Neutral Citation Number: [2018] EWCA Civ 1605

Case No: A3/2017/2268

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Sir Geoffrey Vos, Chancellor of the High Court
[2017] EWHC 1379 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2018

Before:

LADY JUSTICE GLOSTER
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

- -

Between:

DR MARKO LEHTIMÄKI	**Appellant**
- and -	
(1) THE CHILDREN'S INVESTMENT FUND FOUNDATION (UK) **(2) H.M. ATTORNEY GENERAL** **(3) SIR CHRISTOPHER HOHN** **(4) JAMIE COOPER**	**Respondents**

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Mr Guy Morpuss QC (instructed by **Macfarlanes LLP**) for the **Appellant**
Mr William Henderson (instructed by **Linklaters LLP**) for the **First Respondent**
Mr Mark Mullen (instructed by the **Government Legal Department**) for the **Second Respondent**
Mr Robert Ham QC (instructed by **Withers LLP**) for the **Third Respondent**
Lord Pannick QC, Mr Simon Taube QC and Mr Edward Cumming QC (instructed by **Bates Wells Braithwaite London LLP**) for the **Fourth Respondent**

Hearing dates: 16-17 April 2018

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Approved Judgment

Lady Justice Gloster (Vice-President of the Court of Appeal, Civil Division), Lord Justice David Richards and Lord Justice Newey:

1. The origins of charity law long pre-date the recognition of companies limited by guarantee in the Companies Act 1862. Nowadays, however, many charities are companies limited by guarantee without a share capital. They include the claimant, The Children's Investment Fund Foundation (UK) ("CIFF").

2. Charity law having to a great extent been developed in the context of charitable trusts rather than charitable corporations, it is not always clear how its principles apply to the latter. *In re The French Protestant Hospital* [1951] Ch 567 and *Liverpool and District Hospital for Diseases of the Heart v Attorney-General* [1981] Ch 193 each involved such issues. In the *French Protestant Hospital* case, Danckwerts J held (at 570) that the governor, deputy governor and directors of a charitable corporation were "as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property" and that they were, "to all intents and purposes, bound by the rules which affect trustees". In *Liverpool and District Hospital for Diseases of the Heart v Attorney-General*, Slade J concluded (at 214) that the position of a charitable company in relation to its assets had "at all times been analogous to that of a trustee for charitable purposes" and that that "suffices to give rise to the jurisdiction of the court to order a cy-près scheme".

3. The present appeal similarly stems from features of CIFF which would not exist if it were a charitable trust: the existence of members distinct from its directors (or "trustees") and the application of section 217 of the Companies Act 2006. In accordance with a judgment handed down on 9 June 2017 ([2017] EWHC 1379 (Ch), [2018] 2 WLR 259), Sir Geoffrey Vos C ordered the appellant, Dr Marko Lehtimäki, who is a member of CIFF, to vote in favour of a resolution under section 217. Dr Lehtimäki now challenges that order in this Court.

Narrative

4. CIFF was founded by Sir Christopher Hohn and his then wife, Ms Jamie Cooper, each of whom is a respondent. It now has assets in excess of US$4 billion. Its funding has primarily come from Sir Christopher's businesses, but Sir Christopher and Ms Cooper have each contributed to the charity's success. Until 2013, Ms Cooper was its (unpaid) chief executive officer.

5. CIFF was incorporated as a company limited by guarantee without a share capital on 8 February 2002. In practice, its aim has been to improve the lives of children in developing countries, but its objects are expressed widely in its memorandum of association as:

> "the general purposes of such charitable bodies or for such other purposes for the benefit of the community as shall be exclusively charitable as the Trustees may from time to time determine".

The memorandum also provides for CIFF to have power to co-operate with other bodies (clause 4.4), to support, administer or set up other charities (clause 4.5), to

make grants (clause 4.13) and to do anything else within the law which promotes or helps to promote its objects (clause 4.27).

6. Other parts of the memorandum are designed to ensure that CIFF's assets are applied exclusively for charitable purposes. Clause 5.1 states that the "property and funds of the Charity must be used only for promoting the Objects and do not belong to the members of the Charity". Clause 8 provides that, in the event of dissolution, surplus assets must be transferred to another charity or otherwise dealt with in a manner consistent with charitable status.

7. Clause 5.2 of the memorandum prohibits a "Trustee" (i.e. a director of CIFF) from receiving "any payment of money or other material benefit (whether directly or indirectly)" from CIFF subject to certain exceptions (reasonable out-of-pocket expenses, for example). The only exception of relevance to the present litigation is that found in clause 5.2.5, which permits:

> "in exceptional cases, other payments or benefits (but only with the written approval of the Commission [i.e. the Charity Commission for England and Wales] in advance)".

The term "material benefit" is defined as "a benefit which may not be financial but has a monetary value".

