Trusts: a single-minded loyalty

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***P.C.B. 85** This article contains a detailed analysis of the Supreme Court's decision in Lehtimäki v Cooper .[1] This is one of those cases in which the claimant or appellant has succeeded alternatingly at each level. The factual situation was that the directors and members of a corporate charity were burdened by conflicts of interest. As part of a demerger a huge payment by one charity to another was proposed. The payment required approval by the members of the charitable company as such, which on the facts of the instant case meant a single individual member. The directors of the company surrendered their discretion in respect of the payment to the court. The court at first instance approved the payment and also directed the member to give his approval. The Court of Appeal allowed that member's appeal from that direction. But the Supreme Court then restored the decision at first instance, and this involved an extensive and sometimes subtle theoretical examination of the juridical role of the court in supervising the management of charities, charitable companies and their members. The justices were not entirely unanimous in their reasoning, though they were unanimous in the result (Lord Reed, the President,* dubitante*). The analysis is therefore important generally for many corporate charities and their advisers, and not unimportant for other private client professionals and their clients as well. The case has been reported with different names at each level of appeal, and in this article readers will find references to Children's Investment Fund Foundation (UK) v Attorney-General , the decision of Sir Geoffrey Vos C at first instance, Lehtimäki v Attorney-General in the Court of Appeal, and Lehtimäki v Cooper in the Supreme Court. These will be abbreviated where appropriate to Children's Investment Fund , Lehtimäki CA and Lehtimäki SC . Case references to all three judgments are to be found in footnote 1.*

Introduction

A charity is a special creation. It is a trust for purposes or, in the instant case, a guarantee company with charitable objects, a board of directors and also guarantee members. But in common with a private trust (and indeed the law of charities is a branch of trusts law), perhaps its defining characteristic is the holding of property for the benefit of another: ***P.C.B. 86**

"[i]n every such case the court would be acting upon the basis that the property affected is not in the beneficial ownership of the persons or body in whom its legal ownership is vested but is devoted to charitable purposes, that is to say, is held upon charitable trusts".[2]

This arrangement somewhat goes against human nature and can cause unique difficulties for those responsible for the execution of the trust or charity. The consequences of a deviation from the terms of the arrangement can, further, be damaging for the beneficiaries of the trust or charity and, in the case of charity, to the public interest.

The arrangement therefore requires supervision.

That supervision is entrusted to the courts[3] (and more recently the Charity Commission). Over centuries the courts have supervised the administration of charities (and trusts) with "relentless jealousy",[4] to ensure insofar as possible that their purposes are upheld. Charities are afforded special and "beneficent" treatment,[5] reflecting the public benefit they provide.[6]

To enforce this arrangement, and in recognition of the dangers of entrusting a person with responsibility for the welfare and/or property of another, the law has developed the concept of a fiduciary. But what is a fiduciary? That is not a simple question. In fact it is sometimes easier to identify a fiduciary by first identifying his obligations:

"As Dr Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary." [7]

Perhaps the most authoritative description of a fiduciary has been given by Finn J (or Dr Finn, in academic circles) sitting in the Federal Court of Australia. This description is as follows:

"… a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she [the fiduciary] will act in that other's interest to the exclusion of his or her own or a third party's interest".[8]

Fiduciaries are not unthinking agents. Two fiduciaries, faced with the same decision and underlying facts, acting in good faith, may come to very different decisions. This is, in part, because the decisions they take are frequently qualitative, rather than quantitative:

"The court's decision on this question may be (and was in this case) a very difficult one, about which reasonable minds, activated by nothing less than the loyal performance of a fiduciary duty, may well differ." [9]

The courts (historically) have not maintained an iron grip on fiduciaries (whether trustees or otherwise), with a guide setting out what might be the "right" or "wrong" decision on any question. Fiduciaries are afforded flexibility, with the court applying the principle that, absent a breach of duty or the surrender of discretion, it will not intervene in the exercise of a fiduciary's power or discretion.[10] Were it not to apply this principle, the role of the fiduciary would be diminished. There might be a right and wrong answer to ***P.C.B. 87*** each question, with fiduciaries—even those acting in good faith—at risk of court intervention at every turn.

In the writer's view there is danger in construing a fiduciary's decision, where taken in good faith, and where regard has been had to the principles of prudence and reasonableness,[11] as right or wrong. Once we do so, we embark on a slippery slope which might lead to consequences wholly contrary to the interests of the charity and its purposes. Free thought and subjective consideration are at the heart of the role of a fiduciary. A true fiduciary will not blindly follow precedent or direction but will regularly consider what, in their view, best furthers the interests of those to whom they owe loyalty.

There will of course, however, be situations that simply cannot be resolved by fiduciaries on their own. Trustee deadlock is an example. In such cases, the administration of a trust or charity will grind to a halt.

An unworkable trust or charity is of no benefit to anyone. In such cases therefore the court will need to make a decision. That decision may, of course, be open to criticism. But a decision must be made either way to allow the administration to continue.

