The Charity Law & Practice Review

REMUNERATION OF CHARITY TRUSTEES

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Remuneration for charity trustees is a contentious issue. Yet the basic law is absolutely clear. Charity trustees, like any other category of trustee, are under a duty to act gratuitously unless authorised to charge either by the trust instrument or by extraneous authority, that is to say (in the case of a charity, where there can be no question of an agreement with the income beneficiary, as may be the case in a private trust) a scheme of the Charity Commission or the Court.

Court Sanction where no Remuneration Clause Incorporated

Moreover, it is no less clear that it is only in exceptional circumstances that the Courts are ready to exercise the jurisdiction to authorise trustees to charge where provision is not made by the trust instrument. But the jurisdiction does exist. It was explored by the Court of Appeal in the context of a private trust in *Re Duke of Norfolk's Settlement Trusts*[2]. In that case Brightman LJ (as he then was) recorded the existence of the Court's inherent jurisdiction to authorise a prospective trustee to charge, instancing *Re Freeman's Settlement Trusts*[3], and stated without comment that the jurisdiction to authorise an unpaid trustee to charge notwithstanding his acceptance of office without requiring payment had been regarded by Lord Langdale MR as undoubted in *Bainbridge v Blair*[4]; he went on to indicate his acceptance of the proposition sought to be made in *Norfolk* that the Court could increase the remuneration of an existing trustee with a right to charge.

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2 [1982] Ch 61.

3 37 Ch D 148.

4 8 Beav 588.

The basis of the jurisdiction emerges clearly from the judgment of Fox LJ in *Norfolk* at p.79, namely that the Court has to balance two principles, first that the office of trustee is gratuitous, and secondly that it is of great importance that the trusts be well administered, so that the Court may properly increase (and, scilicet, allow) remuneration where having regard to the nature of the trust, the experience and skill of particular trustee, the amounts which he seeks to charge compared with what others might seek in similar circumstances, and the circumstances of the case generally, it would be in the interests of the beneficiaries to do so.

What does this case tell us about the charging of remuneration in the case of a charitable trust? First of all there is in a proper case no objection to the charging of remuneration; proper remuneration is the price to be paid for the efficient running of the charity, not a benefit inconsistent with the claims of charity. Secondly, the Court has the jurisdiction to allow or increase such remuneration (and of course if the Court has that jurisdiction then equally so do the Commissioners). Thirdly, if remuneration or increased remuneration is to be authorised by the Court or the Commissioners it must be justified as being in the interests of the proper administration of the trust.

Stated Policy of the Commissioners

It is the stated policy of the Commissioners not to register trusts which provide for remuneration except in very special circumstances[5], and while they allow limited charging clauses even there the charges are restricted to those of professional persons when instructed by their fellow-trustees to act on behalf of the body of trustees in their professional capacity. Thus, in particular, the Commissioners do not allow a clause permitting the trustees to charge for their time in attending to business which does not necessitate the employment of a professional person. In that particular case the charging clause as approved by the Commissioners is quite different from that which has increasingly come to be incorporated in the vast majority of modern private trust instruments.

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5 See [1989] Ch Com Rep para 89.

Remuneration Clauses and the Commissioners' Duty to Register

The Commissioners have, of course, no discretion whether or not to register a charity; on the contrary (subject to special cases including the provisions of the 1992 Act excluding small charities from registration) every charity "shall" be registered: Charities Act 1960 s.4(2). Charity is defined as "any institution, corporate or not, which is established for charitable purposes, and is subject to the control of the High Court in the exercise of the Court's jurisdiction with respect to charities"; and it is hard to see why a body established for charitable purposes ceases to be so because the trustee has a right to remuneration.

Against this background one is compelled to ask the question: by what right do the Commissioners seek to deny registration to trusts which incorporate professional charging clauses but are otherwise in customary form? Admittedly, if remuneration is more than is reasonable the purposes may not be exclusively charitable, and on occasion it appears that the Commissioners have tended to rely on this principle as the justification for the restrictive approach which has become the norm. But it is not the fact that the obligation to register a charity arises only if the charity is for exclusively charitable purposes; and in any event if the remuneration is reasonable, as for example it must be if it is only a matter of charging customary fees, there cannot be any question of the loss of exclusive charitable status, because the fees provided for are part of the cost of the running of the trust.

