APPLICATIONS TO THE FIRST-TIER TRIBUNAL (CHARITY) BY 'PERSONS AFFECTED' BY THE CHARITY COMMISSION'S DECISION

Alison McKenna[1]

This article seeks to explore the issues raised by applications to the Tribunal from 'persons who are or may be affected' by a Charity Commission decision, in contrast to applications made by a charity which is itself the subject of the disputed decision. I refer to this category of applicants as 'third parties'. I suggest that these cases raise slightly different considerations from appeals by charities themselves and explore the tension that can arise in such proceedings between the interests of the third party applicants and those of the charity which is the subject of the appealed decision direction or order.

The decisions of the Charity Commission which are justiciable by the First-tier Tribunal (Charity) are listed in column one of schedule 6 to the Charities Act 2011 ('the Act'). The persons who may make an application to the Tribunal in relation to the decision, direction or order listed in column one are described at section 319(2)(b) of the Act and column two of the schedule. In many (but not all) instances, the class of potential applicants includes not only the charity and/or its trustees but also 'any other person who is or may be affected by the decision'.

The appeal rights for 'any other person who is or may be affected' are engaged by a wide variety of decisions, including those in relation to registration, schemes and the exercise of regulatory powers. In my view these cases raise slightly different considerations from those raised by the more 'straightforward' type of appeal, made by a charity which is itself the subject of the Charity Commission's disputed decision. It seems to me that the main issues arising from third party applications to the Tribunal relate to:

---

1 Alison McKenna is the Principal Judge of the First-tier Tribunal (Charity).

(i) questions of standing (that is, how does the Tribunal decide who is or may be affected?);

(ii) the procedure to be adopted in case management and for the hearing;

(iii) the question of costs;

(iv) what interim and final remedies are available to the Tribunal; and,

(v) how to balance the rights and interests of the charity which may have originally sought the decision direction or order of the Charity Commission with those of the applicant who seeks to overturn it on appeal.

The Tribunal's Register of Cases (published on its website [2]) shows that applications from 'persons who are or may be affected' have formed a not inconsiderable proportion of the Tribunal's work so far, and my impression is that they are on the increase. It is worth considering the nature of the trend with reference to some of the applications that have been made. In *Ryan and Maidment v Charity Commission*,[3] the applicants were people living close to a recreation ground charity which was the subject of a Charity Commission scheme. A scheme was also challenged by local people in *Ground and Others v Charity Commission*,[4] albeit in respect of a school building rather than a recreation ground. In *Thomas v Charity Commission*,[5] a resident of the charity's area of benefit (who subsequently became a trustee) objected to a scheme permitting trustee benefits. In the application brought (but not proceeded with) by Mr Bartley,[6] the issue was his objection to the Charity Commission's order under section 198(1) of the Act, permitting an alteration of the objects clause of the charitable company of which he was a member. In *Aliss and Hesketh v Charity Commission*,[7] the issue before the Tribunal was the scheme effecting the merger of two independent schools, to which a group of pupils' parents objected.

---

2 http://www.justice.gov.uk/downloads/tribunals/charity/charity-register-cases.pdf

3 [2009] UKFTT 377 (GRC).

4 Unreported; see http://www.charity.tribunals.gov.uk/documents/decisions/Ground_final_6Dec2011_no_sig.pdf

5 Unreported; see http://www.charity.tribunals.gov.uk/documents/decisions/Decision_19Oct2012.PDF

6 Unreported; see http://www.charity.tribunals.gov.uk/documents/decisions/ruling-7-Dec-2012.PDF

7 Unreported; see http://www.charity.tribunals.gov.uk/documents/decisions/ca_2011_0007_decision_aug2012.pdf

There have also been a number of instances in which a third party has complained to the Charity Commission about a charity or asked the Charity Commission to open an inquiry into a charity and then sought to appeal to the Tribunal about the Commission's decision not to get involved. Such an application falls outside the Tribunal's jurisdiction because it does not involve the taking of a decision in column one of schedule 6 to the Act - see, for example, the ruling in *Stowe v Charity Commission*.[8] Some of these applications have been accepted by the Tribunal administration and then struck out by judicial ruling; others have simply not been accepted by the Tribunal administration because they clearly fall outside the Tribunal's jurisdiction.