8. CIFF's articles of association state that the trustees "as charity trustees have control of the Charity and its property and funds" (article 3.1) and article 6 authorises them, among other things, "to exercise any powers of the charity which are not reserved to a general meeting" (article 6.8). Trustees are, moreover, empowered by article 1.5.4 to remove a member of CIFF "on the ground that in their reasonable opinion the member's continued membership is harmful to the Charity". For their part, the members have power to elect persons to be trustees to fill vacancies (article 2.8.4) and, in certain circumstances, to remove trustees (article 3.7.5). The articles also provide for an AGM to be held each year at which, among other things, the members "discuss and determine any issues of policy or deal with any other business put before them" (article 2.8.7).

9. CIFF has only ever had a few members. They are now Sir Christopher, Ms Cooper and Dr Lehtimäki, a university friend of Sir Christopher and Ms Cooper. Dr Lehtimäki, who had been a member from the outset, ceased to be one in 2009, but he was reappointed as such in 2012.

10. There have been more trustees. These have included Sir Christopher, Ms Cooper and, until he resigned in 2009, Dr Lehtimäki (so that he is at present a member but not a trustee). However, CIFF has also had, and still has, a number of other trustees.

11. The present litigation has its origins in the breakdown of the relationship between Sir Christopher and Ms Cooper. Ms Cooper began divorce proceedings in 2012 and the couple were divorced in the following year. Subsequently, Ms Cooper was paid some US$530 million by Sir Christopher pursuant to an order made in December 2014.

12. Lord Malloch-Brown, who was a trustee of CIFF between 2011 and 2016, has explained that the "severe and challenging differences between Sir Christopher and

Ms Cooper" gave rise to real difficulties in the management of CIFF. In April 2015, however, the various parties entered into agreements which it was hoped would resolve the problems. At the heart of what was agreed was a proposal for CIFF to make a grant of US$360 million ("the Grant") to what became Big Win Philanthropy ("BWP"), a charity that Ms Cooper set up in mid-2015. Under the April agreements, CIFF, by a letter written on its behalf by Lord Malloch-Brown, agreed to make the Grant subject to approval from either the Charity Commission or the Court. For their part, Sir Christopher and Ms Cooper sent CIFF's board a "Letter of Intent" in their "capacity as Members and Trustees" reporting that "all outstanding matters and all conflicts have now been settled" and then stating:

> "In a letter from [Ms Cooper's] solicitors to the trustees' solicitors dated 13 February 2015, [Ms Cooper] requested a grant from [CIFF] in an amount of $500m for the purposes of enabling her to establish a new UK charitable foundation (the 'New Foundation'). In a letter from [the trustees' solicitors] to us dated 11 March 2015, the trustees responded to [Ms Cooper's] request by proposing a grant in the amount of $360m (the 'Proposed Grant') to the New Foundation …. [Ms Cooper] now accepts that $360m is the appropriate amount for the Proposed Grant from [CIFF] and [Sir Christopher] has agreed to support the application before the Board of [CIFF], and in the board's application for approval to the Charity Commission or any tribunal or court that may have jurisdiction. For the avoidance of doubt such support shall not require any active steps to be taken by [Sir Christopher] beyond confirming the same in writing in the form of Appendix 1 when required to do so ….
>
> Because both of [Ms Cooper] and [Sir Christopher], as trustees of [CIFF], have a conflict of interest, neither will vote on the Proposed Grant.
>
> After the Board's approval of the Proposed Grant … and its submission to the Charity Commission, [Ms Cooper] will forthwith recuse herself from all involvement with [CIFF], whether as a member, trustee or otherwise, save to pursue payment of the Proposed Grant through the Charity Commission, relevant tribunal or court, which recusal will remain in place pending her resignation as a trustee and member of [CIFF]. … [Sir Christopher] will take no steps, directly or indirectly, through a third party or otherwise, to indicate that he is in opposition to the Proposed Grant. [Ms Cooper] will resign as a trustee and member of [CIFF] with immediate and permanent effect on the determination in respect of the Proposed Grant by the Charity Commission / tribunal / court as the case may be, and for the avoidance of doubt, this will occur whether the Proposed Grant has been approved by such body or not."

13. The letter proceeded to refer to contributions of US$40 million to the "New Foundation" (later BWP) to be made by Sir Christopher and Ms Cooper. In this respect, the letter said:

> "As soon as reasonably practicable after [Ms Cooper's] resignation as member and trustee of [CIFF], and regardless of the outcome of the Proposed Grant to the New Foundation, [Sir Christopher] shall arrange for the New Foundation to benefit from a further $40m by reason of a contribution from monies which he or an entity he controls would otherwise be entitled to. As soon as reasonably practicable after the making of the Proposed Grant to the New Foundation (and only in the event the Proposed Grant is made) and after [Sir Christopher] arranges for the New Foundation to benefit from a further contribution of $40m [Ms Cooper] shall also arrange for the New Foundation to benefit from a further $40m by reason of a contribution from her personal funds or from monies which she or an entity she controls would otherwise be entitled to."

