CHARITY TRUSTEES: NO ONE CAN SERVE TWO MASTERS

A view from the charities bar: the second instalment of a regular series by Matthew Smith, Maitland Chambers, counsel specialising in charity law and practice.

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No one can serve two masters. So said Jesus, according to the Gospel of Matthew.

And his point applies to charity trustees on the board of two charities just as much as to those choosing between God and money. When an actual conflict arises, you can't act as a charity trustee if you owe duties of loyalty to two different charities, whatever the governing document (or the Charity Commission's guidance) might say.

A conflict of interest arises where a charity trustee's duty to their charity conflicts with their personal interest. A conflict of loyalty arises when a charity trustee's duty to charity A conflicts with their duty to charity B.

The most authoritative modern statement of the duties of fiduciaries (such as charity trustees) is found in *Bristol & West Building Society v Mothew [1998] Ch 1*:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary." (*Millett LJ, at page 18.*)

AUTHORISED CONFLICTS

It is sometimes said that a conflict has been "authorised" where the terms of the governing document effectively create the conflict (for example, by determining that the charity trustees should be the holders of particular offices, often in other charities). But when speaking of "authorised conflicts", it is necessary to be clear as to what is authorised.

If a trust deed authorises a conflict of interests, the charity trustee remains duty-bound to act in the best interests of the charity. In effect, the authorisation amounts to an acceptance that the relevant fiduciary can be trusted to put their duty before their interest.

So, in the case of a solicitor-trustee who has the benefit of a charging clause, they are entitled to act as a trustee notwithstanding their personal interest in maximising the fees which they might earn. They can attend trustee meetings and vote on the general business of the trust. They can also keep the fees which they earn for their legal work for the trust. Yet that authorisation does not carry with it the suggestion that when it comes to an actual conflict (such as whether to challenge their bill or instruct another solicitor for a particular piece of work) they would be entitled to participate in that decision. They were authorised to act as a trustee (in circumstances where their personal interest might otherwise have disqualified them completely or to have required them to account for their profit), but they are not authorised to act as if the conflict did not exist.

CONFLICTS OF LOYALTY

The position as regards conflicts of loyalty is even stricter. That is because the fiduciary has another principal to whom they also owe a duty of "single-minded loyalty." That duty cannot be diluted. In the context of trustee exemption clauses, Millett LJ said in *Armitage v Nurse [1998] Ch 241* that:

> " ... there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts ... The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts ... " (at pages 253-254).

Therefore the duty to act in the best interests of the beneficiaries (in a private trust) or in the best interests of the charity (in a charitable trust) is part of the "irreducible core" of a fiduciary's duties. The duty to act with single-minded loyalty cannot be relaxed without the fiduciary ceasing to be such. In circumstances of a conflict of loyalty, it is impossible for a trustee to maintain their single-mindedness. They cannot properly act for either charity and must withdraw.

So, if a national membership charity has a governance structure set out in its governing document whereby some of its trustees are elected from the ranks of those who are trustees of local charities which form part of the membership structure, one might say that the conflict of loyalties (as between the national and the local charities) is authorised, but one would not expect those who were conflicted in this way to participate in board discussions in the event of a serious dispute between the two entities or to be involved in setting the size and terms of a grant to be made by the national charity to the local charity. In such circumstances, the conflicted trustee must withdraw when the issue is under discussion (from the trustee meetings of both charities).

It can be objected that this analysis would leave some charities (especially those which have only one, typically corporate, charitable trustee) without any effective trustee body in some circumstances. However, when an actual conflict arises, it is open to:

- The conflicted trustee to seek the sanction of the Charity Commission for a proposed course of action (under *section 105* of the Charities Act 2011). For further details, see *Practice note, Charity trustees and conflicts of interest: Charity Commission authorisation.*
- The corporate trustee to appoint a committee of persons who do not otherwise owe duties to it, to which it delegates the exercise of its powers.

CHARITY COMMISSION GUIDANCE

The Commission suggests that the trustees of a charity might decide that:

> " ... where a conflict of loyalty poses no risk or a low risk to decision making in the best interests of the charity, the affected trustee, having declared their other interest, can participate in decision making ... Deciding that a conflict of interest is low risk, and that the affected trustee can participate in the decision, is a judgement for the trustees."

(*Charity Commission: Conflicts of interest: a guide for charity trustees (CC29), at page 9.*)

Although this approach has obvious practical attractions, it seems to ignore the single-minded nature of the fiduciary obligation. Even if there is some legal basis for distinguishing between "low risk" and other conflicts of loyalty, the Commission's approach appears to let the charity trustees themselves make that distinction. In many cases (where a charitable trust has a sole charitable company as trustee) there will be no independent person to make even that judgment.

The requirements of the law may cause practical inconvenience on occasion, but they are clear: a charity trustee can never serve two masters.

For Practical Law's guidance on charity trustees and conflict of interests, see:

- *Practice notes, Charity trustees and conflicts of interest* and *Charity trustees: expenses, payments and benefits*.
- *Standard documents, Charity trustees: conflicts of interest: policy, declaration* and *register*.