"Reasonable" is not, of course, the same as "necessary"; it is the latter word that appears to underlie the Commissioners' approach, and it appears to be strongly arguable that it is without foundation in law. The refusal to register charities with the normal charging clause appears equally not to be supported by any discernible logic, for surely a charity with a reasonable charging provision ought to be protected in the public interest, not treated in the same way as a gift which is not charitable at all; indeed, a large charity may be the more readily made the vehicle for its substantial public benefit if the trusts enable those concerned in its administration to devote as much time to its affairs as may be required.

One may readily concede that where the founder does not specifically provide for remuneration or charges the Commissioners' strict policy in requiring exceptional justification before they will themselves approve a scheme conferring rights to charge is both logical and justified by the authorities; but if they are faced with a trust which incorporates a charging clause, whether in draft or already executed, it would seem that their duty is to register it pursuant to the mandatory provisions of the Charities Act 1960, and not to do anything which may frighten the donor away.

In this context it may be worth noting that under s.90 of the Inheritance Tax Act 1984 a trustee's right to remuneration is disregarded for the purposes of inheritance tax "except to the extent that [it] represents more than a reasonable amount of remuneration", thus confirming that reasonable remuneration may for fiscal purposes be seen as no more than the cost of running the trust. In their approach to questions of remuneration it might be said that the Commissioners are taking a line which lies more naturally within the province of the Inland Revenue (in the sense that, unlike the Charity Commission, they do indeed have to consider whether a trust is for exclusively charitable purposes, because of the limitations on the various forms of tax relief). Yet in the light of the provisions of the Inheritance Tax Act not even the possibility of a Revenue claim appears to justify the Commissioners' approach, and it is not believed to be the case that the Revenue have ever sought to take a point on the fiscal status of a charity providing for reasonable remuneration for the trustees. Indeed, there are of course many charities on the register in which remuneration is

allowed, some as a matter of subsequent authority, but some as a matter of the terms of the original trusts; and the argument that remuneration denies charitable status is not one which appears in the law reports.

It thus appears to be the thesis of the Commissioners that, although the general law of trusts recognises the freedom of the settlor to provide for the trustees to be remunerated, it is within their powers to take steps to secure that that freedom of choice does not extend to the realms of charity.

It may be said that where comments are sought on a draft it matters not that the Commissioners should seek to persuade the founder to adopt the form which they prefer to see, and that it is no less reasonable than, say, for the beneficiary of a proposed trust to seek to invite the settlor not to divert part of the benefit to the trustees; but that is not a fair analysis. For the Commissioners' position is not that they seek to express a preference, but rather that they will not countenance without special justification what in law appears to be within the founder's discretion, and to be a matter for his judgment regardless of what reasons may lead him to his conclusion. In such a situation it is all too easy for a negative response from the Commission to be misinterpreted. To coin a phrase, whose gift is it, anyway?

Lack of Uniform Treatment

It is, to say the least, a bold position to which the Commission have clung. It raises the question: what of the many trusts which have been registered incorporating remuneration or charging clause? Ought they to be deregistered? If, as on the statutory wording is undoubtedly the case, there is no discretion in the registration process, then either all must meet the criterion for registration or all must fail except those for which exceptional circumstances are shown. It is at least possible that if this uniformity of treatment is not shown to operate then the Commission would be guilty of failing in their duty to treat all charities alike, and exposing themselves to the possibility of a judicial review. It may also be said that since there is an appeal process open to the charity that is refused registration there is no case for judicial review proceedings, but of course the difference is that the appeal process involves no compensation in costs, and it is not beyond argument that the appeal procedure laid down in the Charities Act 1960 s.5 is not framed in language so clearly mandatory as to exclude the better remedy if cause is shown why the matter should be dealt with by reference to a failure of the administrative function (rather than a simple error in law).

But even more to the point than the lack of uniform treatment is the fact that the Commissioners' stringent views are inconsistent with authority. For even a true benefit to a trustee may be consistent with charitable status, let alone reasonable remuneration designed to encourage the proper running of the trust. Thus, in *Re Coxen*[6], a bequest provided for the giving of a dinner to the trustees of a charity, and this was upheld as charitable as tending to promote the efficient administration of the charity. If that is correct, then how much the more reasonable to pay for the effort involved in discharging the trusteeship? So, in the words of *Tudor on Charities*, 7th Edition at p.432:

> "there seems to be no reason why a donor or testator should not

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6 [1948] Ch 747.