14. The April agreements were taken forward in July 2015 by a further series of documents. A company associated with Sir Christopher and Ms Cooper executed deeds of covenant in respect of the $40 million gifts that they were to make to BWP (subject, in Ms Cooper's case, to the Grant being approved). Ms Cooper also executed a deed providing for her resignation as a member and trustee of CIFF. CIFF told BWP in a letter that it would make a grant to it of US$360 million on condition that the Charity Commission or the Court approved. The Grant was "intended to establish an endowment fund for the Recipient … to enable it to generate income for the benefit of children and young persons in low-income countries around the world". It seems that the potential impact of section 217 of the Companies Act 2006 was not appreciated at this stage.

15. On 20 December 2016, a company associated with Sir Christopher paid BWP US$40 million pursuant to the deed of covenant entered into in July 2015.

16. The present proceedings were issued by CIFF on 15 June 2016, the Charity Commission having authorised them under section 115 of the Charities Act 2011 on 7 June. In essence, CIFF sought Court approval of the Grant.

17. When the matter came before the Chancellor, he identified the following as the main issues (in paragraph 11 of his judgment):

> "i) Is this a case in which the trustees seek the court's approval to a momentous decision they have, in their discretion, decided to take, or a case in which they have surrendered their discretion to the court?
>
> ii) Would the Grant confer a material benefit, whether directly or indirectly, on Ms Cooper within the proper meaning of clause 5.2 of CIFF's Memorandum of Association, so as to require the written approval of the [Charity] Commission in advance?

> iii) Would the Grant be a payment for loss of office within the meaning of section 215 of the Companies Act 2006 so as to require the approval of CIFF's members under section 217 of the Companies Act 2006, because it would be (a) consideration for or in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and either (b) a payment to a person connected with Ms Cooper, or (c) a payment to any person at the direction of, or for the benefit of, Ms Cooper or a person connected with her?
>
> iv) If the Grant does require the approval of CIFF's members under section 217, are either or both of Sir Christopher and Ms Cooper (a) deprived of the right to vote because they owe fiduciary duties as members of CIFF and have a conflict of interest, (b) contractually deprived of the right to vote, and/or (c) contractually or otherwise obliged to vote in a particular way?
>
> v) In any event, if the court approves the making of the Grant, does that abrogate the need for either (a) the Commission's written approval either under clause 5.2.5 of CIFF's Memorandum of Association and/or under section 201 of the Charities Act 2011, or (b) a members' resolution under section 217 of the Companies Act 2006?
>
> vi) What factors should the court take into account in deciding whether to approve the making of the Grant, and in particular what weight should the court attach to the risk of tax being payable on the making of it?
>
> vii) Should the court approve the making of the Grant?"

18. It will be seen that these issues referred to sections 215 and 217 of the Companies Act 2006. Those provisions are concerned with payments for loss of office. Section 215 defines "payment for loss of office" to include a payment to a director or past director of a company "as consideration for or in connection with his retirement from his office as director of the company" (section 215(1)(c)) and states that, for the purposes of sections 217 to 221, "payment to a person connected with a director … is treated as payment to the director" (section 215(3)(a)). Section 217(1) provides that a company "may not make a payment for loss of office to a director of the company unless the payment has been approved by a resolution of the members of the company".

19. Section 217 of the Companies Act 2006 is referred to in section 201 of the Charities Act 2011. The latter provision, headed "Consent of Commission required for approval etc. by members of charitable companies", says this:

> "(1) In the case of a charitable company, each of the following is ineffective without the prior written consent of the Commission—

> (a) any approval given by the members of the company under any provision of Chapter 4 of Part 10 of the Companies Act 2006 (transactions with directors requiring approval by members) listed in subsection (2) ….
>
> (2) The provisions of the 2006 Act are—
>
> …
>
> (f) section 217 (payments to directors for loss of office) ….”

20. The Chancellor summarised his conclusions as follows (in paragraph 157 of his judgment):

> “i) This is a case in which the trustees of CIFF have, in the circumstances that have occurred, surrendered to the court their discretion in relation to the making of the Grant.
>
> ii) The making of the Grant would confer a material benefit on Ms Cooper within the proper meaning of clause 5.2 of the Memorandum, so as to require the written approval of the Commission in advance.
>
> iii) The making of the Grant will be a payment for loss of office within the meaning of section 215 of the Companies Act 2006 so as to require the approval of CIFF’s members under section 217 of the Companies Act 2006, because it would be a payment made as consideration for and in connection with Ms Cooper’s retirement from her office as a trustee of CIFF, and a payment to BWP, a person connected with Ms Cooper.
>
> iv) Sir Christopher and Ms Cooper are deprived of the right to vote on a section 217 resolution as to the making of the Grant because they are contractually obliged not to do so.
>
> v) The Grant is and will be in the best interests of CIFF primarily because it would be inappropriate to allow any of these parties to renege on the April and July agreements unless there were strong reasons requiring the court to do so in the interests of CIFF and charity. No such reasons exist. The April and July agreements will allow a further US$40 million to be secured for charitable purposes, and will allow Ms Cooper to devote her considerable talents to a charity with increased assets. The making of the Grant will bring a conclusion to this dispute and the governance problems that it has created for CIFF, and will avoid further legal and other expenses being incurred, and allow the protagonists to return to devoting their efforts and talents to charity.
>
> vi) Subject to the consent of the Commission under section 201 of the Charities Act 2011 and under clause 5.2 of the

> Memorandum, the making of the Grant must be approved by the members of CIFF, of whom only Dr Lehtimaki is entitled to vote. Dr Lehtimaki will be directed by the court to vote in favour of any resolution of the members of CIFF approving the Grant under section 217 of the Companies Act 2006."