Lord Hodgson's report to Parliament reviewing the Charities Act 2006[9] recognised, in the context of considering the case for a Charities Ombudsman (not now to be proceeded with following the Government's response[10]), the potential for third parties to find themselves in dispute with a charity. However, in considering their means of redress, he did not recognise the rights that already exist for such persons to apply to the Tribunal.

Lord Hodgson recommended a radical reform of schedule 6 so as to expand the range of decisions within the Tribunal's jurisdiction. He suggested that the range of persons with standing to make an application to the Tribunal (in respect of its new, broader jurisdiction) should be:[11]

(i) the charity (if it is a body corporate);

(ii) the charity trustees;

(iii) any other person affected by the decision, order, direction, determination or decision not to act as the case may be.

He does not explain the reason for the retention of the 'persons affected' category nor his apparent abandonment of the 'person who may be affected' category which

---

8 Unreported; see http://www.charity.tribunals.gov.uk/documents/decisions/iain-stowe-decision-17June2013.pdf

9 Cabinet Office, *Trusted and independent: giving charity back to charities. Review of the Charities Act 2006* (TSO 2012) available at: https://www.gov.uk/government/consultations/charities-act-2006-review

10 Cabinet Office, *Government Responses to: 1) The Public Administration Select Committee's Third Report of 2013-14: The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006 2) Lord Hodgson's statutory review of the Charities Act 2006: Trusted and Independent, Giving charity back to charities* (Cm 8700, 2013) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/237077/Response-charities-legal-framework.pdf

11 Cabinet Office (n 9) para 7.19.

currently enjoys standing in the Tribunal. In the absence of a policy rationale for narrowing the category of persons with standing to apply to the Tribunal, I wonder if it was intended? This proposal now seems to have Government support, but there has still been no explanation for the apparently changed provisions as to standing.

It therefore seems likely that the range of justiciable decisions will be expanded in forthcoming legislation but that the category of those with standing to apply to the Tribunal will (unless the Government really does intend to narrow it) remain substantially unaltered. This situation could of course increase the number of third party appeals.

One issue that Lord Hodgson did address directly in relation to 'third party' appeals was the question of whether the Tribunal should have the power to suspend the effect of a disputed decision pending the determination of an appeal by such a person. This question has already been referred to the Law Commission[12] for consideration and I shall return to it below, although I must make clear that, as a serving Judge, I do not propose or endorse any specific legislative proposals – the law is properly a matter for Parliament.

The questions raised by third party applications might be described as a somewhat neglected issue in the debate about reform of the Tribunal so far. This is perhaps not surprising, as one noticeable feature of third party applications is that the applicants tend to represent themselves and so have little or no relationship with the charity lawyer lobby that has been most vocal in the debate. For example, the submissions to Lord Hodgson from charity lawyers, perhaps understandably, tended to focus on the proposals for reform of the Tribunal from the perspective of their own experience in advising charity applicants, rather than considering the position of third parties. The suggestion was made that the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009[13] should be amended so as to give appellants a longer period (of four months rather than the current 42 days) in which to lodge their application to the Tribunal, rather than simply relying on the Tribunal's existing power to extend the time period for

making an application where there is a good reason to do so. My understanding of the proposal was that the longer period in which to lodge an appeal would apply to all applicants and so the increased time in which to lodge an appeal would apply equally to charities and to third party applicants (there has been no suggestion to the contrary). In my view this could have the effect of subjecting the charity seeking to rely on the order being appealed by the third party to an extended

12 See http://lawcommission.justice.gov.uk/docs/charity_law_terms-of-reference_updated.pdf

13 SI 2009/1976 (L 20).

period of uncertainty during which it is unable to proceed safely with its plans. The Government appears not to have accepted this proposal, but it illustrates well the benefits of looking at any proposed changes to Tribunal procedure from the perspective of third party applications as well as from that of charity appellants, as the consequences of rule changes can differ for each type of appeal.

