

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.



THE CHARITY COMMISSION FOR ENGLAND AND WALES V MOUNTSTAR PTC LIMITED [2016] EWHC 876 (CH)

High Court of Justice, Chancery Division, Snowden J, 21 April 2016

Key words: Interim Manager, England and Wales, Taxation, Scheme, Investigation

1. This was an application by the Charity Commission of England and Wales (the Commission) seeking directions from the court with respect to decisions of the interim managers of a registered charity, the Cup Trust (the Charity). Mountstar PTC Limited (Mountstar), a private trust company incorporated under the laws of the British Virgin Islands, is the sole corporate trustee of the Charity. It was common ground in this case that in 2010 the Charity was involved in a tax avoidance scheme (the scheme).
2. The scheme was devised and promoted by entities related to Matthew Jenner who was a tax adviser and a director of Mountstar until his resignation on 10 April 2014, and bankruptcy in March 2015. The scheme was complex, involving the following steps:
 1. The Charity purchased gilts at full value (from The VL Settlement) with the aid of a loan from a foreign-based lender;
 2. It then sold these to an intermediary at a nominal value (0.01% of full value);
 3. The intermediary on-sold the gilts to a high net worth UK-based taxpayer at nominal value;
 4. The high net worth UK-based taxpayer then sold them at full value back to The VL Settlement and 'donated' the net proceeds of sale plus a small amount (0.02%) to the Charity;
 5. The Charity then used these proceeds to repay the loan from the foreign-based lender, retaining the 0.02%;
 6. By this process, the beneficial ownership of the gilts was transferred from The VL Settlement to the Charity, to the intermediary, to the UK-based taxpayer, and then back to The VL Settlement on the same day.

3. Provided that it was repaid within twenty-four hours, the loan to the Charity was interest free. All of the steps were executed on the same day, virtually simultaneously, and repeated numerous times during the course of the day. The process was facilitated by all steps being transacted by, and all parties utilising, the same bare trustee whose bank account was used, and which held legal title to all of the financial instruments (the gilts). All documents were executed by their common appointed attorney HNW Tax Services.
4. The one-day circular process of financial instrument dealing occurred in ten 'rounds' between 30 January and 28 November 2010. There were 826 transactions involving around 300-400 UK taxpayers with over £176 million of gilts being purchased and sold by the Charity with money borrowed from the overseas lender. This was supposed to represent £176 million of 'donations' to the Charity. The only cash which the Charity retained from the scheme was £155,000 representing the nominal payments made by the intermediary and the taxpayer donors.
5. Under the scheme, the taxpayers were then able to claim higher rate tax relief on their 'donations', with the Charity claiming gift aid and gift aid transitional relief from Her Majesty's Revenue and Customs (HMRC) on those 'donations'. If successful, the Charity would have received £46 million in gift aid from HMRC whilst the donors' higher rate tax relief would net them £55 million. The gift aid claim was rejected by HMRC in December 2013.
6. On information received from HMRC, the Charity Commission had investigated the operations of the Charity in 2010, within seven weeks of the first 'round' of transactions. The Commission identified various areas of regulatory concern: the administration, governance and management of the Charity; the protection of property (including reputation); application of funds; identification and management of risks; and Mountstar's compliance with its duties and responsibilities as charity trustee, particularly in relation to the management of conflicts of interest. However, that investigation was closed on 7 March 2012. The Commission took the view that it could not deregister the Charity, which had been established for charitable purposes, because it was not for it to find fault with the scheme. That was for HMRC. The Commission merely issued guidance for Mountstar as to the management and recording of conflicts of interest.
7. The First Tier Tribunal (Charity) (FTT(C)) was underwhelmed by the Commission's position and made a highly critical decision in October 2013. Its decision was widely supported and commented upon in the media. The Times and other leading newspapers, prompted by various politicians, published a report criticising both HMRC and the Commission for its lack of action on the scheme. The report described the scheme as 'a massive tax avoidance scam'. The criticism thus moved into the public arena, and the Commission's opening of the statutory inquiry ensued. Interim managers were appointed by orders of the Commission on 26 April 2014 and 18 February 2015.
8. The decision by the interim managers for which the Commission sought the sanction of the court in this case was to discontinue the Charity's appeal to the First Tier Tribunal (Tax) (FTT(T)) against HMRC's rejection of its gift aid claims. HMRC contended that the payments by the taxpayers did not amount to a qualifying donation for the purposes of gift aid because they failed to satisfy the requirements set out in section 416 of the Income Tax Act 2007. The interim managers took advice on the likely success of an appeal. That advice was that an appeal was almost bound to fail. However, in February 2014 Mountstar obtained partial permission to appeal against the FTT(C)'s decision to appoint interim managers, and by a letter dated 10 March 2014 Mountstar objected to the interim managers abandoning the gift aid claims pending determination of its appeal. In August 2014, Mountstar

withdrew its appeal against the decision of the FTT(C). However, it did continue to apply pressure to the Commission and the interim managers of the Charity to continue the appeal against the gift aid decision by HMRC.