21. As regards paragraph 20(v) above, the Chancellor said this:

> "128 I would like also to record that I have not found the decision with which the court is faced an entirely straightforward one. Whilst pragmatically making the Grant would be more likely to resolve CIFF's managerial issues than not making it, it is not entirely clear why disposing of assets of US$360 million should be regarded as being in the best interests of CIFF. That said, I have resolved, perhaps counter-intuitively, that in the unique circumstances of what is an extremely unusual case, making the Grant is and will be in the best interests of CIFF. My main, but not my only, reasons for reaching this decision can be briefly summarised as follows:-
>
> i) The April and July agreements were entered into in good faith by Sir Christopher and Ms Cooper and by the independent trustees of CIFF. It would be inappropriate to allow any of these parties to renege on such a deal unless there were strong reasons requiring the court to do so in the interests of CIFF and charity. I deprecate Sir Christopher's implicit submission that, because as part of the deal Ms Cooper had already resigned as a trustee, the court should seek to take advantage of that situation by refusing the Grant on the basis that the governance problems were anyway resolved. I acknowledge, of course, that trustees and the court may be forced to take tough decisions, but I am not sure that much has changed as to the pros and cons of the Grant in the time that has elapsed since April 2015.
>
> ii) The April and July agreements, if carried into effect, will allow a further US$40 million to be secured for charitable purposes, and will enhance the value of the assets that will benefit from Ms Cooper's considerable talents as a charity manager in this field.
>
> iii) The making of the Grant will, in fact, if this judgment is carried out, bring a conclusion to this incredibly hostile dispute and the governance problems that it has created for CIFF. It may be hoped that it will avoid further legal and other expenses being incurred, and equally importantly, allow the protagonists to return to devoting their efforts and talents to the charities they have founded and to which they have so much to offer. It may be that there will be some additional costs incurred as a result of the grant being made as Dr Lehtimaki suggests, but I doubt they come anywhere near equating with the costs and disruptive effect of further litigation.

> 129 In stating these as my main reasons, I have taken into account the entirely compliant structure and objects of BWP and the likelihood that the Grant will be well and responsibly used for the benefit of charity if it is made.
>
> 130 I have considered the negative features of making the Grant, but do not consider that they outweigh the massive advantages of the factors I have mentioned. I acknowledge the unprecedented nature of the Grant for CIFF and also for charity generally, and the supposedly bad precedent that it sets. But it seems to me that exceptional situations demand exceptional solutions. I have had, in the course of this case, no basis to question the independence of mind of the independent trustees that reached the original decision to allow the Grant to go forward. I respect their good faith in adopting the solution that the Grant provides. I have also paid very careful attention to the independent submissions of the Attorney General supporting the Grant. It is his sole duty in this regard to protect the interests of charity. In my judgment, his approach in this case was entirely correct and appropriate. I do not accept that the making of the Grant will give rise to reputational damage for either CIFF or the charitable sector more broadly. It will draw a line under an unfortunate dispute."

22. There is no challenge to the Chancellor's conclusions in paragraph 20(i)-(v). The focus of the appeal is exclusively on paragraph 20(vi). So far as that sub-paragraph is concerned, the Chancellor concluded that members of CIFF "owe fiduciary duties to act in the best interests of CIFF and not to act under a conflict of interest in considering a section 217 resolution", observing, among other things, that it would be "contrary to the whole regime established by the increasingly prescriptive legislative regime reflected in the Charities Act 2011 if the member of a company such as CIFF could vote in his own interests or in a manner detrimental to the charitable objects of the company" (see paragraphs 137 and 145 of the judgment). Going on, the Chancellor said this:

> "154 Leaving pragmatic grounds aside, the legal basis for my decision is, in my judgment, to be found in the particular circumstances of this case. Here, both the Commission and the trustees of CIFF have decided that their discretion to approve the Grant should be exercised by the court. That discretion has now been exercised. The discretion so exercised binds the charity and the charitable company, CIFF. Its management is only divided between trustees and members for specific purposes. Here the trustees of CIFF bound CIFF in relinquishing their discretion to the court, and the court order will bind CIFF in deciding that the Grant should be made. That means that, whilst the members must pass a resolution under section 217 to approve the Grant, it is not in this case open to any member of CIFF to vote against that resolution, once the court and the Commission have approved the Grant. The

