The rights of charity trustees to information concerning their charity

The CLA has been made aware of a number of instances in which individual trustees, or charity CEOs, have refused to disclose information to the full board. This has, unsurprisingly, led to (or exacerbated) problems within the charity.

The purpose of this paper is to explore:

- what rights charity trustees have to demand that information be given to them;
- what remedies are available to charity trustees from whom information is being withheld.

In investigating these issues, we have looked separately at the position for charitable companies and unincorporated charities.

Companies

Common law right

Case law establishes that directors have a right to inspect documents belonging to their company.

In *Burn v London & South Wales Coal Co and Risca Investments Co* (1890) 7 TLR 118, Mr Justice North, "*on the question whether a director has a right to see and take copies of documents belonging to his company, held that he had such a right; and that he had such a right not at meetings only.*"

This judgment was referred to in the later case of *Conway v Petronius Clothing Co Ltd* [1978] 1 All ER 185. In that case, directors asked the Court to order that the books of account be made available to them for inspection. Although the judge refused to make the order, he approved the judgment in *Burn* and commented that the common law right existed to allow a director to perform his duties properly.

Similarly, in *Oxford Legal Group v Sibbasbridge Services plc* [2008] EWCA Civ 387, the Court of Appeal was asked to order the defendants to make the company books available for inspection. Sir John Chadwick, who gave the leading judgment, said that "*[t]he court could not, on the one hand, hold that [a] director was at risk of liability for breach of [his] duties and, on the other hand, refuse to enforce the right of inspection by the exercise of which the director could take steps to avoid liability for breach of those duties*".

Although *Conway* and *Oxford Legal Group* concerned inspection of a company's books of account, it seems (both from *Burn* and from comments in the two later judgments) that the right to inspect extends to all a company's documents. Whilst case law does not refer to undocumented information, it is arguable that – given the principle underpinning the right to inspect – a director's right to information extends to information held in any form.

Exceptions

The default assumption is that a director who seeks information is doing so in order to fulfil his duties as a director. On that basis, information should normally be provided to him. There are, however, times when it may be lawful for information to be withheld.

Director seeks information for an improper purpose

Since the purpose of the right to know is to enable a director to discharge his duties, it follows that it will be improper for a director to seek information for any other purpose. In both *Conway* and *Oxford Legal Group*, the Court refused to order disclosure because the defendant had shown that there were doubts about the directors' reasons for seeking information.

A Court will not order disclosure if there is evidence to suggest that the director is seeking information to further his outside interests or to damage the company. So it seems that it will be lawful for information to be withheld from directors in those circumstances. From the case law, it also appears that it will not be not enough that a director has a conflict of interests in relation to the information sought. Nor will it be enough that there is disharmony in the boardroom and the director is seen as a troublemaker. To deny inspection legitimately, there must be evidence that the director concerned has motives that are contrary to the interests of the company itself.

Confidentiality

In many circumstances, information disclosed to a person in their capacity as a representative of the company (whether as a director or otherwise) will be deemed to have been disclosed to the company, rather than to the individual in question. In those cases, it will not be legitimate to refuse to allow a director to inspect documents on the grounds that the information they contain is confidential.

However, there may be occasions when the person receiving information is under a separate duty of confidentiality. For instance, staff providing medical or psychological support to staff (or service users) may well have a duty to keep information confidential.

Trustees should seek advice if there is any doubt about whether information can be withheld from board members on confidentiality grounds."

Data protection

There is a principle in data protection law that personal data held by an organisation should only be made available to those staff members who need access to such information in order to discharge their duties properly . The argument that the role of a company director is such that he is entitled to see all information held by the company has not been tested in a data protection law context, but it is arguable that it would apply.

Remedies / possible consequences of withholding information

Common law

As already discussed, the Court has discretion to order that a director be allowed to inspect and take copies of the company's documents. It will exercise that discretion unless there is reason to believe that the director is seeking inspection for an improper purpose.

Companies Act 2006

Criminal offence

In *Conway v Petronius*, the Court considered whether the provisions of the Companies Act 1948 gave directors a statutory right to inspect a company's books of account. The term "books of account" was given a broad meaning, but the Court held that the 1948 Act did not give directors an enforceable right of inspection.

The wording of the relevant sections of the Companies Act 1948, considered in *Conway*, is very similar to the wording now set out in sections 386, 388(1) and 389(1) of the Companies Act 2006. Although the 2006 Act refers to "accounting records" rather than "books of account", the terms are similarly defined.

