

24 DECEMBER 2020

## **LTN 28 | BASIC CHARITY LAW**

### **Principal roles played by local councils in the trusteeship of charities**

1. A local council can act as:
  - sole trustee: the council as a corporate body holds the property and oversees its application as charity trustee (see paragraph 6 below);
  - joint trustee together with individual trustees;
  - custodian trustee: the council holds the property but takes no decisions on its use (see paragraph 10 below).
  
2. Local councils can also:
  - appoint their nominees as trustees in certain circumstances (see paragraph 15);
  - give financial assistance to a charity e.g. through grants.
  
3. The responsibilities of the local council as trustee will be set out in the charity's governing document. The governing document sets out the charity's purposes and, usually, how it is to be administered. It may take the form of a trust deed, constitution, conveyance, will, Royal Charter or Scheme of the Charity Commission.
  
4. A local council could be involved in more than one capacity, for example acting both as custodian trustee and appointing one or more of the managing trustees. Managing trustees are responsible under the governing document for controlling the charity's management and administration.

### **Restrictions on local councils**

5. Under s.139(1)(b) of the Local Government Act 1972 ('the 1972 Act'), a local council can be appointed as a sole or custodian trustee of a charity for the benefit of all or some of the people living in its area. Most frequently, the charities will be for recreational purposes.

## Local councils acting as sole trustee

6. If a council is the sole trustee, it should set up a committee under s.101(1) of the 1972 Act. The individual committee members are not charity trustees. However, they must ensure that the local council acts appropriately as sole trustee. As a committee of the council all procedural matters will be governed by Standing Orders but all decisions must be made in the best interests of the charity with no regard to the interests of the council. All members of the committee must be councillors unless the charity rules specifically allow the involvement of non- councillors.
7. Pursuant to s.2 of the Charities Act 2011('the 2011 Act'), a charitable body must be established for a charitable purpose and for the public benefit. It cannot be established to further the purposes of some non-charitable body such as the council itself. Local councils and charities often have close interests in local matters. But the charity needs to be independent of the council. Decisions about the administration and operation of the charity must be taken solely with a view to furthering its charitable purposes and for no other purpose. In short, the council must realise it has a dual role, first, as a local authority and secondly as a charity trustee and the two roles must be kept entirely separate. All discussions and decisions relating to the charity should be taken at a meeting specifically called for that purpose, not at a council meeting.
8. There are advantages to having a local council as trustee, but there may also be disadvantages. Conflicts of interest between the council and the charity can often occur as well as a failure by the council to appreciate that it must deal with the charitable property in accordance with the charitable trusts. For instance, where the property is a recreation ground, there have been occasions where a lease has been granted on preferential terms to a (non-charitable) sports club. The Charity Commission is aware of local authorities that have disposed of property that they thought was their own but was in fact charitable property. The Commission will generally try to make some other trustee arrangement when it exercises its power to appoint charity trustees e.g. the council is appointed as custodian trustee with separate managing trustees having day-to-day responsibility for the administration and operation of the charity.

## **The Public Contracts Regulations 2015**

9. In some circumstances, a charity may be subject to the requirements of the Public Contracts Regulations 2015 (“the 2015 Regulations”), for example, the requirement to use the contracts finder website when putting contracts of £25,000 or more out to tender.

## **Local councils acting as custodian trustee**

10. The role of a custodian trustee is very limited. The legal title to the charity’s property is vested in the local council and it has custody of all documents relating to the property. The managing trustees must have free access to the title deeds. The charity property should be listed in the council’s assets register but with nil value. Responsibility for insurance of the charity property falls on the managing trustees. The custodian trustee has no power to manage the property and no role in the administration of the charity. The custodian trustee duty is to perform all lawful acts necessary to enable the managing trustees to administer the charity efficiently. The custodian trustee should not act if the matter is a breach of trust or involves liability for the custodian trustee.
11. Many charities find it convenient to appoint the local council as custodian trustee because the council has a perpetual legal status and identity and thus is capable of holding charity property forever. The situation may be contrasted with other trustees who die or retire and, consequently, new trustees are required and the charity property has to be transferred into the name of the new trustees.
12. Based on the provisions of s.4(2) of the Public Trustee Act 1906 (“the 1906 Act”), the Charity Commission has given the following guidance in respect of the role of custodian trustees:

“The watchword here is “assistance”. The custodian trustee can only assist the managing trustees - it cannot have any management responsibilities itself, no matter how convinced individual members of the corporate body may be that it does... All sums payable to or out of the income or capital of the trust property should be paid to or by the custodian trustee. It may, however, allow the dividends and other income derived from the trust property to be paid to the managing trustees (or to such person, directly or by credit to their bank account, as they may direct). If this is allowed, then the responsibility for ensuring the proper application of those funds falls to

the managing trustees, and the custodian trustee is not answerable for any loss or misapplication of them.