In the instant case the charity had come to a halt due to unique and extraordinary circumstances. A decision simply had to be made to allow the charity to function. This is the context for the Supreme Court's decision.

The facts of the case

The Children's Investment Foundation (UK) (CIFF) is a charitable company (being both a charity and a company,[12] limited by guarantee.[13] Established by Sir Chris Hohn and his wife Jamie Cooper, it became one of the largest charities in the UK. By 2014 it held over $4 billion in assets.

As a charity and a company limited by guarantee CIFF has a unique, two-tier governance structure governed by both the Companies Act 2006 ("CA 2006") and the Charities Act.

(1) Rather than shareholders, it has members. They (like shareholders in a company limited by shares), are the persons who subscribe their names to a memorandum of association or who agree to become a member of the company. They agree to contribute a predetermined nominal sum to the liabilities of the company on winding up. They have certain rights over the company, including the right to vote on certain matters.[14]

(2) Secondly, it has directors who, under s.177 of the Charities Act, are called trustees. They are the persons with the general control and management of the administration of the charity.

The members of CIFF at the relevant time were Sir Chris, Ms Cooper and Dr Marko Lehtimäki. Sir Chris and Ms Cooper (but not Dr Lehtimäki) were also directors/trustees, alongside a number of others who are not relevant for the purposes of this article. Sir Chris and Ms Cooper were married.

The cause of CIFF's problems

The trigger for the proceedings was the breakdown of the marriage of Sir Chris and Ms Cooper. Both were, as members and directors/trustees, heavily involved in the strategic and day-to-day running of the CIFF, and so the "severe and challenging differences between [them]" gave rise to real difficulties in the management of CIFF. ***P.C.B. 88*** [15]

To address this, Ms Cooper agreed to resign as member and trustee in exchange for a grant ("the Grant") of $360m being made by CIFF to a new charity, Big Win Philanthropy (BWP), founded by Ms Cooper and endowed by a $40m payment made by, in effect, Sir Chris in 2015.

The Grant

The making of the Grant was governed by several matters:

(1) the terms of the Grant agreement;

(2) the provisions of the CA 2006;

(3) the provisions of the Charities Act; and

(4) the general law applying to charities, trustees and directors of companies.

Implementation of the Grant was conditional on the passing of a resolution of the members of CIFF in general meeting under s.217 of the CA 2006 ("s.217"). This is because under s.217 a company may not make a payment for loss of office to a director unless the payment has been approved by resolution of the members.

As above, the members of CIFF were Sir Chris, Ms Cooper and Dr Lehtimäki only. Due to the obvious conflict of interest, it was proposed that only Dr Lehtimäki vote on the resolution.

The Grant was also conditional upon either the Charity Commission having approved or made no objection to the payment, or the approval of the court. Once approved, Ms Cooper's resignation would take effect.

CIFF therefore applied to the Charity Commission for approval of the Grant. The Commission did not give its approval but instead made an order under s.115 of the Charities Act authorising the bringing of proceedings to obtain the court's approval of the Grant and directions regarding the s.217 resolution.

The proceedings at first instance

The proceedings were issued by CIFF on 15 June 2016.

Dr Lehtimäki was not originally party to the proceedings but was joined by the Chancellor. He told the court that the only people to whom who he had a fiduciary duty were the intended recipients of CIFF's charitable work, being children in developing countries:

"… the only consideration to the Grant is whether it is a net benefit to the children in developing countries. If it is, then it should be paid. If it is not, then it should not be paid. It is that simple".[16]

As for his position on the s.217 resolution, he told the court that he wanted to obtain further evidence as to BWP and other matters. He did not wish to surrender his discretion to the court. He did not understand that anyone could tell him how he could vote. He did not, however, appear to give an indication of how he would vote on the resolution. The result of this, of course, was that the charity would come to a standstill, and Dr Lehtimäki's failure to confirm how he would in fact vote over the course of the proceedings, from May 2017 to 29 July 2020, is a crucial fact of the case.

The Chancellor's judgment

The Chancellor held that the trustees had surrendered their discretion whether to make the Grant to the court. The trustees were not merely seeking the court's approval: they were asking the court to exercise its own discretion.[17] On the evidence, he held that in the exceptional circumstances of the case the court ***P.C.B. 89*** would exercise its discretion in favour of approving the Grant. He held that in this "extremely unusual case" the Grant was in the best interest of CIFF.

The Chancellor did not avoid the obvious point: how could disposing of $360m be in the best interests of CIFF? He said that his main reasons for finding that it was were as follows:

(1) the agreement to make the Grant was entered into in good faith by Sir Chris and Ms Cooper and by the independent trustees of CIFF;

(2) if carried into effect, the Grant would allow a further $40m to be secured for charitable purposes; and

(3) the making of the Grant would bring a conclusion to the governance problems the dispute had created for CIFF.[18]

The Chancellor confirmed that he had taken into account the objects of BWP and the likelihood that the Grant would be used for the benefit of charity if it was made. He also noted the negative features of making the grant, but that they did not outweigh the "massive advantages" he had mentioned. While he acknowledged the "supposedly bad precedent that it sets", it seemed to him that "exceptional situations demand exceptional solutions". In the writer's view, and in light of the effect of Dr Lehtimäki's refusal to pin his colours to the mast, he was right.