> provide for the trustees to be remunerated...if his object in making such provision is to encourage them to give full attention to their duties."

In the 1990 Report at p.36 the Commissioners mention an unreported case of His Honour Judge Paul Baker QC, *Smallpiece v Attorney General*[7], where a charitable company was denied the right to amend its memorandum of association permitting modest remuneration for the members of the Charity's Council; the case is said to illustrate the reluctance of the Court to sanction the remuneration of charity trustees except in very special circumstances. So be it; that principle is clear enough, but it does not answer the question how the Commissioners can justify a refusal to register new charities which incorporate power to charge.

Charity established by a Will with a Charging Clause in Common Form

That question would be raised in its most acute form as follows (and it is hardly open to doubt that the case is a common one). Suppose a testator leaves his estate on perpetual charitable trusts incorporating a standard form charging clause for his executors and trustees. Is that to be registered or not?

If it is not to be registered it can only be on the basis that it is not a valid charitable gift and, if so, it must fail for perpetuity. Thus there are two groups of persons who have an interest to challenge the charitable nature of the gift, the persons entitled in the event of failure of the gift, and the Inland Revenue, who will be concerned to ascertain whether or not the charitable exemption from inheritance tax is to be conceded to the estate.

It is of course unthinkable that the Revenue will take any point on this gift, since the terms of the Inheritance Tax Act provisions as to trustee charges would be inconsistent with any such claim. And the persons entitled in default are hardly likely to take on their shoulders the burden of arguing what the Revenue have found to be unarguable, all the more so in the light of the decision in *Coxen* and the remarks in *Tudor*.

Suppose then that the Commissioners raise a question over the charging clause. They cannot, as they could with a living donor seeking their comments on a proposed form of trust, express a refusal to register until it is put in preferred form; either they must register or not. If not, then one would be left with the quite extraordinary position that those with the interest to challenge the gift did not seek to do so and those with the duty to protect the gift refused to do so.

Would the Commissioners truly seek to maintain their position in such a case? If they did, and the result became an unopposed appeal at the expense of the charity, it is hard to escape the feeling that the Commissioners' position would be heavily criticised by the Court. It is believed that their stance is rather that of agreeing to register the trust as a charity, but seeking an undertaking from the trustees that they will not avail themselves of the charging clause. Again, one asks on what basis this can be justified? Regrettably there can be only one answer. None. It is to be hoped that trustees will refuse to give such undertakings; for if they do they are failing in their duty to allow their testator's bounty to take effect as it stands, and although they

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[7] See [1990] Ch Com Rep 36.

may of course waive their own right to fees if they so choose they have no right to limit their successors' power to charge.

Is the Present Policy in the Interests of Charity

In any event the question remains to be answered whether or not the blanket refusal to countenance the charging of fees is in the interests of charity. If it is not, then, on the basis of *Norfolk,* it should be reconsidered, even to the extent of the grant of remuneration in trusts where the original instrument did not provide for charges to be made, let alone in the case of the newly registered trust. For if charging is in the interests of the trust then charging can be authorised, and plainly should be because the interests of the trust must be advanced if possible.

The Increasing Burdens of Trusteeship

The burdens on charity trustees are ever growing. They are public officers, and accountable as such. Quite rightly they are now required to provide accounts on a far more rigorous basis than used to be the case. They face many other obligations and responsibilities, heavy enough to ensure that the trustee who treats his office as one of honour will fail to do the job properly.

They also face substantial risks, not just of liability if they do not do their job well, but of personal exposure should things go wrong even for reasons wholly outside their control. Thus they are far more at risk of personal liability on contracts than used to be the case, if only because in a recession there is a far greater risk that available assets will not match immediate liabilities, and far less willingness to let the well-deserving off the hook (because the other party to the contract may find himself on a hook if he does). How many trustees know that when they sign a contract on behalf of their charity they are signing away their personal assets to the extent that the charity cannot assist them to meet their liabilities? The active charity with a bank borrowing, the charity with a building programme which runs over budget when subscriptions are falling short; these are just two obvious examples of cases where a trustee faces risks which he almost certainly would not have anticipated if he took on his trusteeship in happier days when Professor Pangloss could reasonably say that all would be for the best in the best of all possible worlds. (And surely the world of charity is the best of all possible worlds).

