

Supreme Court decision in UK Children's Investment Fund Foundation case

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The Supreme Court handed down its judgment in the matter of Lehtimäki and others (Respondents) v Cooper (Appellant) [2020] UKSC 33, which among other things, analysed the legal role of members of a charitable company. The key finding of the Court was that in principle members of all charitable companies owe fiduciary duties to the purposes of the charitable company. This has raised various complex questions about the practicalities of managing these duties amongst a charitable company's membership and the implications for membership decision making and aspects of charity governance more generally.

The case concerned the Children's Investment Fund Foundation (UK) (CIFF), a charity established as a company limited by guarantee with over \$4 billion in assets. The charity was founded in 2002 by Sir Christopher Hohn and his then wife Ms Jamie Cooper, who were both trustees and members. A third member of the company was Dr Marko Lehtimäki. The marriage of Sir Christopher and Ms Cooper broke down and an agreement was reached that Ms Cooper would resign as both trustee and member of the charity. In addition, a grant of £360 million was to be paid to another English charity called Big Win Philanthropy (BWP), founded by Mrs Cooper.

Under section 217 Companies Act 2006, and section 201 of the Charities Act 2011, payments by a charitable company in relation to the loss of office of a trustee must be approved by the members of the company and the Charity Commission. The Charity Commission authorised the Trustees of CIFF to obtain the approval of the Court. As both Sir Christopher and Ms Cooper had a conflict of interest in relation to the grant to BWP, Dr Lehtimäki had the sole vote on the matter.

One issue before the Supreme Court was whether the members of a charitable company owe a fiduciary duty to further its charitable purposes. The Court unanimously agreed that they do.

Generally, members of a company are free to exercise their voting rights as they choose. However, the Court held that members of a charitable company when deciding how to act have what is referred to as a 'fiduciary duty' to act in the best interest of the charity, or in other words, further the charitable purposes. The judgement noted that;

"the distinguishing characteristic of a fiduciary is that he owes a single-minded duty of loyalty in matters covered by his duty."

For members of charities, it is a duty owed to furthering the purpose of the charity rather than to the charity itself.

Although the facts of this case were unusual, the confirmation that members of charitable companies are fiduciaries is perhaps not surprising. It is keeping with the position of the Charity Commission that members of a charity have an obligation to act in the best interest of that charity when exercising their voting rights. However, the precise scope of the duty is less clear, in particular given there are many different types of membership roles within different types of legal form for charities. Put simply, As a result the decision has given rise to more questions than answers – for example:

- are members obliged to vote and attend meetings?
- Should charities now require members to make declarations of interests before meetings as trustees do?
- can a member who has a conflict of interest vote on a particular matter?
- what information can a member require to be provided from the charity before exercising their vote?

The Charity Commission is going to provide guidance on the fiduciary duties of members which will certainly be eagerly awaited by charity

lawyers.

The case is likely to cause many charities to reflect on the constitutional role of members and whether any governance changes may be required.

If you have any questions about the possible implications of the judgment for your charity, please get in touch with Chris Priestley or your usual contact in the Charities and Philanthropy team.

Authors

Chris Priestley

PARTNER | LONDON

Charities

 +44 20 7597 6135

 chris.priestley@withersworldwide.com

Chloe Harris

ASSOCIATE | LONDON

Charities

 +44 20 7597 6205

 chloe.harris@withersworldwide.com