

The Charity Tribunal – A New Beginning

Part 2 of Chapter 2 and schedules 3 and 4 of the Charities Act 2006 introduce a number of new provisions into the Charities Act 1993 that create a Charity Tribunal and provide for how it will operate.

These new provisions provide a very useful tool to those that may wish to challenge Charity Commission decisions. This option was only previously available to charities by way of potentially very expensive High Court legal proceedings, as a result of which considerable risk in terms of costs had to be considered.

Providing an economic way to challenge the Charity Regulator is not the only function of the Tribunal however. This is because the Tribunal will also receive references from both the Charity Commission and the Attorney General on questions about which they may wish to receive guidance and thus the Tribunal will have a role in the development of charity law.

The relevant part of The Charities Act 2006 and the Rules regulating the practice and procedures associated with the Tribunal (Statutory Instrument 2008 No 22) came into force on 27 February 2008, and the Tribunal is now with us.

The Tribunal will hear three different categories of cases, namely appeals, reviews and references (see sections 2A, schedules 1C and 1D).

Will The Tribunal Make Any Difference?

As stated above, before the creation of the Tribunal the only way for a charity to challenge a Charity Commission decision was by means of an appeal to the High Court. This was a slow and very expensive process, and a path rarely taken.

The Tribunal should provide both a faster and more economic way to appeal against decisions, directions or orders of the Charity Commission or, alternatively, to seek a review of certain “reviewable matters”. Note however that not all decisions can be appealed or are capable of being reviewed. Also note that the Charity Commission is still capable of being judicially reviewed in appropriate cases. The costs of such actions however remains an issue.

Schedule 1C of the 2006 Act contains a table which lists the matters the Tribunal can deal with on an appeal or review. In relation to each category listed, the table specifies who has the right to appeal or seek a review. In most cases it is the

charity or its trustees that will bring the matter before the Tribunal. This table is a useful starting point if considering approaching the Tribunal. Before doing so however the Commission’s internal review process should have been fully explored.

The Tribunal will be able to look afresh at the matter subject to the appeal and can look at evidence that was not available to the Commission. This means that all those things that become clear right up to the hearing can be introduced before the Tribunal.

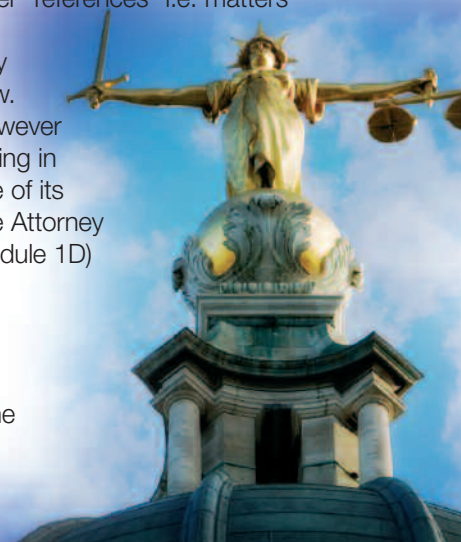
The powers of the Tribunal once it has made a decision vary from being able to uphold or quashing a decision to varying or substituting decisions with its own decision. It can also give directions or make orders to remit certain matters to the Commission (see schedule 1D).

When considering a case for review the Tribunal will apply the same principles as the High Court would when dealing with a judicial review. If a charity wants to challenge a decision or action of the Charity Commission, it will be necessary to identify at the outset whether it is an “appeal” or a “reviewable matter” under consideration. This is because the remedy is different in the case of an appeal than that of a review.

The Tribunal will also consider “references” i.e. matters referred to it by the Charity Commission and/or Attorney General regarding charity law. The Charity Commission however can only refer questions arising in connection with the exercise of its functions and must have the Attorney General’s consent (see schedule 1D) before doing so.

Who will be involved in the Tribunal?

The Tribunal will comprise the President Alison Mckenna, 5 legally-qualified



members and 7 lay members, all appointed by the Lord Chancellor. The administrative centre of the Tribunal will be in Leicester, but hearings will be held across England and Wales.

Panels usually comprising three members including the President and/or one of legally qualified members will carry out the functions of the Tribunal (see schedule 1C). However there is provision to enable the President or one legal member to either sit alone or with just one other member.

Who Can Be A Party?

The Charity Commission will be the respondent to any appeal or review brought before the Tribunal and the Attorney General (as protector of charity) will be able to intervene in any proceedings before the Tribunal. Previously in High Court matters the Attorney General was usually the respondent unless there was an issue between his position and that of the Charity Commission, and the Commission would not usually therefore automatically appear.

