

CHARITY REGULATION AND AMBIGUOUS GIFTS TO CHARITIES

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Charity regulation and ambiguous gifts to charities

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AMBIGUOUS GIFTS TO CHARITIES

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The Commission's 'Protective Powers'

Natalie Pratt
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Overview

- What are the Charity Commission's protective powers?
- When can the protective powers be exercised?
- How to appeal the Commission's exercise of its protective powers

The protective powers

Charities Act 2011, s76(3)

The Commission may of its own motion do one or more of the following –

- a. by order suspend any person who is a trustee, officer, agent or employee of the charity from office or employment pending consideration being given to the person's removal (whether under section 79 [removal of a trustee or officer for protective purposes] or 80 [other powers to remove or appoint charity trustees] or otherwise);
- b. by order appoint such number of additional charity trustees as it considers necessary for the proper administration of the charity;

The protective powers

- c. by order –
 - (i) vest any property held by or in trust for the charity in the official custodian,
 - (ii) require the persons in whom any such property is vested to transfer it to the official custodian, or
 - (iii) appoint any person to transfer any such property to the official custodian;

- d. order any person who holds any property on behalf of the charity, or of any trustee for it, not to part with the property without the approval of the Commission;

The protective powers

- e. order any debtor of the charity not to make any payment in or towards the discharge of the debtor's liability to the charity without the approval of the Commission;
- f. by order restrict (regardless of anything in the trusts of the charity) the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity without the approval of the Commission;
- g. by order appoint (in accordance with section 78) an interim manager, to act as receiver and manager in respect of the property and affairs of the charity.

Interim managers

Charities Act 2011, s78 (highlights)

- Orders made under s76(3)(g) may make provision with respect to the functions to be discharged by the interim manager
- The interim manager's functions are to be discharged under the supervision of the Commission
- The s76(3)(g) order may provide for the interim manager to have the powers and duties of the charity's trustees (or the powers and duties specified in the order), and for those powers and duties to be exercised or performed by the interim manager to the exclusion of the trustees

Interim managers

The Charities (Receiver and Manager) Regulations 1992

- Commission determines the amount of the interim manager's remuneration
- Interim manager's remuneration payable out of the income of the charity

When can the protective powers be exercised?

Charities Act 2011, s76:

- (1) Subsection (3) applies where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied –
- (a) that there is or has been a failure to comply with an order or direction of the Commission, a failure to remedy any breach specified in a warning under section 75A, or any other misconduct or mismanagement in the administration of the charity, **or**
 - (b) that it is necessary or desirable to act for the purpose of –
 - (i) protecting the property of the charity, or
 - (ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity

'Misconduct' or 'mismanagement'

- No statutory definition
- ***Scargill v Charity Commissioners*** (unreported September 1998) (Neuberger J) – 'misconduct' and 'mismanagement' are ordinary English words and should be given their ordinary meanings
- ***Mountstar (PCT) Limited v Charity Commission*** (CA/2013/0001 & 0003) [136]-[139]

`Misconduct' or `mismanagement'

[136] *There is no statutory guidance as to what is meant by 'mismanagement' or 'misconduct'. Both are ordinary English words which should be given their ordinary meaning: Scargill v Charity Commissioner (unreported) 4 September 1998...*

[138] *the acts or the several acts or omissions complained of in their totality must be of some substance to justify the appointment of an interim manager rather than the alternative which would involve the use of some or all of the other statutory tools within the Commission's armoury. The Commission's guidance may provide illustrations of what might constitute mismanagement and misconduct, but cannot restrict their ordinary meaning.*

'Misconduct' or 'mismanagement'

[139] *It is a question of fact and degree to be viewed in the overall context of each case whether the act(s) or omission(s) complained of constitute 'mismanagement' or 'misconduct'. In our view **it would encompass a failure by the charity trustee to act as an ordinary prudent man of business** both in terms of process (how decisions are made, including declaring and managing conflicts of interest) and substance (what decisions are reached and why they have been reached). If the process is adequate and the decision reasoned it may be rare for the Commission to challenge the decision per se.*

'Misconduct' or 'mismanagement'

Commission Guidance (per ***Mountstar***)

- *Misconduct includes any act (or failure to act) in the administration of the charity which the person committing it knew (or ought to have known) was criminal, unlawful or improper*
- *Mismanagement includes any act (or failure to act) in the administration of a charity that may result in significant charitable resources being misused or the people who benefit from the charity being put at risk*
- Current operational guidance at [OG5 B1 para 4](#)

