

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.



SUPPORT THE HEROES V THE CHARITY COMMISSION FOR ENGLAND AND WALES

First Tier Tribunal (Charity), General Regulatory Chamber, McKenna J, Ms S Elizabeth, Mr M Duggal, 12 June 2017

Charity Commission actions reviewed in relation to a charity that was mismanaged with fundraising conflicts.

Key words: Incorporated Charity, England & Wales, Fundraising, Mismanagement, Conflicts of Interest, Insufficient Trustees

1. Support the Heroes (the Charity) is a registered charity in England which was incorporated as a charitable incorporated organisation in February 2014. The Charity's governing document is a CIO Foundation Constitution. Clause 7 of the governing document requires charity trustees to declare conflicts of interest and absent themselves from any discussions where they face such a conflict. Clause 9 (3) provides that there must be at least three trustees and that if the number falls below that minimum, the remaining trustees may act only to call a meeting of the charity trustees or appoint a new charity trustee.
2. At the time of this hearing, the Charity had only two trustees, Ms White and Ms Carruthers, who are sisters. The Charity had entered into a five-year contract for 'management services' with a company controlled by the son of Ms White's partner, Target Management Ltd (TML). The Charity received adverse publicity following a social media campaign, press articles and a BBC television programme about its relationship with TML. The Charity Commission for England and Wales (the Commission) took the view that the contract with TML was a fundraising agreement, which was governed by relevant fundraising laws.
3. The Charity's accounts for the year ended 31 March 2016 showed an income of £119,473 and expenditure of £91,885, of which £81,302 was expended as donations and grants in furtherance of the Charity's objects. The Charity established a wholly owned trading subsidiary called Support the Heroes (Fundraising) Limited, whose sole director (and the sole signatory of its bank account) was Ms White. In the year ended 31 March 2016 that company's turnover was £445,000 with costs of sales of £376,000. The company donated £60,000 to the Charity in that period.
4. The Commission began to look into the Charity on 11 November 2016. The following actions were subsequently taken by the Commission:

1. 11 November 2016: an Order pursuant to section 76 (3)(d) of the Charities Act 2011 (the Act) was made requiring the Charity trustees not to part with any of the Charity's property without the written consent of the Commission;
2. 11 November 2016: a Direction under section 84A of the Act was issued, requiring the trustees immediately to cease and suspend all fundraising activity in the name of the Charity;
3. 18 November 2016: two further Orders under section 76 (3)(d) of the Act froze the Charity's main and subsidiary bank accounts;
4. 9 December 2016: an Order pursuant to section 76 (3)(g) of the Act, appointing an Interim Manager (IM), to the exclusion of the trustees.

5. The Statement of Reasons given by the Commission included that:

- there was evidence of mismanagement and/or misconduct in the administration of the Charity, consisting of a failure to avoid or adequately manage conflicts of interest in respect of the relationship with TML;
- there was no evidence demonstrating why the Charity had entered into the contractual relationship with TML, or that the trustees had considered alternative options;
- there were concerns about the conduct of TML and a history of complaints from the public about its fundraising activities;
- TML did not comply with the relevant regulatory framework and that the financial arrangements between the Charity and TML were not transparent;
- the agreement between the Charity and TML had been running for two years and that the Charity appeared to have received 16% of the total funds raised (with 84% retained by TML). The contract provided for a maximum of 67% of the funds raised to be paid to TML but this amount was expressed to be exclusive of VAT so the true level of remuneration to TML was unclear;
- the trustees had exposed the Charity to reputational and financial risk through their failure to discharge their legal duties with respect to the Charity's relationship with TML, and that there was a resulting risk to public trust and confidence in charities generally.
- The Charity appealed the orders made, particularly in relation to the appointment of the IM. The Tribunal concluded that on all the evidence, there had been mismanagement of the Charity resulting in the need for the appointment of an IM (at [39]). There is no statutory definition of the terms "mismanagement" or "misconduct" in the Act, so the terms carry their ordinary meaning. The Charity Commission's published guidance defines them as:

- 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.

6. This was a case of mismanagement (at [40]):

...we conclude that the Charity trustees failed to ensure that the contract with TML was lawful, appropriate, and represented value for money through the consideration of appropriate advice and a process of benchmarking. This omission created a risk that significant charitable resources would be misused through the over-remuneration of TML, and that the Charity would be provided with services by TML which were delivered in a manner which posed a reputational risk.

7. The Tribunal was satisfied that the appointment of an IM was a 'necessary step' (at [42]), was 'lawful and proportionate' (at [48]), and that it should continue so that the Charity could ultimately be wound up. The appeal was dismissed.

8. The Tribunal commented that the Commission's choice of the particular IM (a person at odds with the Charity's proponents previously) was 'inflammatory', and that it 'sympathised' with the Charity's complaint that the Charity Commission appointed the IM before it had even met with them (at [49]):

In ordinary circumstances, we would regard such a meeting as an important feature of the regulatory process, demonstrating the Charity Commission's commitment to natural justice in its inquiry. However, in the circumstances of this case, we can understand the Charity Commission's precipitation. It was apparent from the papers that the Charity was constitutionally unable to act to regularise its position, and the publicity surrounding the Charity's dealings with TML represented a clear threat to the reputation of the charity sector generally so that the Charity Commission needed to be seen to act quickly and decisively. It follows that there was very little the trustees could have said at a meeting to persuade the Charity Commission to act differently. As things transpired, we agree with the Charity Commission...

IMPLICATIONS



Charity governors should pay particular attention to vetting third party fundraising contracts and appropriately deal with conflicts of interest both from a legal and reputational aspect.

VIEW THE CASE



This case may be viewed at:

[http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%20\(18%20July%202017\).pdf](http://charity.decisions.tribunals.gov.uk/documents/decisions/Decision%20(18%20July%202017).pdf)

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

Email: acpns@qut.edu.au

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