Where the Charity Commission and/or Attorney General refer a matter to the Tribunal the trustees of any charity or any other affected persons are entitled to be present.

Practice and Procedure

The Rules are designed to ensure that proceedings before the Tribunal will be dealt with fairly, efficiently and speedily. They are divided in six parts. Part 1 provides for the commencement of the Rules and includes the interpretation clause. Part 2 deals with preliminary matters in relation to appeals and applications. Part 3 deals with the hearing of appeals and applications, and Part 4 with appealing Tribunal decisions to the High Court. Part 5 covers "general matters", including the Tribunal's duty to maintain a register of appeals, applications and decisions, powers to strike out proceedings

and the sending of notices. Part 6 includes some special provisions in relation to references made by the Charity Commission and/or Attorney General.

Under the Rules most actions would need to be conducted within 28 days, and to bring an appeal the appellant must file notice of the appeal within 42 days of being notified of the Charity Commission's final decision.

Can You Recover Your Costs

Probably not! The Tribunal can only award costs against any party to proceedings before it in limited circumstances.

Costs can be awarded against any party who acts in a vexatious, frivolous or unreasonable way. Costs can also be ordered by the Tribunal against the Charity Commission where it considers that the Charity Commission's decision, direction or order being appealed was unreasonable.

And if you disagree with the Tribunal?

Any party to proceedings before the Tribunal may appeal against a decision to the High Court, but only on a point of law. Where the appellant is the Charity Commission or the Attorney General, the High Court shall consider the question referred to the Tribunal a fresh and may take into account fresh evidence.

Conclusions

The Tribunal should provide a welcome forum for dealing with disagreements without the enormous cost, risk or burden of a High Court case and with suitable economy. It is not without cost and we anticipate many will still wish to employ lawyers to present their arguments in this complex area of law. Further more the delay in dealing with cases which can arise in the court listings should be largely avoided. We welcome the birth of this new Tribunal for charity matters.

New Appointment



We are pleased to announce that on 1 May 2008 Stephen Claus joined our Charities and Social Enterprise Team as a partner.

Stephen worked for the Charity Commission as a legal advisor for just under 14 years, and was Head of Charity with a large Birmingham practice

for two years prior to joining the firm. He is experienced in all aspects of Charity Law and administration. His clients range from national and international charities to small start ups.

During his time at the Charity Commission he was the lead lawyer in *Scargill and Cave v Charity Commission*, and also lead the only High Court case to date to be brought under the Charities Act 1993 by the Commission against Trustees. He regularly speaks and writes on charity matters, and represents charity clients from all over the country.

In Birmingham he acted for a number of significant sized charities operating locally, nationally and internationally and for several faith based charities both Eastern and Western in origin. Stephen also practices Ecclesiastical Law, and was the Deputy Diocesan Registrar in the Diocese of Birmingham.

Stephen is a well known figure in the Charity world, he is recognised in Chambers and his clients say he "gives fantastic advice to any charity". His arrival strengthens our team at a very exciting time for Charity, with the implementation of the Charities Act 2006, the creation of a new Charity Appeal Tribunal, the implementation of the Public Benefit Test and the growth of the contract culture to name but some current issues.

Stephen was appointed in May 2008 as one of only two solicitors nationally to be a legally qualified member of the new Charity Appeal Tribunal, which comprises of five legally qualified members in total.

Anyone wishing to speak to Stephen can contact him (or any member of the team) on 0151 600 3341.

Charities and The Public Benefit Test

The new statutory definition of Charity found in the Charities Act 2006 requires that a charity is established for public benefit.

Prior to April 2008, a presumption of public benefit applied in respect of the old 3 heads of charity i.e. the advancement of religion, the relief of poverty and the advancement of education. In respect of the fourth head of charity (other purposes beneficial to the community), it was necessary to demonstrate public benefit. Public benefit must now be demonstrated under all heads of charity, and it is now necessary for all charities to report on public benefit in the accounting year that follows the 1st April 2008.

The Charity Commission under the Charities Act 2006 was required to both consult and then publish guidance in respect of the public benefit test. Trustees are obliged to have regard to the guidance. The Commission has in its guidance broken public benefit down into principles. The purpose of this article is give you a brief over view of what these principles are rather than to closely analyse the guidance, which is available on The Commission's website.