> member does not have a free vote in this case because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction over the administration of charities. When the court has decided what is expressly in the best interests of a charity, a member would not be acting in the best interests of that charity if he gainsaid that decision. It is not a case of evaluating where on any scale the court's approval is located. The court has approved the Grant as being in the best interests of CIFF and charity in the exercise of its discretion and its decision must be respected. Moreover, the Commission has expressly approved the application to the court for an order under paragraph 10.2.7 of the Claim Form for '[s]uch … directions to the … Defendants or any of them, as the court shall think fit for the purpose of procuring (subject to the consent of the Charity Commission under s.201 Charities Act 2011) the passing of a resolution approving the payment of the Grant by the members of [CIFF] so as to satisfy the requirements of s.217 and/or s.218 Companies Act 2006 in relation to such payment'. The Commission, therefore, contemplated that the court might make directions aimed at procuring the passing of any necessary section 217 resolution. For these reasons, I would propose to make such an order directing Dr Lehtimaki to vote in favour of the resolution to approve the Grant.
>
> 155 I should not leave this aspect of the matter without emphasising the specific nature of the decision I have reached, and the exceptional character of this case. I have looked at numerous charities' cases over three centuries and the present position has not arisen before. It may never arise again. The position might be different if there were numerous independent members of the company, or if the trustees of CIFF had not relinquished their discretion to the court. But here, the Commission and CIFF asked the court to decide and it has done so. The court is not overriding the provisions of the Companies Act 2006. It is simply determining that in the circumstances of this case, the interests of CIFF and of charity demand that the Grant is approved. For that reason, the only remaining voting member of CIFF must be directed to approve it, otherwise the essential interests of charity which the court is there to protect would be put at risk."

23. It is also to be noted that the Chancellor explained:

i) In paragraph 135 of his judgment, that he was:

> "not saying that no reasonable trustee or fiduciary could disagree with my view, nor could I bearing in mind the way the matter was argued; nor, for the avoidance of doubt, am I saying that anyone who disagreed with my view would automatically be acting in bad faith"; and

ii) In paragraph 150 of his judgment, that he took the view that the Charity Commission "should be given its statutory opportunity in the light of this judgment to consider whether to approve the making of a members' resolution under section 217 of the Companies Act".

The parties' positions in outline

24. Mr Guy Morpuss QC, who appeared for Dr Lehtimäki, submitted that the Chancellor had no jurisdiction to direct his client to vote in favour of a resolution to approve the Grant. According to Mr Morpuss, CIFF's members are not fiduciaries, but the Court would not be entitled to intervene even if they were. Dr Lehtimäki, Mr Morpuss said, has had a role assigned to him by section 217 of the Companies Act 2006, and the Court could interfere with his exercise of his discretion only if he were acting in breach of duty, which he is not. Mr Robert Ham QC, who appeared for Sir Christopher, agreed.

25. In contrast, Lord Pannick QC, who appeared for Ms Cooper with Mr Simon Taube QC and Mr Edward Cumming QC, supported the Chancellor's decision, as did Mr Mark Mullen, who appeared for the Attorney General. Lord Pannick and Mr Mullen each submitted that the Chancellor was right to conclude that Dr Lehtimäki owed fiduciary duties. The leitmotiv of Lord Pannick's submissions was, however, that the Court has an inherent jurisdiction to supervise, control, and give directions for the regulation of the administration of a charity, where the Court considers this expedient. Lord Pannick maintained that Dr Lehtimäki is subject to this jurisdiction whether or not he is to be regarded as a fiduciary. The Chancellor was, in the circumstances, so Lord Pannick said, entitled to order Dr Lehtimäki to approve the Grant so as to prevent him from frustrating the Chancellor's (unappealed) determination that it is in the best interests of CIFF.

26. Mr Morpuss suggested that four ingredients can be extracted from paragraph 154 of the judgment, in which the Chancellor explained the legal basis for his decision. One is that "the trustees of CIFF bound CIFF in relinquishing their discretion to the court". A second is that the Charity Commission "contemplated that the court might make directions aimed at procuring the passing of any necessary section 217 resolution". The third and fourth are encapsulated in the sentence, "The member does not have a free vote in this case because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction over the administration of charities": in other words, the Chancellor was relying on (a) the fact (as he saw it) that members of CIFF have fiduciary obligations and (b) the Court's inherent jurisdiction over charities.

27. The battleground before us was on these last points. We did not understand either Lord Pannick or Mr Mullen to contend that the Court could direct Dr Lehtimäki how to vote merely because the Charity Commission envisaged that directions might be given in relation to a section 217 resolution or because there had been a surrender of discretion. They were, moreover, right not to advance such submissions. The fact that the Charity Commission contemplated the possibility of directions in connection with a section 217 resolution cannot have served to confer on the Court a power to override Dr Lehtimäki that it did not otherwise have. Further, CIFF's trustees had surrendered *their* discretion to the Court, but had, as we see it, no power to surrender any

discretion that Dr Lehtimäki enjoyed, and Dr Lehtimäki himself has been very clear that he is not surrendering any discretion.