Again, the volatility of stock markets must have exposed many a charity trustee to worrying moments as he looked at the investments in his portfolio; if by any chance, and it would not be a very extreme chance, he had taken the responsible view that the choice of investments needs a professional expertise and that he should not assert the capacity to manage investments on behalf of the charity, he might well have appointed managers on behalf of the trust without thinking through the precise and somewhat curious limitations on the power of a trustee to delegate, and personal liability might well follow if the investments underperform.[8]

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[8] If the trustee was a professional man then he might well have thought he could take investment decisions because of his professional expertise; could he then have charged for his time under the Commissioners' standard charging clause? No, because the law presupposes that the ordinary person is

competent to make investment decisions with suitable advice from stockbrokers, so that the work done did not necessitate the employment of the professional trustee as such.

So the burdens of a charity trustee are great, and probably greater than nine trustees out of ten appreciate. Is it necessarily the case that trusteeship is better performed by those who are led to believe that their role is gratuitous? Does it not risk limiting the pool of charity trustees to those who are fortunate enough perhaps to be somewhat screened from some of the problems which are at the heart of the charity? It is all too easy a step to move from the notion that a trusteeship is a gratuitous role to seeing the appointment as some sort of honour, like a parent's invitation to stand as godparent. Maybe it is an honour, but charity does not need the trustee who is motivated by such thoughts. It needs those who are committed and ready to be active. Many, if not most, will be ready to give up their time without reward if they are asked to; but why limit the pool in this way?

In any event there are some charities where the burden on the trustee's time are as great as he chooses to make them, and a good trustee may well do a very great amount of work indeed for his charity. The chairman of a body of trustees may well feel that he is indeed a true public servant, who must not complain whatever the inroads made upon his time, because they are the inescapable burden of his office. But we no longer expect all our public servants to act without compensation for their time and trouble.

Time for a New Approach?

Against such a background it is at least arguable that the convention that trustees need no remuneration is one which does not serve the interests of charity. Is it not possible that we open the door too wide to the running of charities by well-intentioned and comfortably placed amateurs from the limited class of persons who do not have to worry about their finances; and in the bigger charities is it not possible that by doing so we make it hard for them to keep abreast of their own paid executives? It is after all for trustees to exercise ultimate control, and not the employees of the charity. And without wishing to be a prophet of doom, and without taking any view of the facts in the Maxwell saga, is not the one lesson that has become clear from that case the lesson that there is a danger in putting control in the hands of the well-intentioned who may be no match for a misplaced professionalism elsewhere in the chain of command?

When Professor Goode has reported on the future of pension funds we may have an answer to the question whether Mr Frank Field's report to Parliament was justified in the mixture of scorn and despair which it showed in referring to the "medieval" system of trust law. One of the relics of that medievalism is undoubtedly the principle that trustees cannot expect to charge. If criticism of trust law is justified in the context of pension funds then there will certainly be lessons to be learnt in the context of charity; for the Goode Committee may be limited in its remit to pension funds, but it is unthinkable that its recommendations will not include many that will require careful consideration wherever a public interest is served by a structure based on the law of trusts.

Thus it may be that round the corner there is an opportunity waiting to bring the concepts of charitable trusteeship into a modern perspective. Why not accept that being a trustee of a big charity is in part at least a difficult and responsible job? Why not insist that every big charity has at least one professional trustee entitled to charge for his time, but charged in return for an unqualified duty to keep the trusteeship on the rails (and offering the charity the protection of his professional indemnity insurance if he fails to do his job); charged, for example, with the duty to ensure that accounts are prepared on behalf of all the trustees, and to keep the other trustees alive

to their duties, responsibilities and potential liabilities generally? If so, then it would be possible for the non-executive trustee, if so he may be termed, still to act from his commitment without the expectation of reward except in those cases where he is so active that he ought to be compensated for the time and effort which he puts into the trust.

It will, quite fairly, be asked whether to introduce the notion of remuneration into the world of charity trusteeships is not to open the door to waste and the possibility of abuse. The criticism must be answered. But answers are available.