I would suggest that the issue of whether, and how, it is appropriate for third party rights to be invoked in the Tribunal merits much more attention from the charity sector than it has received to date. The potential 'nuisance factor' to charities, in having a decision that they are content with being subjected to a third party challenge in the Tribunal, needs to be considered carefully in weighing up proposed legislation to alter the jurisdiction of the First-tier Tribunal (Charity). I certainly do not mean to suggest that all third party appeals are vexatious. On the contrary, the Tribunal has allowed several meritorious third party appeals and consequently amended the Charity Commission schemes which we found to be defective. In *Ryan and Maidment*,[14] the Tribunal commended the applicants for their work in uncovering a serious breach of trust. Yet it is not entirely clear what the original thinking was in endowing third parties with such liberal rights in the Tribunal's statutory framework. Consider the position of the charity which is the subject of the Charity Commission's decision. It may well have been engaged in a long dialogue with the Charity Commission, have possibly incurred legal costs in securing a scheme or order, and may already have had to handle local dissent in that process. It has successfully obtained the Charity Commission's authority permitting certain action, but is then faced with an appeal from a person opposed to the course of action that it has embarked upon. In such cases, the third party applicant has often been in dialogue with the charity for some time and may have objected to a scheme before it was sealed. The lines of dispute may be well-known long before the application to the Tribunal is made. Such a person may well have standing in the Tribunal and the ability to delay or derail the charity's plans as 'a person who is or may be affected' by the decision. I have pondered why it was decided by Parliament that it was right as a matter of principle to include such a wide category of third parties in column two of the schedule. And also how (in a system designed to facilitate swift, low-cost access to justice) the Tribunal is supposed to balance the potential delay, inconvenience and cost to the charity concerned against the rights given to third parties seeking to challenge a decision in respect of that charity.

I will now turn to the various facets of these problematic questions which I identified above as meriting consideration. Doubtless, readers will think of others!

---

14 *Ryan and Maidment* (n 3).

Standing

There is no definition of a 'person who is or may be affected' within the Act. Looking back to the pre-2006 Act debate about the Tribunal, it is not easy to discern the policy objective behind the generous provisions as to standing in the Tribunal. The originating Strategy Unit policy document 'Private Action, Public Benefit'[15] published in 2002 states:[16]

> The Government believes, therefore, that an independent tribunal should be introduced to hear appeals against Commission decisions. A person or organisation affected by a decision will have an automatic right of appeal and will be able to represent themselves.

The Government's response,[17] published in 2003, endorsed the idea of a dedicated Tribunal for charity appeals, but did not comment on the issue of who should be able to exercise rights of appeal. The draft Charities Bill, published in 2004, contains the phrase 'any person who is or may be affected by the order' in the more detailed provisions regarding rights of appeal to the Charity Appeal Tribunal (as it was then known) but the Explanatory Notes on the draft clauses do not comment on that aspect of the provisions, despite the evident widening of the standing provisions from those previously discussed, to include the difficult-to-define class of 'persons who may be affected' by the Charity Commission's decision.

Neither the Report of the Joint Committee on the Draft Charities Bill in 2004[18] nor the Government's response to it mentioned the issue of who should be able to appeal to the Tribunal at all. Later, in the debate in Grand Committee in the House of Lords in 2005, Lord Phillips of Sudbury argued for a broader concept of standing in column two, to include 'any person or persons representing or acting on behalf of any class of persons (including charities) who may be thus affected'.[19] In his reply Lord Bassam of Brighton, resisting the amendment on behalf of the Government, said that 'It would not be appropriate to give direct appeal rights to representatives, unless the representative was an affected party in his own right'.[20] After Lord Bassam's reply, Lord Phillips withdrew his amendment and did not move any amendment on the same point when the Bill returned to Committee in

15 http://webarchive.nationalarchives.gov.uk/20060715135117/http://strategy.gov.uk/work_areas/voluntary_sector/index.asp

16 ibid, para 7.76.

