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<https://www.gov.uk/government/publications/charity-inquiry-the-bersam-trust/charity-inquiry-the-bersam-trust>

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.



CHARITY INQUIRY: THE BERSAM TRUST

Charity Commission for England and Wales, 12 February 2021

Whether the trustees of a charitable trust had managed the affairs of the trust in accordance with the law and their governing document

Key words: Charity, England and Wales, Charitable Trust, Duties of Trustees, Breach of Trust, Management of Finances, Conflicts of Interest, Misconduct of Trustees, Mismanagement by Trustees

1. The Bersam Trust (the charity) is a charitable trust governed by a declaration of trust dated 31 May 1955. Its charitable objects include “providing Jewish children with a strictly orthodox Jewish religious education”. It was registered as a charity with the Charity Commission for England and Wales (the Commission) on 6 December 1966.
2. The charity, which is based in Salford, leases a building to an independent Orthodox Jewish faith school (the school). The charity also meets some of the support costs of the school.
3. Regulatory concerns were first raised in 2016, resulting in a Regulatory Compliance case being opened, and guidance issued to the charity in 2017. Continued monitoring of the charity by the Commission found that the guidance was not being followed. Investigation found that there were unmanaged trustee conflicts of interest and possible financial mismanagement of loans and bank accounts.
4. On 14 January 2019, the Commission opened a statutory inquiry (the inquiry) to examine issues which included:
 1. The financial management of the charity, and whether funds had been properly expended solely for exclusively charitable purposes and could be accounted for;
 2. Whether loans involving the charity were in accordance with its governing document and had been properly accounted for;
 3. The trustees’ compliance with legal obligations for the content and preparation of the charity’s accounts and other information or returns;
 4. Whether the trustees may have knowingly or recklessly provided the Commission with information which was false or misleading;
 5. If the trustees had avoided or adequately managed potential conflicts of interest, and if there had been any direct or indirect private benefit;
 6. The extent to which the trustees had complied with previously issued regulatory advice and guidance.

5. On issues 1 and 2, the inquiry found that, although the trustees had tried to improve the school's building over recent years, in line with the charity's purposes, they had borrowed substantial sums in such a way as to place the charity at risk. During the financial years ending 31 March 2014 to 31 March 2018, in addition to loans from a bank, the charity received 56 loans totalling £2.4 million. The inquiry found that 49 of those loans were not documented with a loan agreement. Those 49 loans accounted for £1.9 million of borrowing by the trustees on behalf of the charity, taken from various sources such as individuals and other charities.
6. In February 2019, the Commission inspected the books and records of the charity. However, at that inspection only six loan agreements, which accounted for borrowing of £485,000, were made available. Of these six loan agreements, two recorded the borrower as being the school, rather than the charity, and one had no lender recorded. One further loan agreement, which accounted for an additional £31,500, was subsequently provided to the inquiry.
7. The trustees claimed that charity's loans were taken 'on trust', and did not need documentation. They were therefore unable to provide evidence that the charity had an obligation to repay £1.9 million. The inquiry found the trustees also failed to demonstrate that loans entered into were objectively reviewed to determine that they were in the best interests of the charity. These were failures on the part of the trustees to manage their charity's resources responsibly. The Commission considered this to be a breach of trust or duty or other misconduct and/or mismanagement.
8. On issues 3 and 4, the accounting discrepancies identified at the opening of the inquiry had given rise to serious regulatory concerns that, in submitting accounting information to the Commission that was not representative of the funds entering and leaving the charity's bank accounts, the trustees may have knowingly or recklessly supplied false or misleading information to the Commission. This is a criminal offence. However, evidence indicated that the undocumented loans were responsible for the discrepancies in the accounts, so there was no finding of knowingly or recklessly supplying false or misleading information.
9. Regarding issue 5, on conflicts of interest, one of the trustees held a position of paid employment at the school and was registered as being the school's proprietor. Therefore, a clear conflict of interest arose in relation to this trustee and the charity's ongoing relationship with the school. The conflict was not correctly identified or managed by the trustees when they made the decision to lease the charity's building to the school, or when entering the charity, as borrower and lender, into loan agreements with the school.
10. The failure to properly identify and manage the conflicts arising meant that the trustees could not demonstrate that they were acting in the best interests of the charity when these decisions were made. The Commission considered this to be a breach of trust or duty or other misconduct and/or mismanagement, and one which was even more serious given the regulatory advice and guidance the Commission had previously provided to the trustees.
11. A further conflict arose over the lease of the school premises. In 2016 the trustees of the charity leased the school premises for a period of 24 years to Talmud Torah Chinuch Neorim, a registered company. The inquiry obtained and examined a copy of the lease which revealed that the party entering the lease was named as the charity.