Protection Against Abuse

There is, for example, no reason why schemes allowing remuneration should not be approved on terms that require the remuneration of any one trustee to have the express approval of all other trustees, and a certificate from the charity's auditor that the costs have been reasonably incurred for services duly rendered.

There is no reason why the Commissioners' new powers to act for the protection of charities which suffer abuse should not be a sufficient protection against those who seek to outflank such safeguards; but in any event one is tempted to ask whether those who are minded to pay themselves improperly will be deterred by the lack of power to do so, and, if that is a fair comment, then to confer a power to claim reasonable remuneration is unlikely to open the door to any element of abuse that is not already inherent in a system where there will always have to be a substantial element of trust.

Furthermore, it is worth bearing in mind that the insurance policy of the professional trustee is itself a major safeguard against abuse, *a fortiori* if he is being paid for his services so that it is clear that his actions in relation to the trust (and in particular any tendency to overcharge himself or to turn a blind eye to wrongful charges by others) will be covered by the policy.

But these are not the only possible safeguards. It would be perfectly possible for a remuneration scheme to require a charity if it expends, say, more than ten per cent of its income in fees or remuneration to the trustees to make a special return of that fact to the Commissioners. It would be perfectly feasible for any such scheme to lay down maximum levels of remuneration. The professional might be limited to a discounted hourly rate (say two-thirds of the rate for a professional of the relevant standing, be he partner or assistant, in some suitable provincial centre, say Birmingham or Manchester, chosen to ensure that the rate is truly a median, and not an extreme figure, with suitable provision for indexation to take account of changes in the rates thereafter); other executive trustees whose commitment of time and energy to the trust is such that they deserve special treatment might be limited to a discounted civil service salary (two-thirds of the remuneration of a grade 5 civil servant for a charity with an income over £100,000 or assets over £2 million and grade 6 below that, to be scaled down to the level appropriate to take account of the amount of time actually spent in the affairs of the charity), while there might be a limit of 1% of income as the maximum honorarium which can be claimed by any trustee who is not prepared to justify his remuneration by reference to time spent but still asks his fellow trustees to allow him to charge.

Other safeguards could of course be devised, while a suitable scheme would in many cases have to take account of other duties performed by the trustees; for example, as directors of wholly-owned trading subsidiaries, or other forms of profit attributable to the trusteeship. However, this article is concerned with the principle that

remuneration is alien, and until that principle has been disposed of there is little point attempting to descend to the minutiae of drafting suitable forms. The crucial point to bear in mind is that the principle is almost certainly an illusory barrier to abuse, one which deters only those who would never think of abusing their trusteeship, and is easily circumvented by those with a mind to do so.

Encouragement or Discouragement?

The greatest advantage which ought to have been achieved by the strengthening of the Commissioners' powers to act against abuse by the Charities Act 1992 is the prospect that henceforth the charitable sector can be regulated on a basis that does not require the honest to be penalised by fear of what the dishonest might do. The sector depends on the work of the honest, who must not be discouraged; and the dishonest ought now to be able to see that there is a police force with all the powers it needs to catch them in the act and to dispose of them accordingly.

So, to allow a reasonable level of remuneration ought not to be the beginning of the end for the world of charity. One does ask whether the denial of remuneration in appropriate cases might not be.

One asks oneself: is there any reason why the chairman of an active charitable trust who gives up, say, two-thirds of his time to the work which the trust involves and to the management perhaps of tens of millions of pounds of assets and a substantial workforce should not be paid, say, half the salary of a civil servant of appropriate grade? They are both public servants. They are both actively involved in the sort of responsibilities which impose an exceptional burden. The trustee does in fact expose himself to far greater personal risks than the civil servant. What then is the logic of saying that the trustee should not be paid when it is unthinkable that the civil servant would act without his salary? There was logic one hundred years ago when society saw position as its own reward, and position as a trustee of a great foundation was a position to be envied. But society has moved on from there.

Alas, for those of us who say that one of the great glories of the law of charity is its ability to move with the times, there are areas in which charity does not seem to move as readily as it should. If we want it to reflect the times in which we live, as it must if *rigor mortis* is not to set it, is it right to preserve a rule that no longer fits the bill?