17 Home Office, *Charities and Not-for-Profits: a Modern Legal Framework* (HMSO 2013).

18 http://www.publications.parliament.uk/pa/jt/jtchar.htm

19 HL Deb 8 March 2005, vol 670, col GC253.

20 ibid col GC254.

the House of Lords after the general election. This might be taken as indicating that he was satisfied with Lord Bassam's reply. But it seems to me that both of their Lordships failed in their speeches to maintain a clear distinction between two meanings of 'representative': (i) a charity in 'representative' proceedings – i.e. one of a group of charities affected in a similar way by a decision and (ii) as a person such as a lawyer who 'represents' a charity in its appeal before the Tribunal. In any event, the Parliamentary debate on this point is not terribly illuminating.

The origin of the 'person who is or may be affected' formulation may lie elsewhere. The legislation that was in force before the creation of the Tribunal was the Charities Act 1993. Under the 1993 Act appeals against orders or decisions of the Charity Commissioners (as they were then) were to the High Court. The 1993 Act specified, in relation to particular orders or decisions, the persons who had standing to appeal. In addition to the rights of appeal to the High Court, there was a right to object to the registration of an institution as a charity, on the grounds that it was not a charity. This right of objection was given[21] to 'any person who is or may be affected' by the registration of the institution as a charity. I speculate that when it came to the drafting of the Bill for the 2006 Act that formulation was alighted on as suitable for use more widely in relation to rights of appeal to the new Tribunal. But why it was preferred to the 'any person interested in the charity' formulation, which is used in the 1993 Act in the provision[22] dealing with rights of appeal against schemes, is not clear. And the right of objection to registration – including its 'any person who is or may be affected' wording – dates back in turn to the Charities Act 1960[23] where I understand that its inclusion was principally to allow the Inland Revenue (as it then was) to object to a registration decision with which it disagreed.

It may be helpful to compare the provisions as to standing in column two of schedule 6 to the Act with the other two jurisdictions in which the same third party applicant might theoretically seek to challenge a decision of the Charity Commission with respect to a particular charity: charity proceedings in the Chancery Division and judicial review in the Administrative Court.

'Charity Proceedings' are defined by section 115(8) of the Act as 'proceedings in any court in England and Wales brought under (a) the court's jurisdiction with respect to charities, or (b) the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes'. Proceedings brought in the Tribunal are not 'charity proceedings' because (i) the Tribunal is not a court and (ii) it does not exercise the court's inherent jurisdiction with respect to trusts

21 Under Charities Act 1993, s 4(2).

22 ibid s 16(14), now used in Charities Act 2011, s 70(3)(b).

23 Charities Act 1960, s 5(2).

for charitable purposes but rather a statutory jurisdiction.[24] Section 115(1) of the Act states that charity proceedings may be taken by:

(a) the charity,

(b) any of the charity trustees,

(c) any person interested in the charity, or

(d) if it is a local charity, any two or more inhabitants of the area of the charity, but not by any other person.

The consent of the Charity Commission or the court is required to bring charity proceedings. The courts have considered the meaning of '(c) any person interested in the charity' on a number of occasions but have steered clear of defining that phrase. Judges have commented that the need for consent to bring charity proceedings may serve as a means of protecting charities from 'busybodies'[25] yet the statutory test for standing has generally been construed broadly. In *Re Hampton Fuel Allotment Charity*[26] Nicholls LJ referred to the 'interested person' test as a requirement for 'an interest materially greater than or different from that possessed by ordinary members of the public' and suggested that the interest of a potential beneficiary of the charity would not therefore be a sufficient interest. In *RSPCA v Attorney General*[27] Lightman J described the 'interested person' test thus: 'not a technical rule of law, but a practical rule of justice affording a degree of flexibility responding to the facts of each particular case.'

