

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## CHILDREN'S INVESTMENT FUND FOUNDATION (UK) V ATTORNEY GENERAL AND OTHERS [2017] EWHC 1379 (CH)

England and Wales High Court, Chancery Division, Vos C, 9 June 2017

The Grant of money was approved subject to the consent of the Commission under s 201 of the *Charities Act 2011* and under cl 5.2 of the Memorandum, the making of the Grant must be approved by the members of CIFF, of whom only Dr Lehtimaki is entitled to vote, per the court's direction.

**Key words:** Gift, England and Wales, Charitable Company, Company Limited by Guarantees, Payment of Grant to New Charitable Company, Fiduciary Duties, Loss of Office, Member Fiduciary Duty

1. The Children's Investment Fund Foundation (CIFF) is a company limited by guarantee without a share capital, incorporated in 2002. In this case, CIFF sought the court's approval to make a grant of US\$360 million (the grant) to another English registered charity, Big Win Philanthropy (BWP), also a company limited by guarantee without a share capital.
2. CIFF obtained the bulk of its funds from companies operated by a philanthropist and banker, Sir Christopher Hohn, the second defendant in this case. It has assets of more than US\$4 billion. CIFF was co-founded by Sir Christopher and his ex-wife, the third defendant, Ms Jamie Cooper. BWP is a new charitable foundation incorporated by Ms Cooper in June 2015. BWP had already been funded by a payment of US\$40 million made by TCI Fund Management Limited on 20 December 2016, pursuant to a Deed of Covenant made by Sir Christopher on 25 July 2015. Ms Cooper has also executed a Deed of Covenant dated 9 July 2015 under which she has covenanted to give or procure a gift of US\$40 million to BWP on conditions including one that requires the grant to be approved by the Charities Commission of England and Wales (the Commission) or the court.
3. The establishment of BWP and the intention to make the grant to BWP arose as a result of the break-up of the marriage between Sir Christopher and Ms Cooper in late 2011. The couple were divorced on 3 April 2013. The matrimonial proceedings between them resulted in a payment of some US\$530 million being made by Sir Christopher to Ms Cooper on 12 December 2014. In addition, there were extensive negotiations concerning the monies to be moved between the charities, and the resignation of Ms Cooper as a director of CIFF.
4. In the event, it became apparent that the court was faced with the question of whether the court had jurisdiction over the governance bodies of a charitable company limited by guarantee. This was because if the court determined, as submitted by Sir Christopher, that the payment of the grant would be a payment for loss of office

to a director of CIFF, this would be caught by sections 215 and 217 of the *Companies Act 2006*. This meant that the grant would need to be sanctioned by a resolution of the members of CIFF before it could be paid.

5. The members of CIFF were Sir Christopher, Ms Cooper, and a friend of Sir Christopher's, Dr Marko Lehtimäki. The latter's vote on the matter was thus crucial, and the court had him joined as a party to the action on 10 May 2017. There were also independent trustees of CIFF to be taken into account. The independent trustees of CIFF had approved the grant on 25 July 2016.
6. The court held that this was a case in which the trustees of CIFF had, in the circumstances that had occurred, surrendered to the court their discretion in relation to the making of the grant. That being so, the court then considered whether the grant would confer a material benefit (directly or indirectly) on Ms Cooper such that the written approval of the Commission would be required in advance (in order to comply with CIFF's Memorandum at clause 5.2). This was held to be the case (at [77]):