That said, the Chancellor expressly noted that he was not finding that no reasonable trustee or fiduciary could disagree with his view, or that anyone who disagreed with him was automatically acting in bad faith. That was "not what this litigation was about".[19]

The s.217 Resolution

Moving on, the Chancellor also found that the Grant constituted a payment in connection with loss of office, thus engaging s.217. This required a vote of the members. The difficulty at this point was (as above) that Dr Lehtimäki, as the sole unconflicted member, had not confirmed anything other than that he had not taken a decision on the vote. He did not consider himself bound to vote in favour of the Grant.

The Chancellor however found that, in effect, he had no choice. He found that Dr Lehtimäki was a fiduciary in that his power as a member of CIFF to vote on the s.217 resolution was vested in him for the benefit of CIFF, and not in him personally. As such, he was bound to exercise his right to vote in the best interests of the charity and was directed to do so.

The Court of Appeal

The Court of Appeal agreed that members of CIFF were fiduciaries. It distinguished *Bolton v Madden* [20] and held that a member was part of the internal workings of the charity. As such, a member's powers were exercisable for the benefit of the charity.[21]

With that said, the Court of Appeal held that the Chancellor should not have made the direction against Dr Lehtimäki.

In arriving at this conclusion the Court of Appeal suggested that a member of CIFF owes a duty corresponding to that specifically imposed on members of a Charitable Incorporated Organisation (CIO). These duties are set out at s.220 of the Charities Act: ***P.C.B. 90***

"Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO."

The Court of Appeal emphasised that this duty of the members was to exercise his powers in the manner that *he* decides, in good faith, is most likely to further the purposes of CIFF.

The Court of Appeal therefore held that the Chancellor had been wrong to direct Dr Lehtimäki how to vote. The basis for this decision was the "non-intervention principle".

This is, in short, the principle that, in the absence of evidence of breach of duty, the court does not intervene in the exercise by a fiduciary of a discretion:

"… it is not enough to justify judicial intervention to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way".[22]

There was no evidence of a breach of duty,[23] and the Chancellor had expressly accepted that he was not saying that no reasonable trustee could disagree with his decision to approve the Grant. It was open to Dr Lehtimäki to disagree. Despite Ms Cooper and the Attorney General maintaining that different principles apply in relation to charities,[24] the Court of Appeal held that "the Court has no wider jurisdiction to control the actions of fiduciaries in the context of charities than, say, private trusts".[25]

The Supreme Court
There were three issues for determination:

(1) Was Dr Lehtimäki a fiduciary, in his capacity as member of CIFF, in relation to the objects of the charity?[26]

(2) If he was, had circumstances arisen with respect to the s.217 resolution in which the court could exercise its jurisdiction over fiduciaries in relation to Dr Lehtimäki?

(3) Does s.217 allow the court to direct a member how to exercise his discretion when Parliament has provided for members to approve the resolution?

The "overarching question" however, as described by Lady Arden, was whether the Chancellor of the High Court could in law make the direction requiring Dr Lehtimäki to vote in a particular way.

The structure of the Supreme Court's ruling
The Supreme Court's judgment begins with Lady Arden's analysis. However, her analysis was not agreed to in full by the majority of the court. The majority ruling was, in fact, given by Lord Briggs. Nevertheless, he adopted the majority of Lady Arden's analysis and agreed with her findings on each of the three issues. Where they differed was on their conclusions as to the basis upon which the court could direct Dr Lehtimäki how to vote.

We therefore need to start with Lady Arden's analysis. ***P.C.B. 91***

Summary of Lady Arden's ruling on the three issues
Lady Arden's ruling, as agreed by Lord Briggs, was as follows:

Issue 1
A member of a charitable company owes fiduciary duties to the charitable purposes of the company (including in relation to the passing of a resolution such as the s.217 resolution).

Issue 2
The court has jurisdiction to give a direction to Dr Lehtimäki to vote in favour of the s.217 resolution. Her justification for this was that the present case was a rare exception to the non-intervention principle (the "non-intervention route").[27] Lord Briggs disagreed. He held that the jurisdiction could be invoked because, once the court had ruled on the merits of the s.217 resolution, any vote against the resolution would be a breach of duty (the "breach of duty route").[28]
Issue 3
The court can direct a fiduciary as to the manner in which he votes on a s.217 resolution and nothing in the CA 2006 prevented this.

Issue 1: Does a member of a charitable company owe fiduciary duties, and what are these duties?
Lady Arden began by explaining the overriding principles and context. Equity imposed stringent duties on people appointed as trustees. Those duties were applied with "relentless jealousy" in order to ensure that trustees fulfilled their duties and had to be "watched with infinite and the most guarded jealousy" by the court.[29] She then, perhaps rather deliberately, noted: "The words 'infinite' and 'relentless' aptly indicate the capacity of equity to develop to meet new challenges."