In judicial review proceedings in the Administrative Court, the current standing test is set out in section 31(3) of the Senior Courts Act 1981, which provides that:

> No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

The Administrative Court has generally adopted a generous interpretation of 'sufficient interest' so that, for example, a pressure group such as Greenpeace has

---

24 In this analysis, I respectfully disagree with the advice to charities contained in Hubert Picarda QC, *The Law and Practice Relating to Charities* (4th edn, Bloomsbury Professional 2010) 915 to the effect that they would need the Charity Commission's consent to bring proceedings in the Tribunal.

25 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (HC).

26 [1989] Ch 484 (CA) 494.

27 [2001] EWHC 474 (Ch) [21].

been permitted to issue a claim to challenge the building of a nuclear facility.[28] The breadth of this interpretation may reflect the supervisory role of the Administrative Court and its concern that the court's adjudication of public law issues should not be inhibited by technical points as to standing. However, the Ministry of Justice is currently consulting[29] on a proposal to change the 'sufficient interest' test into a 'direct interest' test, which would narrow the range of those with standing, in order to reduce the number of judicial review applications coming before the courts.

Until the phrase is interpreted by the Upper Tribunal or higher courts, it is difficult to know whether the requirement to be a person who is 'affected' or even one who 'may be affected' by a decision direction or order of the Charity Commission is a broader category of standing than the tests to be applied in charity proceedings or in judicial review proceedings. Being affected or potentially affected by a decision seems to me to cast the net wider than the need to show an interest in it, whether a 'sufficient' one or not. This may mean that a third party who would have no standing in the Chancery Division or the Administrative Court would have standing in the Tribunal. I am far from clear whether that was Parliament's clear intention or an unintended consequence of the drafting in column two of the schedule.

It is possible that future legislation could seek to define 'affected or may be affected' so as to require a specific type or degree of likely detriment to be shown in order to establish standing in the Tribunal. It is also possible that a review of schedule 6 could confer broad standing in relation to some decisions directions or orders, but not others. It is also notable that in both charity proceedings and judicial review proceedings, there exists the filter of the requirement for permission to bring the proceedings, yet as this is absent from the Tribunal's jurisdiction, the merits of a permission stage in the Tribunal could be considered in future legislation.

In conclusion on this point, it would seem that, in the absence of a direct challenge to the third party applicant's standing from the Charity Commission (or possibly from the charity which is the subject of the decision appealed), a third party application to the Tribunal could be brought by a very wide category of persons. The policy rationale for this and its practical implications for the Charity Commission and for the charity sector should perhaps be considered afresh in the context of future legislative reform.

---

28 See e.g. *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).

29 https://consult.justice.gov.uk/digital-communications/judicial-review

The Procedure to be adopted in Third Party Appeals

The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended)[30] govern the procedure for First-tier cases. The Rules are drawn up by the Tribunal Procedure Committee, a statutory body created by section 22 of the Tribunals, Courts and Enforcement Act 2007, and laid before Parliament so that they emerge as Statutory Instruments (I shall call them 'the Rules').

The only differing provision in the procedural requirements for charity applicants and third party applicants lies in rule 26 of the Rules, which concerns the period of time allowed for filing the Notice of Application to the Tribunal. This rule currently provides that:

> (1) An appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received—
>
> (a) if the appellant was the subject of the decision to which the proceedings relate, within 42 days of the date on which notice of the decision was sent to the appellant; or
>
> (b) if the appellant was not the subject of the decision to which the proceedings relate, within 42 days of the date on which the decision was published.

The question of when 'the clock starts ticking' for a third party applicant has sometimes proved difficult. In the *Bartley* application referred to above,[31] it was apparent that Mr Bartley, as a third party, could not comply with either part of rule 26, as the Charity Commission does not publish the decisions it makes under section 198 of the Act. The Tribunal extended the time limit to the date on which the applicant became aware of the decision in order to allow the application to proceed. The question of how third parties are to be made aware of their appeal rights if the Commission does not publish all of its decisions is one that merits further consideration in the context of possible reform of the Act and the Rules.