The custodian trustee, if it acts in good faith, is not liable for accepting as correct, and acting upon, any written statement by the managing trustees relating to any matter of fact upon which the title to any or all of the trust property may depend. It is also not liable for acting upon any legal advice obtained by the managing trustees independently of it.”

13. Pursuant to s.4(3) of the 1906 Act, custodian trustees are able to charge for their services. However, a custodian trustee:

- cannot act for the managing trustees even if there are none; and
- must carry out the managing trustees’ instructions unless that would involve the custodian trustee in a breach of trust or some personal liability.

14. A custodian trustee can be appointed in any of the following ways:

- the governing document of the charity when it is first established;
- the person or persons having power to appoint new trustees;
- an Order or Scheme of the Court; and
- an Order or Scheme of the Charity Commission.

### **Appointment of trustees**

15. In some cases, the governing document of a charity may give a local council power to appoint some or all of the trustees of the charity.

16. S.300 of the 2011 Act gives some local councils powers to appoint trustees of certain types of charities for public recreation or allotments.

17. Trustees appointed by a local council under s.300 of the 2011 Act have exactly the same duties and responsibilities as other trustees. They must act independently of the council which appointed them and act only in the best interests of the charity.

### **Non-functioning managing trustees**

18. Charities can lose all of their managing trustees or have insufficient trustees to be quorate. The custodian trustee would still have no power to manage

the charitable property and no role in the administration of the charity. What options are there to re-activate the charity? The Charity Commission has powers to appoint trustees (including appointing the council as sole trustee). And under section 36 of the Trustee Act 1925 the remaining trustee(s) may have the power to appoint other trustees.

### **Different types of charity**

(i) ecclesiastical charity

19. An ecclesiastical charity (as defined by s.75 of the Local Government Act 1894) has one or more of the following purposes:

- for any lawful spiritual purpose;
- for the benefit of any spiritual person or ecclesiastical officer;
- for use, if a building, as a church, chapel, mission room or Sunday school or otherwise by any particular church or denomination;
- for the maintenance, repair or improvement of such a building or for the maintenance of religious service in it;
- otherwise for the benefit of a particular church or denomination or their members

A local council cannot be a sole or custodian trustee of an ecclesiastical charity or a charity for the relief of poverty (s.139 (3) of the 1972 Act).

(ii) parochial church council

20. A parochial church council ('PCC') is the elected body dealing with the finance and organisation of the church in a parish or ecclesiastical district. The powers of a PCC are laid down in the Parochial Church Council (Powers) Measure 1956. A measure is the equivalent of an act of parliament. The General Synod has powers to pass measures which relate to any matter concerning the Church of England.

### **Conflicts of interest**

21. Sometimes council officers or members are appointed as trustees of charities and trustees of charities become members or employees of councils. Such dual roles can give rise to potential conflicts of interest. Charity trustees must not let their other interests' conflict with their duty to act in the interests of the charity.

22. In England, a member has obligations under the Localism Act 2011 ('the Localism Act') concerning disclosable pecuniary interests as defined in the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012. The definitions of disclosable pecuniary interests are given in NALC Legal Briefing L10-12. If a councillor is also a charity trustee for profit or gain, or a director of a charitable company and a council meeting is making a decision about a contract for goods and services between the parties or a tenancy in which the council is the landlord and the charitable company is the tenant (or vice versa), the councillor cannot, without a dispensation from the parish council, participate or vote on the issue. In England, the code of conduct adopted by a council under s. 27(2) of the Localism Act may prevent a councillor from participating in a discussion and voting at a council meeting in respect of any decision about an unincorporated charity of which he/she is a charity trustee without profit or gain (even if appointed or nominated by the council). If a council has adopted the NALC template code of conduct (set out in Legal Briefing L09-12), a councillor in the situations described would be able to speak on the issue only if the public have rights to speak at the council meeting. If a councillor wants to participate in the council's discussion and vote on the matter, he/she would first need to obtain a dispensation from his/her council.
23. In Wales, by virtue of s.50 (4) of the Local Government Act 2000 and the provisions of the Local Authorities (Model Code of Conduct) (Wales) Order 2008 No.778, a member cannot, without a dispensation from his/her principal authority's standards committee, participate or vote on a matter at a council meeting if he/she has a prejudicial interest in a matter arising from his office as a charity trustee (even if his/her council appointed or nominated him/her).
24. Council officers and employees have a duty to ensure that they act in the best interests of tax payers and trustees have a duty to act in the best interests of the charity and its beneficiaries. These duties can, and frequently do, conflict. A conflict can arise in a number of situations and a classic example is the sale or lease of land by one body to the other.
25. For example, trustees leasing or selling land to a council are under a duty to obtain the best price or rent. At the same time, council officers or employees are under a duty to ensure that tax payers' money is spent prudently. Another example is where contracts are agreed by one body to the other. Clearly, it is extremely difficult to comply with both duties at the