She held that, while considerable debate had taken place on the issue, it was generally accepted that the key principle is that a fiduciary acts for, and only for, another.

So, is a member of a charitable company a fiduciary? It was noted that a Charity Commission publication made clear that the Commission takes the view that members have an obligation to use their rights and exercise their votes in the best interests of the charity, and that "rights that exist in relation to the administration of a charitable institution are fiduciary".[30] In the Finn J test as set out above,[31] one can see that those duties are plainly fiduciary duties, making quite easy the task of identifying a member as a fiduciary.

There were also signposts for the court in its analysis.

> The case law showed that the courts would, wherever possible, uphold charitable gifts.[32]
>
> Parliament recognised charitable companies in statute and had, by the Charities Act, stapled on to the CA 2006 restrictions which it wished to impose on charitable companies.[33]
>
> The *Liverpool Heart Hospital* case showed that a company's relationship to its assets was analogous to that of a trustee. ***P.C.B. 92*** [34]
>
> The *Construction Industry Training Board* case showed that the High Court has two bases of jurisdiction over charities: that over trusts generally, and that over charities.[35]
>
> The courts do not allow technical matters to prevent a gift to charity taking effect.

Lady Arden then clarified that the task for the court was to determine whether there is a fiduciary relationship between the charitable objects of CIFF and Dr Lehtimäki in his capacity *qua* member of CIFF. In her view there was.

"… what applies to Dr Lehtimäki and CIFF will apply to all other members of charitable guarantee companies which, like CIFF, contain restrictions which in general prevent members receiving profits from the company".

Difficulties with members being fiduciaries
Counsel for CIFF had impressed upon the court that a large number of difficulties arose for members if they were fiduciaries.

To counter this point, Lady Arden held that the law allows the duties of a fiduciary to be fashioned to an extent by the arrangements between the parties. In the case of a charitable company that meant that the duties of a member can be fiduciary even if the memorandum and articles impose restrictions which mean he cannot discharge all of the obligations which a fiduciary

would have under the general law. Trust law allows fiduciary duties to be diminished by an appropriate means and extent, so long as the duties are not reduced below the "irreducible core".[36]

The relevance of CIFF's constitution

The memorandum of association of CIFF was a "further indication that members should be treated as fiduciaries". It contained exemptions to the no-conflict and no-profit principles (being principles at the heart of fiduciary duties). These exemptions provided evidence that the original corporators of CIFF took the view that the no-conflict and no-profit principles would in fact apply to members, absent express exemptions.[37]

To what or to whom did members of CIFF owe fiduciary duties?

The answer to this was simple: to the charitable purposes of CIFF. The core duty was of single-minded loyalty to those purposes.

"In my judgment, it requires that he considers whether the resolution should be passed and that he do so only by considering the best interests of the objects of the charity. That is because the resolution involves a disposition of assets that would otherwise be available for application by CIFF towards those objects." [38]

Lady Arden found not only that this duty was one which "exactly matches" what Dr Lehtimäki considered was required of him and was what a member of the public would expect of him. Moreover, she found that holding a member to be a fiduciary was entirely consistent with the special and beneficent treatment which the law gives to charities.

As for the suggestion that it was unnecessary for a member of a charitable company to be a fiduciary, Lady Arden gave this short shrift. While the interests of charity were well protected by the Charities Act, ****P.C.B. 93*** the finding that members were fiduciaries would make it "easier for the court to exercise its inherent jurisdiction over charities, and the law of charities will be more consistent".[39] The precise circumstances in which the member of a charitable company has fiduciary duties in relation to the charitable purposes and the content of those duties would have to be worked out when they arise.

Issue 2: Can the court exercise its jurisdiction over fiduciaries in relation to Dr Lehtimäki?

It was here that Lord Briggs's and Lady Arden's analyses took different paths. Both agreed that the court could exercise its discretion. The question, however, was why?

Lord Briggs's analysis

Lord Briggs held that there was a "simple, although unusual reason why it was right for the Chancellor to direct Dr Lehtimäki how to cast his vote".

CIFF was a charitable company, which fell under the court's special jurisdiction. CIFF was only a charity because its objects are exclusively charitable. The furtherance of its purposes is entrusted primarily to its trustees. Although their functions are in most respects indistinguishable from those of company directors, like other charitable trustees they have the power to surrender to the court the exercise of their fiduciary discretion about a particular matter. If the court accepts that surrender, it will exercise that discretion in accordance with what it considers will best further the charitable purposes of the company.[40] Where the surrender of discretion relates to the approval of a particular transaction, the court will have to come to a view on whether that transaction furthers the charitable purposes. If it concludes that it does, then it follows that the purposes will not be best furthered by that transaction not going ahead.