So the 2006 Act probably does not give directors a statutory right to inspect the company's accounting records. However, section 389(1) makes it an offence for a company (or any officer of a company) to fail to keep a company's accounting records open for inspection by the company's officers at all times. So any director or officer who refuses to allow a director to inspect the accounting records – bearing in mind the wide meaning this term is likely to have – will be guilty of an offence, unless he can show that "he acted honestly and that …the default was excusable[1]".

Breach of directors' duty

Section 172 of the Companies Act 2006 gives the directors of a charitable company a duty to promote the achievement of the company's purposes. It must be uncontroversial to say that a director will be unable to fulfil this duty unless he has sufficient information on which to base his decisions.[2]

From this, it is arguable that any director who withholds information from his fellow directors is undermining their capacity to fulfil their duties and so, by extension, breaching his own duty to act in the company's best interests.

Employees

An employee has a common law duty to, amongst other things:

- act in good faith; and
- comply with the employer's lawful and reasonable orders.

These duties are implied into every contract of employment. Employers will often use express clauses in a contract of employment to reinforce these obligations or to flesh out the scope of the employee's duties and the obligation to follow work rules. An employee who refuses to provide directors with information may find him/herself in breach of these terms, and liable to disciplinary action. If the employee concerned is the CEO, and the information requested falls within the definition of "accounting records", he/she may also be guilty of an offence (see section 389(1) of the Companies Act 2006, discussed earlier).

Trusts

[1] Companies Act 2006 s.389(2)
[2] See, for example, Sir John Chadwick's comments in the *Oxford Legal Group* case, quoted earlier.

General

Trustees are usually expected to act jointly. The property of the trust is usually vested in the name of all the trustees jointly. Often in the case of charity trustees the trust document will prescribe that a majority decision can be taken. The basic rule in equity is that a person entrusted with a fiduciary duty does not fulfil it if he delegates it to someone else. In principle if a trustee delegates his or her function to others they remain personally liable for that person's default, however in the case of charity trustees there may be a collective delegation of some of their functions to a Chief Executive Officer (CEO) who is employed by the charity to undertake duties on behalf of the charity trustees.

In *Speight v Gaunt*(1884) 9 App Cas. 1 Lindley L.J. stated;

"The real importance of this case is that it lies between two propositions- that a Trustee cannot delegate his trust, and that, on the other hand, he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do."

This sentence shows how the power to delegate functions must be reasonable. What is or is not reasonable in any circumstance is therefore inextricably connected with the need to be fully informed of the agent's activities. If trustees do employ a CEO, merely employing such an agent may not be enough to escape potential liability. In *Leoroyd v Whiteley* (1887) 12 App. Cas. 727 the issue was the adequacy of an investment in land and the trustee had employed an agent to undertake the valuation. Lord Halsbury stated;

"But unless one examines with reference to what question the skilled person gives his advice it is possible to confuse the reliance which may be properly placed upon the skill of a skilled person with the judgment which the Trustee himself is bound to form on the subject of his trust"

Lord Watson stated the principle saying;

"But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the Trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient in the absence of detailed information which would enable them to form, and without forming an opinion for themselves."

"If they choose to place reliance upon his opinion without the means of testing its soundness they cannot, should the security prove defective escape from personal liability."

The onus of proving that their decisions were fully informed and reasonable in all circumstances lies on the trustees. Whilst these cases concentrate on the power vested in trustees to manage investments there does not appear to be any reason why these principles should not apply to delegable functions under the Trustee Act 2000.

Historical overview of the Power to Delegate

The principle of non-delegation of duty was established in *Turner v Corney* (1841) 5 Beav.515 but the principle has never been applied inflexibly and it has been recognised that certain matters would always be delegated to skilled agents. Additionally, the Courts will not be quick to impose liability on trustees who for the most part act voluntarily without a view to gain. The motive for being a trustee is however irrelevant in judging whether or not there has been a breach of duty.

Trustee Act 1925

Trustees were no longer required to show a need to delegate and delegation was an accepted method of performing the duties of a Trustee. Section 23(1) of the 1925 Act provided that trustees could delegate matters of an administrative nature to agents and trustees would not be liable for the defaults of an agent "if employed in good faith". Additionally, section 30(1) provided that a trustee was liable for his own acts and defaults but not for those of any co-trustee or agent unless he wilfully ignored matters which he should have inquired about. *Re Luckings Will Trust* [1968] 1 W.L.R. 866, established that the 1925 Act had not removed the duty to supervise the agent adequately.