same time.

26. If the council believes that there may be a conflict of interest, it should seek advice from the Charity Commission, who have produced guidance. It can be accessed at: [www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29](http://www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29).
27. In some situations, it may be possible for individuals simply to refrain from taking part in meetings or to refrain from taking part in the decision-making process. In more difficult cases, the Charity Commission might invite trustees to resign voluntarily. It could, after conducting an investigation, also require a trustee to step down.

### **Duties and liabilities of trustees**

28. The duties of trustees can be quite onerous. They must act in the best interests of the beneficiaries at all times. The position is one of personal confidence towards the beneficiaries. The duties owed to the beneficiaries must not in any circumstances be permitted to come into conflict with their personal interests. A trustee acting in breach of trust is usually liable for any losses personally.
29. The courts have been keen to ensure that the trustee's strict duties towards the beneficiaries do not conflict with any of the trustee's other personal interests. Consequently, a sale or lease of trust property to a trustee or to people or companies closely related to him should be approached cautiously. A number of rules have developed which may be summarised as follows:
- a trustee should not place himself in a position where trafficking in the trust property may prove to be an irresistible temptation;
  - a trustee is not allowed to become the owner or lessee of trust property;
  - a trustee may not sell or lease property to a nominee;
  - the sale of trust property to a trustee's relative will be looked upon with suspicion, as will a sale of trust property to a company in which the trustee has a substantial interest.

## The Charity Commission

30. The Charity Commission, established by the Charities Act 2006, is one of the main sources of detailed advice and information about charities. It has the following main roles:

- registering eligible organisations in England and Wales which are established only for charitable purposes;
- taking enforcement action when there is malpractice or misconduct;
- ensuring charities meet their legal requirements, including providing information on their activities each year;
- making information widely available about each charity;
- providing guidance to charities.

31. The contact details of the Charity Commission are as follows:

- general enquiries — contact centre 03000 66 9197;
- website — [www.gov.uk/government/organisations/charity-commission](http://www.gov.uk/government/organisations/charity-commission);
- useful publications —
  - The Essential Trustee:  
[www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3](http://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3)
  - Local Authorities as Charity Trustees:  
[www.gov.uk/government/publications/local-authorities-as-charity-trustees](http://www.gov.uk/government/publications/local-authorities-as-charity-trustees)
  - Charities and Meetings:  
[www.gov.uk/government/publications/charities-and-meetings-cc48](http://www.gov.uk/government/publications/charities-and-meetings-cc48)
  - Charities and Insurance:  
[www.gov.uk/government/publications/charities-and-insurance-cc49](http://www.gov.uk/government/publications/charities-and-insurance-cc49)



**Other Legal Topic Notes (LTNs) relevant to this subject:**

| LTN | Title   | Relevance   |
|-----|---|---|
| 21  | Local council help for village halls  | Sets out the powers of councils to assist the running of village halls.   |
| 40  | Local councils' documents and records   | Sets out local councils' duties to record ownership of land and keep title documentation.                                   |
| 45  | Disposal and appropriation of land by local councils                              | Sets out restrictions relating to disposals of land subject to charitable trusts.   |
| 45A | Disposal of charity land by local councils acting as sole or managing trustee     | Explains the rules and procedures for the disposal of charitable land by a local council which is sole or managing trustee. |
| 80  | Members' conduct and the registration and disclosure of their interests (England) | Explains councillors' obligations under the Localism Act 2011.  |
| 87  | Procurement   | Explains the arrangements that councils must follow when the Public Contracts Regulations 2015 apply.                       |