However, the charity itself is a trust and has no legal personality. In addition, the company was dormant at the time the lease was granted and, at the time of entering into the lease, three of the four directors of the company were also trustees of the charity. These were the only trustees of the charity at that time, so it was not possible for them to manage the conflict of interest arising from this transaction.

12. The inquiry found that the affairs of the charity and the school were intermingled and not managed appropriately. Loan repayments and bank accounts were used interchangeably, and the charity conducted correspondence using the school's letterhead and email address. Thus, it was unclear which entity was being dealt with.
13. On issue 6, there was also found to be a breach of trust or duty or other misconduct and/or mismanagement. During the 2017 compliance case, the Commission had issued the trustees with regulatory advice and guidance in the form of the action plan. This action plan set out measures aimed at ensuring the trustees complied with their legal duties and responsibilities and acted in the best interests of the charity. However, there were multiple failings. The charity's governing document was not followed, in that fewer than half the required meetings of trustees were held between 2013 and 2019, and the meetings that were held were not documented properly. This was particularly so with respect to the major financial decisions that were taken by the trustees.
14. The trustees also failed to implement a conflicts of interest policy by the time of the opening of this inquiry in 2019 as had been required by the 2017 action plan. The Commission considered the trustees' failure to comply with regulatory advice and guidance in this regard to be misconduct and/or mismanagement. A conflicts of interest policy was finally implemented on 21 December 2020.
15. The Commission concluded that the trustees failed to maintain adequate records or recognise and manage conflicts of interest. Therefore, the trustees who were in office when the events and decisions referred to above occurred administered the charity in a manner which risked compromising the charity's independence. They were responsible for these failings, which amounted to misconduct and/or mismanagement in the administration of the charity by the trustees, and an official warning was issued to them to address this.

IMPLICATIONS



The Commission pointed aspects of this inquiry which might have relevance for the sector as a whole, which would be equally applicable in Australia. These were:

1. If a loan has been made to a charity, the charity should have some form of agreement in place to evidence this arrangement. This should, as a minimum, set out the terms of the loan, when it is to be repaid and any interest applied. This helps to protect charitable funds from potential abuse. As such, any failure by the trustees to take this action potentially puts charitable funds at risk and so would be a breach of a trustee's duty to safeguard the charity's assets.
2. Trustees must make decisions in a way that meets the requirements of charity law and their governing documents. This includes recording decisions properly, so there is no doubt about what was decided and why. Written records should be sufficient to allow someone to understand the issues involved, and the decisions made and the reasons for them, particularly for important or controversial decisions.

- Trustees are expected to act on regulatory advice and instructions from the regulator. If they fail to do so and this mismanagement or non-compliance arises or continues, this may lead to regulatory action against the trustees.
- Charity trustees should have a conflicts of interest policy in place to ensure that they are fully aware of their responsibilities, and that any conflicts that do arise are appropriately managed.
- A charity's connection with a non-charity can bring benefits and opportunities but it can also bring new risks. The level of risk to a charity from its connection with a non-charity will depend on the charity's particular circumstances and the type of connection it has with the other organisation: see (in England and Wales) [guidance on charities with a connection to a non-charity](#).

VIEW THE CASE



This inquiry may be viewed at <https://www.gov.uk/government/publications/charity-inquiry-the-bersam-trust/charity-inquiry-the-bersam-trust>

Read more notable cases in [The Australian Nonprofit Sector Legal and Accounting Almanac series](#).

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