Sections 319(3) and 321 of the Act respectively provide that the Charity Commission is the Respondent to an appeal and to an application for review in the Tribunal. An Appellant is defined in rule 1 of the Rules as the person who commences proceedings and a Respondent is defined as the person appealed against or challenged. Rule 9 of the Rules governs the addition, substitution and removal of parties to proceedings, but it is not directive as to whether, in the case

30 Amended by the Tribunal Procedure (Amendment) Rules 2012. SI 2012/500 L1.

31 *Bartley* (n 6).

of a third party application, the charity concerned should be joined as a Second Appellant or a Second Respondent. There are no 'necessary parties' in the Tribunal and it is doubtful that the Tribunal could properly order anyone to be a party to proceedings against their will. My own practice in cases involving third party applications has been to ask the Charity Commission to contact the charity and ask it if it wishes to apply to be joined under rule 9 of the Rules. This is sometimes opposed by the third party and sometimes welcomed. The question undoubtedly poses something of a dilemma for the charity (or its trustees) concerned. If the charity is joined, then it is drawn (possibly not for the first time) into a dispute with the third party applicant and may incur legal costs if it chooses to be represented. Charities may in particular not wish to make the disclosure to third parties that could be required under rule 5(3)(d) of the Rules if they were to become a party to the appeal. They may therefore prefer to watch matters unfold from a safe distance. On the other hand, joining as a party gives the charity a say in the proceedings and some influence over the outcome. A third way may be for it to seek to file witness evidence or submissions under rule 5(3)(d) of the Rules (which permits as well as requires the submission of documents), without becoming a party. Such an application would be at the discretion of the Tribunal, having regard to the overriding objective under rule 2, of dealing with cases fairly and justly.

If the charity is not a party, it may find it difficult to discover what is going on in the appeal until it is decided. There is a very limited amount of information in the public domain about on-going Tribunal cases (although there is often plenty of speculative comment!) and unless and until a document is referred to in open court, only the party that created it can disclose it to a third party. So the Charity Commission may consider its hands tied, even though it is willing in principle to provide practical assistance to a charity with whom its interests in the proceedings coincide.

Another distinctive factor in third party appeals is that they seem more likely to proceed to a final hearing. In my experience, when an appeal has been made to the Tribunal by the charity itself, settlement negotiations often continue so that the charity and the Charity Commission may ultimately agree on the outcome and file a consent order under rule 37 of the Rules. However, where the applicant is a third party, it seems less likely that fruitful three-way negotiations will take place, not least because the battle lines between the applicant and the charity have often become entrenched long before the Tribunal stage and, as noted above, the charity may not wish to show its hand to the third party applicant in entering such discussions. From the cases so far, I get the impression that third party applicants may be more likely to request an oral hearing and not to opt for determination on the papers, as a charity (or putative charity) applicant might do.

Proceedings are, of course, often slower-paced when any party self-represents, but the Tribunal's administrative staff in Leicester are always helpful to litigants in person, and I have found the Charity Commission lawyers to be most helpful to them too, explaining procedural points and pointing them towards the relevant law. Where a third party is self-representing, the Commission usually takes on the role of preparing the hearing bundle for the Tribunal and also presents its case at an oral hearing first, allowing the appellants to focus their reply on the key issues. This is consistent with the Commission's duty, as a party, (under Rule 2(4)(a)) to assist the Tribunal in meeting the overriding objective.

Where there are a number of third party applications in relation to the same Charity Commission decision, the Tribunal has power to direct that they be consolidated or heard together under rule 5(3)(b) of the Rules. This might save time and costs for all parties, in particular avoiding the repetition by the Charity Commission (and possibly the charity) of its witness evidence and argument. The Tribunal would need to consider the overriding objective of dealing with cases fairly and justly in deciding whether to exercise its power to consolidate any particular proceedings and would have regard to previous decisions on the exercise of that power.[32]

The new NCVO guide to using the Tribunal without lawyers will doubtless prove invaluable to third party and charity appellants alike. It is hoped that hearings will be easier for everyone concerned if self-representing parties know a bit more about how the Tribunal operates.[33]