It is, in my judgment, relevant, but not conclusive, that Ms Cooper will gain no proprietary interest in the money represented by the Grant, because of the exclusively charitable status of BWP. She will, however, gain some benefit from the Grant because she will be the founder and a trustee of a charity with an endowment of an additional US\$360 million. To a person whose life's work is in charity and philanthropy that must be regarded in normal understanding as a "benefit". The principle that non-monetary benefits including moral benefits can be material does, I think, carry over from the situation in [the relevant case law]...Ms Cooper will, if the Grant is made, have the benefit of being able to use her considerable talents to direct the significant funds represented by the Grant towards projects that she personally supports within CIFF's charitable objects. I do not think that clause 5.2 is drafted in a restrictive way that requires the court in these circumstances to ignore these tangible benefits. I remind myself that the fact that Ms Cooper was prepared to accept less money if the Grant were made is reflected in the opinions of counsel that have been placed before the Court. I can well understand why she might have been prepared to take that course. Clause 5.2 is not an absolute bar on benefits, but merely allows the Commission the opportunity to review what is proposed in advance. It should be able to do so in this case.

7. The next issue was: Would the grant be a payment for loss of office within the meaning of section 215 of the *Companies Act 2006* so as to require the approval of CIFF's members under section 217 of the *Companies Act 2006*, because it would be (a) consideration for or in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and either (b) a payment to a person connected with Ms Cooper, or (c) a payment to any person at the direction of, or for the benefit of, Ms Cooper or a person connected with her? The court held that the grant was agreed to be paid both in consideration for and in connection with Ms Cooper's retirement (at [87]).
8. However, was the grant being paid to a person connected with Ms Cooper, or to any person at the direction of, or for the benefit of, Ms Cooper or a person connected with her? This would require the approval of a resolution passed by the members of CIFF. On this point, the court said (at [97]):

Section 215(3) [of the *Companies Act 2006*] is, I think, the governing provision. A payment requires members' approval if it is made either to a person connected with a director or to any person at the direction of or for

the benefit of the director. They are cumulative protections. Section 252(2) then provides a complete list of those persons that are to be regarded as connected with a director. It explains that those persons are (broadly) family members, bodies corporate with which the director is connected, trustees holding for the benefit of a director, partners of the director, and firms in which the director is a partner. There is no basis to regard the provisions of section 252(2)(c) as holding some unexpressed special position in that list...The obvious and proper construction of section 252 is, in my judgment, that the legislation was intended to catch payments to the persons mentioned in section 252(2), and only to those persons. If, therefore, the payment is to a "body corporate with which the director is connected (as defined in section 254)", then the payment is caught by section 215(3)(a). It matters not that the payment might not be within section 252(2)(c) because it is made to a company that will hold the money on trust for beneficiaries other than the director personally.

9. The Chancellor went on to say that (at [100]-[101]):

It seems to me that the provisions of sections 215 and 217 of the *Companies Act 2006* were deliberately applied to charitable companies by the legislature (see section 201 of the *Charities Act 2011*). It would be a retrogressive step to construe the controls imposed by those sections narrowly or artificially, when they simply operate to bring the terms of a proposed payment connected with the retirement of a director to light and to be considered by the Commission and the membership of the company...I conclude, therefore on this issue that the Grant would be a payment for loss of office within the meaning of section 215 of the *Companies Act 2006* so as to require the approval of CIFF's members under section 217 of the *Companies Act 2006*, because it would be a payment made as consideration for and in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and a payment to BWP, a person connected with Ms Cooper.

10. The fourth issue before the court was: If the grant did require the approval of CIFF's members under section 217, were either or both of Sir Christopher and Ms Cooper (a) deprived of the right to vote because they owed fiduciary duties as members of CIFF and had a conflict of interest, or (b) contractually deprived of the right to vote, and/or (c) contractually or otherwise obliged to vote in a particular way?

11. The court held that both Sir Christopher and Ms Cooper were deprived of the right to vote on the section 217 resolution because they were contractually obliged to so refrain. The trustees having abrogated their right to decide the issue to the court, the Chancellor then moved to consideration of whether the court should approve the grant to BWP. The court decided that: 'perhaps counter-intuitively, that in the unique circumstances of what is an extremely unusual case, making the Grant is and will be in the best interests of CIFF' (at [128]).