It must be clear what the benefits are

If the benefits arising from the charity activity are not obvious then the Commission will ask for evidence in respect of the benefits.

The benefits must be related to the aims

This may sound obvious, but for example if a school occupied an historic building, then conserving or preserving that historic building will not count towards the public benefit test unless the school has an object

which specifically states it is there to preserve and conserve an historic building.

The benefits must be balanced against any detriment or harm

Essentially this appears to be a balancing test and apparently the Commission will apply this test.

The benefit must be to the public or a sufficient section of the public

Again this has always been the case, but has been highlighted in the new guidance. Generally, the class of people who can obtain the benefit must represent a sufficient cross section of the public and generally must not be joined together in any way by a common nexus.

Where the benefit is for a section of the public the opportunity to benefit must not be unreasonably restricted

Any restrictions applied must be legitimate and proportionate. Restrictions generally involve things such as geographical areas, on occasions, race, religion or gender, perhaps membership or a charitable need. Restrictions introduced by the ability to pay fees that the charity may charge is perhaps politically the most

sensitive area in the entire guidance. This is a complicated area and if you are a fee charging charity, particular attention needs to be paid in this area when reporting public benefit.

For example, people in conditions of poverty must not be excluded from the opportunity to benefit. The way that this test can be satisfied is itemised in some detail in the guidance, and careful attention should be paid to that guidance.

Any private benefits must be incidental

Again this has always been the rule, but essentially if a private benefit to a non-charitable individual arises, then it must be nothing more than incidental or ancillary to the achievement of the main purpose.

As well as an over-arching public benefit guidance, there is sub sector guidance. Again, these are substantial volumes and if any client is experiencing a difficulty or would like to know more about demonstrating public benefit or the public benefit test, then they should contact their usual contact at the firm. E-mail addresses and telephone numbers can be found elsewhere in this newsletter.



The Companies Act 2006

ARE YOU A CHARITABLE COMPANY?

then read on . . .

The Companies Act 2006 has implications for those charities who are constituted as companies.

Charities need to be aware of the effects of the Companies Act 2006, and this article aims to examine the principle areas in which the Act affects charity.

The Companies Act 2006 introduces new rules on conflict. It also introduces new provisions that overrule a Memorandum & Articles, and also affords de-regulation in respect of some areas. There are also issues concerning directors' duties that charities need to be aware of.

Conflicts of Interest

The issue of conflict is always one which charity trustees should bear in mind. In particular most trustees are now familiar with the concept that their duty as trustee may not conflict with their duties in their personal capacity or other capacities. Trustees with two posts must be careful if one charity becomes aware of an opportunity which would also be important to the second charity. There is then a conflict as to whether or not that trustee can use their knowledge in respect of the first trusteeship to assist the second charity.

New Provisions that Overrule the Articles

- **Proxy voting.** From October 2007 all charitable companies must allow proxy voting at meetings. It is actually a punishable offence not to notify members in the notice of any meeting of their rights to vote by proxy.
- **Written resolutions.** The Act now makes it easier for members of a company to pass a Written Resolution

without holding a General Meeting. Members can now pass most resolutions with 75% of the members concurring (in the case of a Special Resolution), or more than 50% of the members (in the case of an Ordinary Resolution).

De-regulation issues Examples include :-

- The notice period for General Meetings has now been amended to 14 days, but if your Articles require a longer period you will not be able to take advantage of this provision;
- **Holding General Meetings on short notice.** Meetings may now be called on short notice. It is necessary to have the written approval of at least 90% of the members to use this provision. However your Articles must be amended to take advantage of this;
- Annual General Meetings are no longer required, however again you must amend the Articles. If you surrender the holding of Annual General Meetings other provisions may be necessary in respect of, for example, trustee election;
- **Accounts.** Company Accounts and Reports no longer need to be laid before members at a General Meeting. This provision only applies in financial years ending on or after 1 October 2007, again though you must follow your Articles if they contradict this.

Directors' duties

Directors' duties are now spelt out in Statute. We plan to explain the new statutory duties in a later edition of this publication.

Charity Seminars 2008/09

Timings: 5.00 for 5.30pm, Seminar 60 mins, Buffet & Drinks at 6.30pm

Charity and Company Law Changes

Wednesday 17 September 2008

Charity and Wills and Legacy Preservation

Wednesday 12 November 2008

Charity 09 Update

Wednesday 28 January 2009

The New Charity Tribunal

Wednesday 11 March 2009

Charity and Fundraising

Tuesday 19 May 2009

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