Costs

The Tribunal's power to award costs derives from section 29 of the Tribunals, Courts and Enforcement Act 2007 and the procedure for applying for costs and awarding costs is set out in rule 10 of the Rules. Rule 10 provides that the Tribunal may make an order for costs if it considers that 'a party' has acted unreasonably in bringing, defending or conducting the proceedings. This rule applies to all parties to the proceedings, so would clearly apply to third parties as well as to charities and to the Charity Commission in tri-partite appeals. In principle, there is no reason why a third party who has behaved unreasonably might not be ordered to pay some or all of the Charity Commission's costs, in addition to those of a charity which joined as a party. However, the Tribunal may not make a costs order against a person without first giving that person an

32 See e.g. *Maharani Restaurant v Commissioners of Customs and Excise* [1999] STC 295 (HC).

33 NCVO, *The Charity Tribunal: How it Works and How You Can Use It* (NCVO 2013).

opportunity to make representations and, if the paying person is an individual, considering their financial means – rule 10(5). The number of applications to the Tribunal from third parties suggests that the risk of paying the Charity Commission's or the charity's costs is not a deterrent factor, either because third parties are unaware that the risk exists or, if they are aware, because they judge that the likelihood of being made to pay is tolerably low. In practice, the Tribunal has never made a costs order against a party for unreasonable conduct in proceedings before it. If a third party were represented,[34] they might seek their costs if the Charity Commission (or the charity) behaved unreasonably. Once again, the Tribunal has never in practice made such an order.

The Tribunal also has power to order the Charity Commission to pay the costs of any appellant if it considers that the decision direction or order appealed against was unreasonable. There is no reason why a third party applicant and a charity which had been joined as a party might not both rely on this provision in appropriate cases.

The Tribunal has to date provided a costs neutral environment for appeals, with no orders for costs made, and parties bearing their own costs (if they choose to be represented). There is no reason in principle why an expansion of third party appeal rights should alter this situation.

What Interim and Final Remedies are Available to the Tribunal?

The table in schedule 6 to the Act sets out in column three the powers that the Tribunal may exercise in respect of the decision in column one, upon the application of a person in column two. The powers in column three are all in the form of final remedies, with no provisions for interim relief. Yet in the tri-partite situation of a third party applicant seeking to overturn a Charity Commission scheme or order on which the relevant charity seeks to rely, it seems to me that what the third party usually wants is to 'stop the clock' so that the charity may take no action in reliance upon the scheme or order before the Tribunal has determined his or her appeal. At present, the Tribunal has no power to make such an order and the third party would presumably have to apply for injunctive relief in the High Court.

In my view, this situation can have such serious consequences that the appeal rights granted by Parliament to the 'persons affected' in column two are effectively

34 There are currently no procedural rules permitting the award of costs under the Litigants in Person (Costs and Expenses) Act 1975 in Tribunals so it seems unlikely that a self-representing party could make a claim for their costs.

negated. For example, in the *Aliss and Hesketh* case,[35] the parents' group had a nasty shock when it discovered that, in reliance upon the Charity Commission scheme under appeal, the trustees had already granted a 999 year lease of the school land, having done so in fact on the day the scheme had been sealed. The scheme was capable of appeal on the parents' application, but the Tribunal had no powers in respect of the lease granted in reliance upon the power conferred by the scheme. The charity did nothing wrong in acting swiftly on the basis of the sealed scheme, and the third party group did not delay in making its application to the Tribunal, yet it was in many respects too late. One must wonder what was the purpose of Parliament conferring on a third party a right of appeal when it is perfectly possible, under the Tribunal's statutory framework, that the charity horse will have bolted before the third party has been able to reach the stable door.