Stopping here, it should be remembered that the direction sought was against Dr Lehtimäki. But he was not a trustee and had not surrendered his discretion. Lord Briggs's answer to this point was simple. Once the court's decision about the merits of a transaction is made, he said, then subject to any appeal or change in circumstances, the debate was over and the court's order was "… binding on all those interested parties joined to the relevant proceedings". But he went further. He said that the duty of all the charity's fiduciaries "whether or not joined as parties" is to use their powers to the end that is to be implemented, both generally and in accordance with any directions which the court may give.[41]

This was, perhaps, a simpler explanation than that put forward by Lady Arden, who noted that Dr Lehtimäki was subject to the terms of the articles of CIFF, which entrust the management of CIFF to the trustees (who had surrendered their discretion).[42]

She did not agree that the court had jurisdiction against the members simply because it had jurisdiction against the trustees. This was "bootstrapping".[43] Finally, while the Chancellor had joined Dr Lehtimäki as a party, that did not enlarge the court's jurisdiction. Dr Lehtimäki had not surrendered his discretion, and the trustees had no power to do so for him. This meant that the court's jurisdiction could not be based on the threatened breach of duty. The jurisdiction had to be found in some other way.[44] But it did not mean that the court could not make a direction: just as the court was entitled to make a direction against the organ which made the application, it could also make a direction against any other organ of the charity whose consent is required, subject to that organ being given an opportunity to be heard (as Dr Lehtimäki was). ***P.C.B. 94*** [45]

Returning to Lord Briggs's analysis, he noted that s.217 provided a veto by the members over the ability of the directors (in this case CIFF's trustees) to make payments to themselves or others from the company's funds. Section 201 of the Charities Act recognises that the Charity Commission, representing the public interest, should have the same control over such payments. But these restraints had no purpose where the decision to make the payment for loss of office had been decided on by the court. In essence, no one (whether the Charity Commission or a member) should want to complain about their loss of the right to veto the transaction, when the court had approved it.[46] This did not render s.217 redundant.

Applied to the facts, his analysis was as follows:

> (1) The management of CIFF was threatened by the falling out between its founders. The Grant offered a solution, demerging CIFF's funds into two charities, with the same objects.
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> (2) CIFF was under the control of five trustees, and three members. The trustees surrendered their discretion, and the Charity Commission had deferred to the court. But the Grant was essentially a payment for loss of office within s.217 and so had to be approved by the members. The other two members being conflicted, the decision fell upon Dr Lehtimäki only.
>
> (3) The Chancellor had decided that the Grant was in the best interests of CIFF.
>
> (4) When informed that Dr Lehtimäki did not consider himself compelled by the court's decision to vote on the Grant, the Chancellor directed him to do so. The Chancellor explained that: "The member does not have a free vote … because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction … When the court has decided what is expressly in the best interests of a charity, a member would not be acting in the best interests of that charity if he gainsaid that decision." Lord Briggs agreed.

The basis for the court's jurisdiction: the "breach of duty" route

Lord Briggs explained that, if it were necessary to proceed on the basis that Dr Lehtimäki was neither committing or threatening a breach of his fiduciary duty by declining to vote on the s.217 resolution in accordance with the court's decision, then he would agree with Lady Arden's conclusion, being that the court had power under an exception to the non-intervention principle.[47]

But he was not able to accept that premise. While he accepted that a fiduciary might in good faith conclude that the making of the Grant was not in the best interests of CIFF, once the court had ruled on the underlying question, the "position fundamentally changes".[48] The right of a fiduciary to make a subjective decision, in good faith, fell away once the core question had been determined:

"… there comes a point where the ordinary subjective duty of the fiduciary (as the Court of Appeal put it …)[49] to 'exercise the powers that he has in that capacity in the way that he decides, in good faith, would be most likely to further the purposes of CIFF' has to give way, where the court has reached a different view from his own and made a final decision to that effect.

This is because the concept that the fiduciary is entitled to form his own subjective judgment about a matter affecting (in this case) the company assumes that there are different conclusions about the matter which may reasonably be reached. ***P.C.B. 95***

But when the very question in issue has been finally decided by the court in proceedings in which the fiduciary has been joined as a party and been heard, then there is no longer any legitimate debate.

The duty of the fiduciary is then to use his powers so as to give effect to the court's decision about the company's best interests … If he finds that he cannot in conscience do so, then he should resign." [50]

In rationalising his decision Lord Briggs gave the example of trustee deadlock. In such a case the court may be asked to resolve the issue to enable the trust to be administered. The court may then choose to decide whether or how the particular power should be exercised in the best interests of the beneficiaries. Following a decision, it becomes the duty of all the trustees to act in line with the court's decision, whether they agree with the decision or not. If necessary, the court may direct them to do so.[51]

The above, of course, is a principle relating to trustees. And in this case it was the trustees who had surrendered their discretion. But it was a member who had to vote. He was, it was suggested, a "different organ" of the company, entitled to reach his own view on the merits and overrule the trustees. It was suggested that his joinder as a party did not detract from his entitlement.