12. The main reasons put forward for the court's decision was that the making of the grant was in line with the existing decisions made by the directors and trustees, would bring the acrimonious dispute between the parties to an end, thus solving CIFF's management problems, and that the money would be used well and properly for charitable purposes (at [128]-[129]).

13. Thus, the court approved the grant of money from CIFF to BWP. Did this abrogate the need for written approval from the Commission, or for a members' resolution under section 217 of the *Companies Act 2006*? The Commission

had granted the court the power to make the decision, but what were the court's powers over the members of charitable companies limited by guarantee? Do members of an exclusively charitable company limited by guarantee without a shareholding owe fiduciary duties to the company? The court held that they did (at [144]):

In my judgment, a member of a company limited by guarantee without a share capital with exclusively charitable objects is bound in to the regime now contained in the *Charities Act 2011*, the whole thrust of which is to ensure that the assets of the company are used for its exclusively charitable objects and for no other purpose. There are numerous provisions designed to prevent the trustees and members benefitting personally from the assets of the charity. Even on a winding up, the assets must go to other charitable purposes.

14. There was only remaining unconflicted member of CIFF, Dr Lehtimaki. Did the court have the power to direct him as to how he should vote, if a vote under section 217 of the *Companies Act 2006* was actually necessary? The court held that Dr Lehtimaki should not be permitted to vote without guidance from the court (at [153]):

I have nonetheless concluded that it would be inappropriate for the court to defer to this most unfortunate situation. It is, in my judgment, too great a risk for the court to allow the final decision to be taken by Dr Lehtimaki without guidance from the court. If he decided against the Grant, there would no doubt be another massively expensive round of litigation which would be hugely to the detriment of the proper operation of both CIFF and, no doubt, BWP. Charity generally would also suffer. Finality is greatly to be desired and that can only be achieved, in the circumstances of the court's existing decisions, if Dr Lehtimaki is required (if the Commission approves the Grant) also to approve it.

15. Both the Commission and the trustees of CIFF had decided that their discretion to approve the Grant should be exercised by the court. That discretion had been exercised in favour of making the grant (at [154]):

The discretion so exercised binds the charity and the charitable company, CIFF. Its management is only divided between trustees and members for specific purposes. Here the trustees of CIFF bound CIFF in relinquishing their discretion to the court, and the court order will bind CIFF in deciding that the Grant should be made. That means that, whilst the members must pass a resolution under section 217 to approve the Grant, it is not in this case open to any member of CIFF to vote against that resolution, once the court and the Commission have approved the Grant. The member does not have a free vote in this case because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction over the administration of charities. 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...The court has approved the Grant as being in the best interests of CIFF and charity in the exercise of its discretion and its decision must be respected. Moreover, the Commission has expressly approved the application to the court for an order...The Commission, therefore, contemplated that the court might make directions aimed at procuring the passing of any necessary section 217 resolution. For these reasons, I would propose to make such an order directing Dr Lehtimaki to vote in favour of the resolution to approve the Grant.

16. Thus, the court's approval did not abrogate either the Commission's written approval or the need for a section 217 resolution. The Commission had acquiesced to the finding in all respects. However, Dr Lehtimaki was directed as to his vote on the section 217 resolution.

17. The court noted that in over three centuries of charity case law the precise question before it had never arisen before, and indeed, might 'never arise again' (at [156]). In that sense it was specific to its facts.

## IMPLICATIONS



This decision was appealed. Refer later case note: LEHTIMÄKI V CHILDREN'S INVESTMENT FUND FOUNDATION [2018] EWCA CIV 1605 Court of Appeal (Civil Division), Gloster, Richards, Newey LLJ, 6 July 2018  
<https://eprints.qut.edu.au/131995/>

## VIEW THE CASE



This case may be viewed at <http://www.bailii.org/ew/cases/EWHC/Ch/2017/1379.html>

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**Author:** McGregor-Lowndes, Myles & Hannah, Frances M.

**Email:** [acpns@qut.edu.au](mailto:acpns@qut.edu.au)

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