28. In the circumstances, the issues we need to address are these:

    i) Is Dr Lehtimäki subject to any (and, if so, what) fiduciary duties ("the Fiduciary Duties Issue")?

    ii) Is the Court's inherent jurisdiction in relation to charities extensive enough to allow it to order a member to exercise a discretion in a particular way regardless of whether there is evidence of breach of duty on the part of the member ("the Inherent Jurisdiction Issue")?

    iii) In the light of the answers to the previous questions, was the Chancellor entitled, on the facts of the present case, to direct Dr Lehtimäki to vote for a resolution under section 217 of the Companies Act 2006 approving the payment of the Grant ("the Present Case Issue")?

29. We shall take these points in turn, but should first note that, while helpfully drawing the Court's attention to certain matters, Mr William Henderson, who appeared for CIFF, sensibly did not advance substantive submissions.

The Fiduciary Duties Issue

30. As a general rule, the directors of a company are subject to fiduciary duties but its shareholders are not. Although the case law contains statements to the effect that members of a company must exercise their votes "bona fide for the benefit of the company as a whole" (stemming, it seems, from *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, at 671), it has also been "repeatedly laid down that votes are proprietary rights, like other incidents of shares, which the holder may exercise in his or her own selfish interests even if these are opposed to those of the company" (Gower's Principles of Modern Company Law, 10th ed., at paragraph 19-4). As Dixon J observed in *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457, the shareholders of a company "are not trustees for one another, and unlike directors, they occupy no fiduciary position and are under no fiduciary duties". "They vote", Dixon J continued, "in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage".

31. Mr Morpuss argued that, in this respect, the members of a charitable company limited by guarantee are in no different position. Far from having fiduciary obligations, Mr Morpuss said, they are entitled to vote in their own interests, without regard to the interests of the charity.

32. Mr Morpuss sought support for his submissions in passages from textbooks on charity law (Picarda, "The Law and Practice Relating to Charities", 4th ed., at 287, and Tudor on Charities, 10th ed., at paragraphs 17-003 to 17-005). He also referred us to the highly influential work by Finn J (as he was later to become), "Fiduciary Obligations", dating from 1977. Finn J observed (in paragraph 13 of "Fiduciary Obligations") that those recognised as fiduciaries "possess certain common characteristics":

> "First, the position held by each of them exists, not for his own, but for another's benefit – in the case of the director, for example, for the company; in the case of the trustee in bankruptcy, for the creditors. Secondly, the duties imposed on, and the powers exercised by, each have a source *other than* in an agreement between him and the person(s) for whose benefit he is required to act – with the receiver, for example, they stem from the order of the court; with the executor, from the will, legislation and the general law. Thirdly, as a general rule, each alone is ultimately responsible for determining how those duties are to be discharged, how those powers are to be exercised."

In the present case, Mr Morpuss submitted, none of these characteristics exists. That there is no general obligation on members of a charitable company to act in the interests of the charity rather than his own is confirmed, Mr Morpuss suggested, by the fact that the Charity Commission recognises that people sometimes become members of a charity with a view to "tangible benefits, for example reduced admission fees to historical sites or particular areas" and "many members are involved primarily in order to gain access to information" (see "RS7 - Membership Charities", at 17). With regard to the second characteristic, Mr Morpuss contended that the relationship between a charitable company and its members "is not imposed upon the charity", but is "one created by the charity itself, and regulated by the charity's own rules and constitution". As for the final (and "decisive" – see paragraph 25 of "Fiduciary Obligations") characteristic, members have, Mr Morpuss observed, very limited powers, and the Charity Commission is always there in the background, with the consequence that "[n]one of the members' rights can freely be exercised so as to necessitate the intervention of Equity".

33. To illustrate the problems to which an imposition of fiduciary duties would give rise, Mr Morpuss cited the National Trust. It would, he said, be impossible to police fiduciary obligations owed by the very large number of members of such an organisation. Further, members would be unable to vote if, say, a resolution were proposed to remove the right to free parking at National Trust properties.

34. Mr Morpuss also drew a comparison with section 220 of the Charities Act 2011 (by which Parliament expressly stipulated that each member of a charitable incorporated organisation (or "CIO") "must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO") and relied on *Bolton v Madden* (1873-74) LR 9 QB 55. That case concerned a charity whose objects were selected by its subscribers. It was agreed between the parties, who were both subscribers, that the plaintiff would vote for an object favoured by the defendant, who, in return, would vote at the next election for an object favoured by the plaintiff. The defendant having failed to fulfil his promise, a question was raised as to whether it was enforceable. The Court of Queen's Bench held that it was. Blackburn J, giving the judgment of the Court, said:

> "The argument for the defendant was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff, if he gave his votes at the first election to what he thought the best candidate, incurred neither

> trouble nor prejudice, so that there was in that point of view no consideration; and if he gave his votes to the candidate whom he did not think the best, the whole agreement was void as against public policy.
>
> But though some of us, at least, much disapprove of this kind of traffic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power."