Lord Briggs disagreed. The underlying question was the same for both trustees and members: was the Grant in furtherance of CIFF's charitable purposes? Although they were different fiduciary organs of the company, this was not a case "where the two organs might legitimately have a different agenda with each other." If the Grant was in furtherance of CIFF's purposes, they had a duty to see that it happened.

Lady Arden's analysis: the "exception to the non-intervention principle" route

On this issue Lady Arden proceeded on the basis that Dr Lehtimäki's stance did not represent a breach of duty. This made the case "particularly difficult" because in private trusts, the court rarely intervenes in the exercise of a discretionary judgment.

The law of charities is, of course, a branch of the law of trusts, but the law of charities has a number of different features unique to it, the best known of which is its jurisdiction to make a scheme. Lady Arden noted that Lord Pannick (for Ms Cooper) in submissions had relied on *In re J W Laing Trust* [52] as demonstrating that the court may intervene in a charity when it is expedient in the interests of the charity to do so. This showed that the court's powers were very broad. *Letterstedt v Broers* also evidenced the broad jurisdiction of the court over trustees.[53]

With these principles in mind, she found that the court could found its jurisdiction to direct the fiduciary in question to vote through an exception to the "non-intervention principle".

She noted that Lord Briggs and the majority of the court agreed that, if such an exception was needed, it could be found, but that Lord Briggs had reached the same result by holding that the position adopted by Dr Lehtimäki would constitute a threatened breach of fiduciary duty.[54] She disagreed. In her view, while *Pitt v Holt* [55] was authority for the position that a breach of duty was necessary before the court would intervene in the exercise of a trustee's discretion, there was room for exceptional cases as described in *Re Beloved Wilkes's Charity*:

"the duty of supervision on the part of the court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases". ***P.C.B. 96*** [56]

While there was little authority to support intervention by the court in the circumstances of this case, she saw that only as a result of the fact that the reported charity cases do not often have two governing organs with differing views.

In conclusion, she held that the court's well-established jurisdiction to intervene where charity can no longer be carried out could be applied. While the court should proceed with caution, the categories of cases that would show "exceptional" or "particular" circumstances were not closed.[57] In this case an impasse was threatened in the performance of the trust if Dr Lehtimäki was unable to reach the same conclusion as the Chancellor.

The court's jurisdiction was also not limited that of the Charity Commission (see for example, s.20(2) of the Charities Act). The court's jurisdiction was of ancient origin and there was no provision in the Charities Act which attempted to codify it. An express provision in statute would be required to reduce or remove the scope of the court's jurisdiction.[58]

Finally, she made some enlightening comments regarding the "breach of duty" route, which can be summarised as follows:

(1) The Chancellor had no jurisdiction to make an order against Dr Lehtimäki unless he was threatening a breach of duty. But he was not.

(2) The fiduciary's duty is subjective.

(3) Only the trustees had surrendered their discretion. Dr Lehtimäki had not. A surrender confers no power on the court which the trustees themselves did not have.[59]

(4) The jurisdiction must therefore be found in some other way.

(5) The order approving the Grant could only be made by making a separate substantive order against Dr Lehtimäki, requiring him to vote.

(6) Jurisdiction must be established in substance before the direction is given. It is not enough for the court to found jurisdiction on a breach of duty which does not arise unless the court has jurisdiction to make the order.

(7) The court must therefore first establish jurisdiction by finding, if it properly can, an exemption to the non-intervention principle.

(8) Further, as the member's decision is one to be taken at the date of the vote (and not the date of the hearing), it cannot be concluded that a fiduciary, who has assured the court that he will act bona fide in the best interests of the objects of the charity, is currently threatening a breach of duty ([195]).[60]

(9) Unless there is an applicable exception to the non-intervention principle, there is no jurisdiction.[61]

Enlightening as these comments are, and difficult as they are to criticise, they are strictly obiter.

Issue 3: Does s.217 of the CA 2006 allow the court to direct a member to exercise his discretion in a particular way when Parliament has provided for members to pass the resolution?

This issue can be dealt with quickly. Lady Arden's ruling on this issue (with which Lord Briggs agreed) began with the following principles: ****P.C.B. 97***

(1) the court has inherent jurisdiction to intervene in charities, and Parliament must make clear if it is restricting the jurisdiction of the court;

(2) the regulation of charities takes place in the field of public law, and in public law the court does not substitute its decision for that of a decision-maker selected by Parliament, which in this case was the member of CIFF; and

(3) registered companies must follow provisions of the Companies Acts applicable to them, and in default of this any actions taken without compliance with those provisions will be of no effect.

While the question of how the member votes is usually an exercise of a member's discretion (in which the court cannot interfere), if the directors/trustees have surrendered their discretion to the court, then the court may exercise its power to agree to a transaction which involves a payment in connection with a trustee's loss of office.[62] There was no interference with the statutory scheme: there still must be a resolution under s.217. Nor was the court dispensing with the statutory requirements of the Charities Act which required the prior written consent of the Charity Commission. While Lady Arden sympathised with the frustration felt by Dr Lehtimäki at not being able to exercise his judgment, the Chancellor had done the job for him.