Trustee Act 2000

Whilst the 1925 Act did allow the delegation of administrative functions it did not permit the delegation of the exercise of discretions. This problem was highlighted by the Law Commission, (*Law Com. No. 260 (1999) Trustees Powers and Duties para 4.6)*

"Far from promoting the conscientious discharge of the obligations of trusteeship, the prohibition on the delegation of fiduciary discretions may force trustees to commit breaches of trust in order to achieve the most effective administration of the trust."

The Trustee Act 2000 was intended to reform trustees' powers of delegation. Section 23 of the Trustee Act 1925 was repealed and it was intended to create a clearer framework in which certain discretionary functions could be delegated. Whilst the power of investment is a significant power the 2000 Act is not restricted to just this power. It is also important to remember that the provisions of the 2000 Act are subject to any restrictions or exclusions in the trust instrument or other legislation.

In the case of charitable trusts section 11(3) of the Trustee Act 2000 provides a list of delegable functions. Those delegable functions are;

(a) any functions consisting of carrying out a decision that the Trustees have taken,
(b) [investment]
(c) [fundraising other than by means of trading]
(d) any other function prescribed by order of the Secretary of State.

It can be observed that section 11(3)(a) is very widely drafted and inclusive of most of the day to day activities of a charity. However, the drafting of this clause also makes clear that the responsibility for making the decision itself still rests with the trustees and agents may only "carry out" the decision made by trustees. A distinction should be drawn between the actual decision and any consequential decisions which could be made by a CEO as to the best method for carrying out that decision.

Prior to the Trustee Act 2000 the standard of duty on Trustees was that of a "prudent man of business" and the 1925 Act used the terminology of "good faith". Now trustees are subject to the statutory duty of care in section 1 of the Trustee Act 2000 and must act with such care as is reasonable in all the circumstances having regard in particular to their own knowledge and that of their agent.

Trustees must therefore ensure that this standard is reached when determining the selection of the agent (CEO), and the terms on which they should act. These matters must be regularly reviewed.

<u>The Application of the Trustee Act 2000 in Running a Charity.</u>

It can be seen from the above assessment of the duty of care which trustees operate under that the decision-making rests with the trustees, and it is only the means by which the decision is carried out which can be delegated. That delegation must be effective, on agreed terms, and regularly reviewed. The right to know any facts or

matters upon which the CEO has acted is essential knowledge if a trustee is to be able to discharge their duties and exercise their powers under the trust. Whilst there is no authority or case specifically on this point it seems that good management must be based on reliable information. There seems to be no reason why a trustee should be prevented from requesting any information concerning the delegated functions undertaken by a CEO appointed for that purpose.

In some charities where there is a strong or long serving CEO, the relationship between the CEO and the trustees may become inverted and the trustees may appear to be, or feel inadequately informed. If this happens, then the trustee has a right and a duty to request as much information as they feel is reasonable to become fully informed. Whilst it could be argued that trustees should try not to "interfere" with the business of the running of the charity this is clearly wrong in principle. The case law and the construction of the Trustee Act 2000 makes it perfectly clear that the Trustees are the decision makers and therefore also responsible for any actions which might result in loss to the charity. It is not too strong to say that they have a duty to “interfere”.

In reality once a CEO has been appointed, regular reviews and good reporting by the CEO should be enough to reassure the trustees that their decisions remain valid. The issue of disclosure of trust documents is dealt with separately in the case law and there is some uncertainty as to what qualifies as a trust document. The definition is not fixed and the cases concern mainly instances where private beneficiaries are requesting documents from trustees. It seems though that an application by a trustee against his own agent to disclose documents held by the agent would almost certainly be granted. There is no authority on what is or is not reasonable in these circumstances as *prima facie* all documents prepared in the course of an agent's duty belong to the trust and therefore to the trustees as office holders.

Conclusion

It is our view that, in general, charity trustees have a right to receive all information relating to their charity and that it may be unlawful (or, in the case of charitable companies, even an offence) to withhold information from them without sound legal reasons.

Trustees who are being denied information may ask the Court for an order allowing inspection of the charity’s documents.

We recommend that trustees take advice if they are concerned that information is wrongfully being kept from them, or if they are uncertain about whether it is legitimate to refuse to allow a trustee to see certain records.