Examples

- Unmanaged conflicts of interest
- Trustee unilateral decision making
- Failure to comply with section 15 'action plans'
- Failing to act in accordance with the charity's governing documents
- Charitable funds unaccounted for
- Accounting anomalies
- Risk to charitable funds
- Failure to minute trustee decisions

Appealing the use of protective powers

- Appeal to the Tribunal (not a reviewable matter) (CA 2011, sch 6)
- Appellants:
 - The trustees of the charity
 - The charity itself (if incorporated)
 - Any person suspended (if appealing s76(3)(a))
 - Any other person who is or may be affected by the order
- Tribunal's powers:
 - Quash the order in whole or in part and (if appropriate) remit the matter to the Commission
 - Substitute for all or part of the order any other order which could have been made by the Commission
 - Add to the order anything which could have been contained in an order made by the Commission

Appealing the use of protective powers

Charities Act 2011, s319(4)

In determining such an appeal the Tribunal –

- (a) must consider afresh the decision, direction or order appealed against and
- (b) may take into account evidence which was not available to the Commission.

Burden of proof

Knightland Foundation v Charity Commission [2021] UKFTT 0365 (GRC)

[51] *In my view, unless Parliament has clearly spelt out in legislation to the contrary, it is for an appellant on appeal, even an appeal in which there is to be a complete rehearing or where the Tribunal must consider the decision afresh, to demonstrate that the evaluative judgments and discretionary decision-making body (in this case the the Charity Commission) are wrong... The weight to be attached to the reasons of the Charity Commission is a matter for the Tribunal to determine, bearing in mind that Parliament entrusted the Commission to regulate the charity sphere. To put this into words which have been used by other constitutions of this Tribunal, the Tribunal should "stand in the shoes of the Charity Commission and take afresh the decision on the evidence before it, giving appropriate weight to the Commission's decision as the body tasked by Parliament with making such decisions".*

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Ambiguous gifts to charities

Matthew Mills

1st March 2022



The problem

- Uncertain and failed charitable legacies
- Charitable legacies should give the official name, charity number, and address for each recipient
- But it is all too common for draftsmen and testators not to do this
- The most common mistake is "*cancer research*"

The 8 possible solutions

1. Ignore trivial misdescriptions
2. If the gift is to charitable purposes, select a recipient
3. The royal sign manual procedure
4. Apply for a scheme
5. Broker a compromise between the potential recipients
6. Ask for an order authorising PR to rely on an opinion
7. Ask the court to interpret the will
8. Ask the court to rectify the will

Option 1: ignore trivial errors

"satisfy[] themselves as to the testator's true intentions and hand[] over the gift to the selected charity accordingly"

Charities: The Law and Practice, paragraph G.112

- E.g. using 'vicar' instead of 'rector': *Hopkinson v Ellis* (1842) 5 Beav 34
- E.g. using 'archdeaconry' instead of 'diocese': *Re Smith* (1934) 51 TLR 108
- E.g. a gift to 'the Blind Home, Scott Street, Keighley': *Re Spence* [1979] Ch 483
- E.g. 'the Patagonian, Chilian, and Peruvian Missionary Society': *Makeown v Ardagh* (1876) IR 10 Eq 445

Option 2: gifts for purposes

"where a gift to charity has failed and the executors are able to construe the purposes for which the property is held, a cy-près Scheme will not be required and the executors can choose another charity carrying out those purposes"

OG505-1, section E1.1

- Gift 'for the Cancer Research Fund': *Knipe v British Racing Drivers' Motor Sport Charity* [2020] EWHC 3295 (Ch)
- Three risks:
 1. It is not always easy to decide if a gift is for purposes
 2. Can put PRs in an awkward position when they choose
 3. Courts sometimes suggest making a scheme instead:
e.g. *Re Songest* [1956] 1 WLR 897

Option 3: royal sign manual

- The Crown's jurisdiction to give directions as to how charitable property should be applied
- Traced back to AG v Peacock (1676) Rep Temp Finch 245
- Literally involved the monarch writing a letter to give directions: Kane v Cosgrave (1873) Ir R 10 Eq 211
- Power delegated to the Attorney General in 1986
- AG applies the same principles as the court does when deciding whether to make a scheme: Moggridge v Thackwell (1802) 7 Ves 36, at 87 per Lord Eldon LC
- Generally, it gives a quick, cheap and easy answer

Option 3: royal sign manual

- It is generally assumed that the procedure can only be used for gifts (i.e. there is no trust in the will): *Moggridge v Thackwell* (1802) 7 Ves 36, at 85-86 per Lord Eldon LC
- However, there are 4 reasons to doubt this:
 1. Lord Eldon's distinction was novel and uncertain in 1802
 2. Some later cases have allowed the Crown to act even if there is a trust: e.g. *AG v Fletcher* (1835) 5 LJ Ch 75
 3. There is some evidence the AG will *still* act if the trust is purely administrative: e.g. *The Report of the Charity Commissioners for England and Wales for 1989*, para 38
 4. The distinction has been criticised: e.g. *Re Bennett* [1960] Ch 18, at 24 per Vaisey J ('a curious thing')