35. For his part, Mr Ham said that, unlike its directors, CIFF's members "sit outside the company". He also invoked the principle that "a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose" (to quote from Millett J's judgment in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495, at 505), manifested in the trust context in the "fraud on a power" doctrine. This means, Mr Ham said, that any exercise of his voting rights by a member of a charitable company for an improper purpose (e.g. to obtain a personal benefit for himself from the charity) would be invalid irrespective of whether he is a fiduciary. There can therefore, Mr Ham suggested, be no question of needing to recognise fiduciary duties to prevent such conduct.

36. On the other hand, membership of a charitable company limited by guarantee is very different from ownership of shares in a non-charitable company. A company cannot be charitable without being "established for charitable purposes only" (see section 1(1) of the Charities Act 2011). Its assets will be devoted exclusively to charitable purposes, not the private interests of its members. While, therefore, a share is property and the right to vote attached to it "an incident of property to be enjoyed and exercised for the owner's personal advantage", membership of a charitable company confers no proprietary rights. It brings with it, not property, but functions in connection with assets appropriated to charity in which the member has no personal stake. In the particular case of CIFF, the point is reinforced by the provisions mentioned in paragraph 6 above (stipulating, for example, that "property and funds of the Charity must be used only for promoting the Objects and do not belong to the members of the Charity").

37. Turning to the "common characteristics" that Finn J identified in "Fiduciary Obligations", the arguments for saying that a member of CIFF lacks them do not appear to us to be compelling. In the first place, there is, as it seems to us, a very strong case for considering such membership to exist for the benefit of the charity, not the member. After all, as we have already said, CIFF is "established for charitable purposes only" and its assets "must be used only for promoting the Objects and do not belong to the members". Secondly, while the provisions of a company's constitution "bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions" (section 33(1) of the Companies Act 2006), "the articles of association of a company differ very considerably from a normal contract" (per Dillon LJ in *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693, at 696) and they derive their binding force "not from a bargain struck between parties but from the terms of the statute" (per Steyn LJ in the *Bratton Seymour* case, at 698). Moreover, the powers and duties of members of a charitable company, like those of its directors, will depend on the

general law as well as the memorandum and articles. Thirdly, we do not see why the limited extent of members' powers or the fact that a regulator such as the Charity Commission can potentially intervene in certain circumstances should be taken to mean that they do not have sufficient responsibility for determining how their powers are exercised. The focus must be on the extent to which they are constrained in the powers that they *do* have, and they are less obviously exposed to Charity Commission supervision than directors, who are undoubtedly fiduciaries.

38. It is also to be noted that Finn J said this on the subject of "who is a 'fiduciary'" in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 as a member of the Federal Court of Australia (at paragraph 177):

> "while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest".

Writing extra-judicially, Finn J drew attention to the relevance of asking "for what purpose one party has acquired rights, powers and duties in the relationship: to promote his own interests, the joint interest, or the interests of the other party alone", noting that the latter two indicate a fiduciary relationship (see "The Fiduciary Principle", in "Equity, Fiduciaries and Trusts", ed. T.G. Youdan, 1989).

39. In the present case, a member of CIFF can, we think, be said to assume by his membership "a responsibility to [CIFF] as would thereby reasonably entitle [CIFF] to expect that he or she will act in [CIFF's] interest to the exclusion of his or her own or a third party's interest" and to acquire powers "to promote … the interests of [CIFF] alone".

40. Several cases dealing with the status of power-holders in private trusts also, as it seems to us, lend at least a degree of support to the proposition that members of CIFF have fiduciary duties. The earliest such case to which we were referred is *Re Skeats' Settlement* (1889) 42 Ch D 522. That case concerned a marriage settlement which empowered the husband and wife to appoint any "other" person to be a trustee or trustees. They purported to appoint the husband and another person as trustees, but the appointment was held invalid, in part on the basis that the power had a "fiduciary character". Kay J said (at 526):

> "The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose. Is that power of selection a fiduciary power or not? I will try it in this way, which I offered as a test in the course of the argument. Suppose, as happens not

> unfrequently, that trustees, under the terms of the deed of trust, are entitled to remuneration by way of annual salary or payment. Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer is inevitable. Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is a fiduciary power."