Conclusion

The issue at the heart of this case was, in fact, quite simple: what was in the best interests of the purposes of CIFF? Once that was established, the question then was: how far would the court go to intervene to ensure that its purposes were upheld?

The answer, emphatically made by both Lady Arden and Lord Briggs, is, in effect: as far as is required.

In particular, the Supreme Court was not going to let anyone, let alone a fiduciary who owed single-minded loyalty to CIFF's purposes, to stand in the way. Indeed it was inappropriate, once the merits of the Grant had been determined, to do anything other than vote in favour of the Grant. That covered the vote under the s.217 resolution.

The decision of the court, and in particular the decision of Lord Briggs, rather runs a coach and horses through the flexibility afforded to fiduciaries in their decision making. That said, in his view it was incorrect to say that the test for breach of fiduciary duty was purely subjective.[63] The fiduciary's belief had to be both bona fide and reasonable, if he or she is to act upon it without risking breach of duty. Honesty and sincerity are not the same as prudence and reasonableness,[64] This therefore imports into the subjective consideration an assumption that the fiduciary will exercise his discretion by reference to objective considerations.

In this case, like many others, it does appear that the court may have found the answer to the core question (what was in the best interests of CIFF's purposes), and worked backwards, rather like the trick for identifying a fiduciary described by Finn J. While Lady Arden found fault in Lord Briggs's approach, it is hard to argue with an approach which has at its core a focus on seeing the purposes of a charity upheld.

One further question arises, as touched on in Lord Briggs's judgment. Why would any fiduciary complain about having to make a decision in line with the ruling of the court? He was protected. If he disagreed with the course of action proposed, he could have said so, and provided evidence showing that the Grant was not in fact in the best interests of CIFF. Instead, Dr Lehtimäki reserved his position and considered that he should not be directed by anything other than by his conscience. But his conscience had not yet come off the fence. In the face of indecision, the court had little option. If it refused to direct him to make ***P.C.B. 98*** a decision which, on the evidence, was considered to be in the best interest of the charity, then the result was indefinite standstill. It is possible that his "studied neutrality" may well have been taken by the court as indicative of a unilateral deadlock. It may well be that the court, in coming to its novel conclusion, was, in part, frustrated by Dr Lehtimäki's stance, and refused to countenance it coming in the way of a charitable company pursuing its objects.

"The court finds itself in the position that it is totally uncertain as to what the final conclusions of Dr Lehtimäki's deliberations might be, and he has not sought an opportunity to come to a view before the court makes any order." [65]

That is not to criticise the decision of the court, nor Dr Lehtimäki, but rather to celebrate the court adapting the relevant principles to the situation, to see that the right result on any objective basis was achieved, so that the duties of fiduciaries could be applied with the "relentless jealousy" described in *Ex p Lacey*.

That, in short, is another way of saying that the court had as its focus one thing only: the best interests of charity.

Joseph de Lacey

Footnotes

1 *Lehtimäki v Cooper [2020] UKSC 33; [2020] 3 W.L.R. 461* ("Lehtimäki SC"), on appeal from *Lehtimäki v Attorney General [2018] EWCA Civ 1605; [2019] Ch. 139* ("Lehtimäki CA"), itself on appeal from *Children's Investment Fund Foundation (UK) v Attorney-General [2017] EWHC 1379 (Ch); [2018] Ch. 371* ("Children's Investment Fund").

2 *Construction Industry Training Board v Attorney General*

[1973] Ch. 173; [1972] 3 W.L.R. 187 per Buckley LJ.

3 Note s.1(1)(b) of the Charities Act 2011 ("Charities Act"): "For the purposes of the law of England and Wales, 'charity' means an institution which … falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities."

4 *Ex parte Lacey (1802) 6 Ves. Jr. 625, 626; 31 E.R. 1228*.

5 *Lehtimäki SC [2020] UKSC 33* at [91] per Lady Arden.

6 That charities are expected to provide a unique benefit to society is reflected in the "public *benefit* test", set out in the Charities Act s.4.

7 *Children's Investment Fund [2017] EWHC 1379 (Ch)* at [142]. See also *Bristol & West Building Society v Mothew (t/a Stapley & Co) [1998] Ch. 1, 18; [1997] 2 W.L.R. 436* per Millett LJ, quoting Dr Finn in *Fiduciary Obligations (1977)*.

8 *Grimaldi v Chameleon Mining NL (No 2) [2012] 287 ALR 22* at [177] per Finn J.

9 *Lehtimäki SC [2020] UKSC 33* at [207] per Lady Arden.

10 *Lehtimäki SC [2020] UKSC 33* at [216] per Lord Briggs.