Option 4: apply for a scheme

- Either a cy-près scheme (initial failure cases) or an administrative scheme (subsequent failure cases)
- PR will need to show the Commission 2 main things:
 1. The legacy cannot be applied in the absence of a scheme (i.e. the gift *has* failed). For example:
 - a) The legacy was tied to the existence of a particular charity
 - b) The legacy is too vague to give any clear direction
 - c) There are two (or more) equally-plausible recipients
 2. The testator had a general charitable intention (only required in cases of 'initial failure')

Option 4: apply for a scheme Radcliffe Chambers

- To decide if a misdescription gives rise to a failed legacy:
 1. Is the misdescription a trivial error?
 2. Are there words/clauses in the will which could help?
 3. Is there relevant evidence from the testator's lifetime?
 4. Has the potential recipient charity changed its name?
 5. Is the potential recipient charity known by more than one name?
 6. Can the intended recipient be found by location / purpose?
 7. Can the name be read as a description?

Option 4: apply for a scheme

"a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation, notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention"

-- Re Lysaght [1966] Ch 191, at 202 per Buckley J

- PR only needs to prove this in cases of *initial* failure
- Practically, the Commission will ask itself 2 questions:
 1. Is it only the mechanics of the gift which have failed?
 2. Was it more important to the testator that the bequest went to a general charitable cause or a specific charity?

Option 4: apply for a scheme

- To decide if the will discloses a 'general charitable intention', the Commission will consider:
 1. The gifts in the will (e.g. are there many charitable legacies?)
 2. The nature of the relevant gift (e.g. does the name or location point towards a purpose or a recipient?)
 3. The directions for the residue (e.g. does it go to charity?)
- The Commission will expect the PR to canvass the views of any third parties who might otherwise inherit

Option 5: a compromise

- Suggested in OG505-1, section E2
- s.15(f) Trustee Act 1925: the power to compromise
- The Commission will not sanction any compromise agreement: OG505-1, section E2
- The PR must exercise reasonable skill and care: paragraph 4(1) of schedule 1 Trustee Act 2000

Option 6: relying on advice

- s.48 Administration of Justice Act 1985
- The High Court can authorise a PR to take steps in reliance on counsel's advice on the construction of a will
- This *may* avoid the costs of a fully attended hearing
 - But the court has the power to order a full hearing: e.g. *Greenwood v Pike* [2007] EWHC 2202 (Ch)
- An order protects the PR from a breach of trust claim
- But an order does not protect the *recipient* (i.e. the charity) from claims by disappointed third parties

Option 7: interpreting the will Radcliffe Chambers

1. The court interprets wills in (essentially) the same way as contracts: Marley v Rawlings [2014] UKSC 2, at [19]-[23]
2. The courts will try "to uphold charitable gifts wherever possible": Lehtimäki v Cooper [2020] UKSC 33, at [53]
3. The court can consider extrinsic evidence in certain cases: s.21 Administration of Justice Act 1982. For example:
 - a) The testator subscribed to one of the potential recipient charities: Re Kilvert's Trusts (1871) 7 Ch App 170
 - b) The testator lived near one of the potential recipient charities: Re Lycett (1897) 13 TLR 373
 - c) Only one charity existed when the testator lived nearby: King's College Hospital v Wheildon (1854) 18 Beav 30

Option 8: rectifying the will

- s.20 Administration of Justice Act 1982 and Re Segelman [1996] Ch 171, at 180 per Chadwick J:
 1. What were the testator's intentions for the legacy?
 2. Does the will fail to carry out those intentions?
 3. Was this due to (a) a clerical error or (b) a failure to understand the testator's instructions?
- E.g. Re Harte [2015] EWHC 2351 (Ch): a gift to the 'West Berkshire Ambulance Hospital' was rectified to go to the 'Thames Valley and Chiltern Air Ambulance Trust'
- Limitation period is 6 months from grant of probate: s.20(2)
- Potential costs claim against draftsman: cf Re Recher's WT [1972] Ch 526, at 543 per Brightman J

A photograph of the interior of Radcliffe Chambers, showing a long, vaulted hallway with a series of pointed arches supported by columns. The ceiling is highly detailed with intricate carvings and a central decorative element. The lighting is warm and natural, highlighting the architectural details.

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