9. Was the proposal of the interim managers to discontinue the appeal appropriate? The court said that the Charities Act 2011 made it clear that the proper body to question on these matters was the Commission (at [57]):

...in most cases in which interim managers are in any doubt as to what they should do, or where they do not have any doubt but wish to have protection from subsequent complaint, it is the Charity Commission and not the court that should be asked to deal with the question.

10. However, sometimes the court did need to intervene. His Honour said that this would be in situations analogous with those in *Public Trustee v Cooper* [2001] WTLR 901 at 922–924. Of these, the most analogous was the second category in which intervention might be required (at [61], [66]):

...

‘...where the issue is whether the proposed course of action is a proper exercise of the trustees’ powers where there is no real doubt as to the nature of the trustees’ powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers...’

....

11. ...it seems to me that the instant application has a good deal in common with applications by trustees of the second type referred to in *Public Trustee v Cooper*. It is a case in which the Interim Managers have decided what they want to do, but the sanction of the court is sought because the decision is recognised as being a ‘momentous’ one for the Cup Trust.

12. To what extent should the considerations that apply to cases involving ordinary trustees in the second category apply to cases such as this one? His Honour said that (at [68]):

...there must be a real question as to whether the court should ordinarily be prepared to give directions to interim managers, ‘blessing’ what are essentially business decisions.

13. However, this was not an immutable rule (at [69]):

...I think that there are plainly exceptional circumstances in the instant case that justify the Charity Commission having referred this matter to the court. The facts are highly unusual in the context of a charity and the potential amounts at stake are large. Moreover, given the controversy surrounding the Cup Trust and the challenge to the appointment of the Interim Managers in the first place, coupled with Mountstar’s views that the matter should be referred to the court, I think that the Charity Commission was justified in seeking an independent review of the decision that its appointees wish to take.

14. The approach to be taken by the court was not one which would be more interventionist than for an ordinary trust (at [72]). The question then became whether the decision to discontinue the gift aid claims was one that a reasonable body of trustees, properly instructed, and ignoring irrelevant factors, could properly have reached. On this issue, the first requirement was that the interim managers had relied on competent advice. The advice they had received from senior counsel made this, in the court's view, 'a test passed with considerable ease' (at [76]). Senior counsel's conclusion was that the appeal had negligible prospects of success. Moreover, the Cup Trust was a charity so that (at [77]):

...in fulfilling the role of charity trustees, the Interim Managers do not have the freedom to 'take a punt' on speculative litigation, even if the charity has the funds to finance it. In fact the Cup Trust has minimal assets to play with, so that although the amounts potentially recoverable are large, given the advice that the Gift Aid claims have negligible prospects of success, it seems to me to be an entirely sensible requirement of the Interim Managers that the claims could only be pursued if there is no financial risk whatever to the charity in doing so.

15. The offer of the one remaining director of Mountstar to fund the appeal was properly rejected by the interim managers (at [89]):

...taking all of the points into account, and even having regard to the very large amount of the Gift Aid claims, I do not think that the Interim Managers are obliged to accept funding and pursue an appeal against HMRC on the terms offered by Mr. Mehigan and Mountstar. In my judgment, the decision of the Interim Managers not to accept such funding and to discontinue the Gift Aid claims is within the range of decisions to which rational charity trustees could properly come.

16. Therefore, the court gave a direction, as sought by the Commission, that the interim managers should be at liberty to discontinue the gift aid claims, and sanctioning their decision to do so.

IMPLICATIONS



Refer to ACPNS Reports: The Cup Trust Inquiry Report of 18 January 2019 available at <https://eprints.qut.edu.au/133621/1/77.%20The%20Cup%20Trust%20Inquiry%20Report%20of%2018%20Jan%202019.pdf>

VIEW THE CASE



This case may be viewed at: <https://www.bailii.org/ew/cases/EWHC/Ch/2016/876.html>

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