Trustees maintain that the investment was in the best interests of the Charity and that it provided a secure financial guarantee.

With regards to the charitable activity of the Charity, the commission acknowledges and commends the desire of the Trustees to commit to long term charitable giving. However, trustees of every charity must ensure that the charity's funds are used appropriately, prudently, lawfully and in accordance with the charity's purposes for the public benefit. The general principle of trust law is that funds received as income should be spent within a reasonable period of receipt.

Finally, in regularising the position with regards to payments made to a connected company the commission concludes that the Trustees subsequently fulfilled their duties and responsibilities under charity law.

Regulatory action taken

Following the commission's intervention the Charity has now recovered the monies owed to it as a result of the loan to the Subsidiary Company and subsequent investment. The commission granted consent under section 201 of the Act to facilitate the repayment.

Unauthorised trustee benefits, in the form of monies paid to the Private Company, were also recovered by the Charity. As a result according to its 2013 Accounts the Charity received a repayment of £34,500 and the return of the investment capital of £500,000 which amounts to £705,100 of charitable funds to apply for charitable purposes.

The Inquiry was kept open to ensure repayment took place and the commission verified evidence that this was the case.

The Trustees were provided with regulatory advice and guidance under section 15(2) of the Charities Act 2011 on a number of topics including charities and investment matters, conflicts of interest and charities and reserves.

The Charity will now be placed in monitoring and the commission may consider visiting the Charity again in 9-12 months' time to assess the progress it has made.

Wider lessons

Conflicts

Trustees have a legal duty to act in your charity's best interests when **making decisions as a trustee**. If there's a decision to be made where a trustee has a personal or other interest, this is a conflict of interest and you won't be able to comply with your duty unless you follow certain steps.

For example, if you're a trustee, you would have a conflict of interest if the charity is thinking of making a decision that would mean:

- **you could benefit financially or otherwise from your charity**, either directly or indirectly through someone you're connected to
- **your duty to your charity competes with a duty or loyalty you have** to another organisation or person

Conflicts of interest are common in charities – having a conflict of interest does not mean you have done something wrong. But you need to act to prevent them from interfering with your ability to make a decision only in the best interests of the charity.

Trustees must be alert to and actively manage any conflicts of interest. A trustee cannot receive any benefit from his or her charity without explicit authority. Trustees should not be in a position where their personal interests and their duty to the charity conflict, unless the possibility of personal benefit from which the conflict of interest arises is transparent. Transparency is achieved by requiring explicit authorisation of the benefit, and by ensuring that any particular conflict of interest is properly and openly managed.

It is the potential, rather than the actual, benefit from which the conflict of interest arises which requires authority. In order to avoid a breach of trust and to ensure transparency, authority is required where there is a possibility of benefit. This will avoid accusations of impropriety, which could in turn have a damaging effect on the charity's reputation. We expect trustees to be able to identify conflicts of interest when they arise and to ensure, if they receive a material benefit as a result of the conflict of interest, that the benefit is authorised.

Trustees should be alert to possible conflict and should have a policy on how they will deal with any conflicts which arise as a result of the work which the charity undertakes. Conflicts of interest are more likely when there are only a small number of trustees on the board, when trustees are closely related or when the charity has dealings with businesses in which the trustees have interests.

Investments

A charity's trustees have overall responsibility for investment decisions. Although trustees do not need to have specialist investment knowledge themselves, charities that have invested, or want to invest, significant funds will find it helpful to have a trustee with specialist knowledge of investments on its board. Trustees should ensure that details of their investment approach and key decisions are recorded in writing. This will enable them to demonstrate that they have considered the relevant issues, taken advice if appropriate and reached a reasonable decision. Trustees should agree how frequently and at what level they will review their charity's investments.

Trustees must take and consider advice from someone experienced in investment matters before making investments and when reviewing them, unless they have good reasons for not doing so. They may decide not to take advice if they conclude that it is unnecessary, or inappropriate in the circumstances. They may decide not to take external advice if they have sufficient experience within the charity.

Reserves

Charity trustees have a general legal duty to spend income within a reasonable time of receipt. Trustees may spend this income to fund charitable activities, in acquiring assets to use in the charity's work, and in meeting the day to day running costs of the charity. To hold income in reserve rather than spending it, trustees rely on an explicit or implicit power to hold reserves and they must use that power in the charity's best interests.

The charity's governing document may, in some cases, explicitly give the trustees an express legal power to hold income in reserve instead of spending it promptly. This power is not common but it is still worth checking the governing document in case there is such an express power to hold reserves.

The more common situation is that trustees will have to rely on their implied power to hold reserves. An implied power will not be written into the governing document but is a power implicit in trustees' duties enabling them to take actions which are necessary for the charity to function properly. Trustees are justified in exercising their power to hold income reserves, whether express or implied, only if in their considered view it is necessary to do so in the charity's best interests.

The power to hold reserves needs to be used appropriately by trustees. If the power is used without justification then the holding of income in reserve might amount to a breach of trust. A failure to report on the reserves policy adopted can indicate that trustees have not exercised their legal power correctly. However, good reporting of a charity's reserves policy can help to demonstrate the legal power to hold reserves has been properly used.