11 For which see *Cowan v Scargill [1985] Ch. 270, 289; [1984] 3 W.L.R. 501*.

12 Charities Act s.193.

13 Companies Act 2006 s.3(1). The Court of Appeal noted that many charities are companies limited by guarantee: *Lehtimäki CA [2018] EWCA Civ 1605* at [1].

14 *Lehtimäki CA [2018] EWCA Civ 1605* at [8].

15 *Lehtimäki CA [2018] EWCA Civ 1605* at [12].

16 *Children's Investment Fund [2017] EWHC 1379 (Ch)* at [39].

17 *Public Trustee v Cooper [2001] W.T.L.R. 901*.

18 *Children's Investment Fund [2017] EWHC 1379 (Ch)* at [128].

19 *Children's Investment Fund [2017] EWHC 1379 (Ch)* at [135].

20 *Bolton v Madden (1873–74) L.R. 9 Q.B. 55*, in which the Court of Appeal enforced an agreement between two subscribers to a charity who had expressly agreed that, if one were to vote in favour of an object favoured by the other, that other would later vote in favour of an object favoured by the first.

21 *Lehtimäki CA [2018] EWCA Civ 1605* at [46]. They left open the question, however, as to whether the position might be different for members of so called "mass-membership charities" such as the National Trust.

22 *Pitt v Holt [2013] UKSC 26* at [73].

23 *Lehtimäki CA [2018] EWCA Civ 1605* at [67].

24 *Lehtimäki CA [2018] EWCA Civ 1605* at [51].

25 *Lehtimäki CA [2018] EWCA Civ 1605* at [62].

26 A fiduciary must be a fiduciary in relation to someone or something: "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?": *Securities & Exchange Commission v Chenery Corpn (1943) 318 US 80, 85–88* per Frankfurter J.

27 *Lehtimäki SC [2020] UKSC 33* at [201] and [203].

28 *Lehtimäki SC [2020] UKSC 33* at [208].

29 *Lehtimäki SC [2020] UKSC 33* at [43], citing *Ex p Lacey (1802) 6 Ves. Jnr. 625*.

30 Membership Charities (RS7): https://www.gov.uk/government/publications/membership-charities-rs7 [Accessed 8 April 2021].

31 *Grimaldi [2012] 287 ALR 22* at [177] per Finn J.

32 See *National Anti-Vivisection Society v IRC [1948] A.C. 31, 64; [1947] 2 All E.R. 217*.

33 *Lehtimäki SC [2020] UKSC 33* at [65].

34 *Liverpool and District Hospital for the Diseases of the Heart v Attorney General [1981] Ch. 193; [1981] 2 W.L.R. 379*.

35 *Construction Industry Training Board [1973] Ch. 173*.

36 *Armitage v Nurse [1998] Ch. 241; [1997] 3 W.L.R. 1046*.

37 *Lehtimäki SC [2020] UKSC 33* at [85].

38 *Lehtimäki SC [2020] UKSC 33* at [90].

39 *Lehtimäki SC [2020] UKSC 33* at [93].

40 *Lehtimäki SC [2020] UKSC 33* at [206].

41 *Lehtimäki SC [2020] UKSC 33* at [208].

42 *Lehtimäki SC [2020] UKSC 33* at [173].

43 *Lehtimäki SC [2020] UKSC 33* at [178].

44 *Lehtimäki SC [2020] UKSC 33* at [181]–[182].
45 *Lehtimäki SC [2020] UKSC 33* at [133].
46 *Lehtimäki SC [2020] UKSC 33* at [210].
47 *Lehtimäki SC [2020] UKSC 33* at [217].
48 *Lehtimäki SC [2020] UKSC 33* at [218].
49 *Lehtimäki CA [2018] EWCA Civ 1605* at [48].
50 *Lehtimäki SC [2020] UKSC 33* at [218].
51 *Garnham v PC [2012] JRC 050*.
52 *In re J W Laing Trust [1984] Ch. 143; [1983] 3 W.L.R. 886*.
53 *Letterstedt v Broers (1884) 9 App. Cas. 371; [1881–85] All E.R. Rep. 882*.
54 *Lehtimäki SC [2020] UKSC 33* at [119].
55 *Pitt [2013] UKSC 26*.
56 *Re Beloved Wilkes's Charity 42 E.R. 330; (1851) 3 Mac & G 440*.
57 *Lehtimäki SC [2020] UKSC 33* at [137].
58 As noted above, s.1(1)(a) of the Charities Act defines a charity as an institution which falls subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.
59 *L. Tucker, N. Le Poidevin and J. Brightwell, Lewin on Trusts, 20th edn (London: Sweet & Maxwell, 2020), para.39–099*.
60 *Lehtimäki SC [2020] UKSC 33* at [195].
61 *Lehtimäki SC [2020] UKSC 33* at [196].
62 *Lehtimäki SC [2020] UKSC 33* at [164]–[165].
63 *Lehtimäki SC [2020] UKSC 33* at [232].
64 *Cowan [1985] Ch. 270*.
65 *Lehtimäki SC [2020] UKSC 33* at [171].