Not only does the Tribunal have no power to prevent the charity acting in a manner that effectively negates a third party's appeal rights, but under the Act the Charity Commission is also free to act in a manner that could frustrate the third party's appeal rights pending determination of an appeal. For example, the Commission retains its statutory power to amend the scheme even whilst the Tribunal is seized of it. It may be appropriate to ask the Charity Commission to give the Tribunal an undertaking not to amend the scheme pending determination of the appeal, in recognition of this difficulty.

The question of whether the Tribunal should have the power to suspend the effect of the Charity Commission's decision direction or order pending determination of an appeal (currently under consideration by the Law Commission) would provide a partial remedy to this problem, effective in many cases but probably insufficient to impact upon the most swift-footed of charities. An alternative statutory formula (seen in some other Tribunal jurisdictions) [36] would be for the Charity Commission's decision not to take effect until the expiry of the period in which an appeal could be made. Such an approach would seriously strengthen the rights of third party applicants in the Tribunal, but may cause considerable inconvenience to the charity concerned. This tension takes us back to the fundamental question of what was the original policy objective in conferring the third party appeal rights.

In the absence of interim orders, do the final orders within the powers of the Tribunal offer effective remedies to third parties? As noted above, the Tribunal has upheld or partially upheld a number of third party appeals and has amended some schemes as a result. I have had my doubts, however, as to whether this was

35 *Aliss and Hesketh* (n 7).

36 See e.g. the provisions for appeals against decisions of the Gambling Commission under the Gambling Act 2005, in particular s 145.

the remedy that the third party appellant really wanted. In the *Thomas* case,[37] the Tribunal was able to put the charity back in the same position it had been in prior to the Charity Commission's offending scheme by revoking it, but in other cases this has not been possible and the scheme has merely been amended. In these cases, the third party appellant may be left with something of a pyrrhic victory, having won some points of principle but not having achieved the final outcome desired. Where third party applicants have legal advisers, it may be important for them to manage their clients' expectations.

I would suggest that there is a need for clarity as to whether third party appeal rights are intended to be meaningful and effective and, if so, that the statutory framework and powers exercisable by the Tribunal should be reviewed to this end.

The Need to Balance the Rights and Interests of the Charity which May Have Sought the Decision Direction or Order of the Charity Commission under Appeal with those of the Third Party Applicant who Seeks to Overturn It

As can be seen from the considerations explored above, third party applications to the Tribunal can sometimes involve conflicting interests between a charity which seeks to rely on a Charity Commission order and a third party which opposes it. I have already described some aspects of the tension between the interests of these two parties.

The Law Commission project will doubtless tease out the ramifications of the proposed power for the Tribunal to suspend the effect of the Charity Commission's decision pending the determination of a third party appeal. In exercising such a power, it may be that the Tribunal would need to apply the 'balance of convenience' test commonly applied by courts[38] in deciding whether to grant an injunction i.e. to weigh the convenience to the party asking for the suspension against the inconvenience to the party opposing it. And yet it must be remembered that these are not (and are not intended to be) adversarial proceedings between the third party and the charity. The Tribunal's function is to hear appeals against decisions of the Charity Commission and yet, if there is to be an expansion of third party applications, it may increasingly be cast in the role of adjudicator in disputes between a charity and a member of the public.

Conclusion

The overriding policy objective in creating the Tribunal was said to be a concern with the accountability of the Charity Commission as a modern regulator. The

37 *Thomas* (n 5).

38 *American Cyanamid v Ethicon* [1975] AC 396 (HL).

Tribunal was intended to be one means by which the regulated sector could hold its regulator to account. Yet, my exploration of third party application rights in this article suggests that the Tribunal may in fact also be used as a mechanism by which charities are held to account by members of the public. If this is an unintended consequence, then surely it is time for the sector to address this issue before those appeal rights are expanded? If it is an intended consequence, then it may be appropriate now for policy-makers to explain its rationale to the sector, and to consider if it has been successfully achieved in view of the Tribunal's limited powers to deliver meaningful remedies to third party applicants. In view of the likelihood of legislative reform to the Tribunal in the next few years, this seems to be a good time to debate the policy objectives and to consider whether the Tribunal's statutory architecture has been appropriately constructed.