41. The next case, *Vestey's Executors v Inland Revenue Commissioners* [1949] 1 All ER 1108, involved a trust under which the trustees were required to invest at the direction of "authorised persons" (initially, the settlors). The House of Lords held that the authorised persons' power of direction was (in the words of the headnote) "a fiduciary power and must be used, not to benefit themselves, but in the best interests of the beneficiaries". Lord Simonds said (at 1115):

> "But, if I ask how any court of equity would regard this power, it seems to me that the only answer must be that it is a fiduciary power to be exercised with a single eye to the benefit of the beneficiaries. Let me suppose that the authorised persons, who may for this purpose be either the Vestey brothers or those who later answer that description (since the character of the power will not vary with those who exercise it) direct the trustees to invest the trust funds by way of loan to themselves at a low rate of interest without security, and that the trustees, regarding such an investment as very precarious, apply to the court and ask whether they must comply with the direction. In such a case it would, as it appears to me, be an irrelevant plea by the authorised persons that the right to direct investment was merely a part of a scheme for avoiding liability to income tax. The court could see nothing but a settlement with a wide power of investment of the trust funds and a mandate to the trustees to invest at the direction of certain persons. Nothing short of the most direct and express words would, I think, justify a construction which would enable those who exercised the power of direction to disregard the interests of the beneficiaries."

In a similar vein, Lord Morton concluded (at 1132):

> "The result is that, in my view, on the true construction of the trust deed, the power of direction is a fiduciary power, and the authorised persons are not entitled to use it for the purpose of obtaining a benefit for themselves. They must exercise it *bona fide* in what they consider to be the best interests of the beneficiaries."

42. In the final case, *Inland Revenue Commissioners v Schroder* [1983] STC 480, a trust provided for the settlor to have power to appoint members of a "committee of protectors", which itself could appoint and remove trustees. Vinelott J said this about these powers (at 500):

> "The power to remove trustees is vested in the committee, and although the settlor can fill vacancies or possibly appoint additional members of the committee even when there is no vacancy, that power, like the power to appoint new trustees, must I think be a fiduciary power. It could not properly be used to 'pack' the committee to ensure that the settlor has a majority which will follow his directions. Similarly, the committee's power to remove and his power to appoint new trustees are fiduciary powers."

43. Powers relating to the administration of trusts have thus been held to have a fiduciary character. An analogy can be drawn with the powers that members of CIFF have in connection with its administration. It is noteworthy, too, that the Charity Commission has said as regards "Members' voting obligations" that it "considers that the rights that exist in relation to the administration of a *charitable* institution are fiduciary, regardless of the identity of the person or persons on whom the rights are conferred" (see "RS7 – Membership Charities").

44. We do not think that *Bolton v Madden* shows otherwise. Mr Morpuss himself spoke of the decision as an "indicator", not an "answer". It related to subscribers rather than members and there is no mention in the report of fiduciary duties.

45. In all the circumstances, we agree with the Chancellor that members of CIFF owe fiduciary duties. It seems to us that, contrary to Mr Ham's submissions, members do not "sit outside the company" but are (as the Chancellor said) "part of the administration of the charity" with "powers that are all directed at aspects of the management and administration of the charity designed to achieve the charity's exclusively charitable objects" (see paragraphs 141 and 145 of the judgment).

46. It does not necessarily follow that members of charities such as the National Trust also have fiduciary obligations. Since we are not dealing with such an organisation, we do not need to decide whether their members are in the same position as CIFF's. There may possibly, moreover, be scope for argument as to whether it is less reasonable to expect those belonging to mass-membership charities to act exclusively in the charities' interests. That said, it is far from clear that it should be legitimate for members of, say, the National Trust to vote to obtain benefits for themselves from an entity with exclusively charitable objects.

47. Mr Ham reminded us of these well-known words of Frankfurter J in *Securities & Exchange Commission v Chenery Corporation* 318 US 80 (1943):

> "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?"

In the present case, the Chancellor said that it was "not necessary … to decide in detail the nature and extent of the members' fiduciary duties", but (echoing the Charity Commission's "RS7 – Membership Charities") held that, "at least in the circumstances of this case, 'members [of CIFF] have an obligation to use their rights and exercise their vote in the best interests of the charity for which they are a member'" (paragraph 145 of the judgment). It would, the Chancellor considered, "be contrary to the whole regime established by the increasingly prescriptive legislative regime reflected in the Charities Act 2011 if the member of a company such as CIFF could vote in his own interests or in a manner detrimental to the charitable objects of the company" (paragraph 145 of the judgment).

48. Like the Chancellor, we do not think it necessary to rule on the precise scope of the fiduciary duties owed by members of CIFF. It is sufficient to say that a member of CIFF owes, in our view, a duty corresponding to that specifically imposed on members of CIOs by section 220 of the Charities Act 2011. In other words, the member must exercise the powers that he has in that capacity in the way that *he* decides, in good faith, would be most likely to further the purposes of CIFF. It should be stressed that this duty is subjective: in other words, that what matters is the member's state of mind (compare e.g. *Regentcrest plc v Cohen* [2001] 2 BCLC 80, at paragraph 120, dealing with company directors).

The Inherent Jurisdiction Issue

49. The next question is whether the Court's inherent jurisdiction in relation to charities is extensive enough to allow it to order a member to exercise a discretion in a particular way regardless of whether there is evidence of breach of duty on the part of the member.

50. In general, the Court is slow to interfere with the exercise of discretion by fiduciaries (such as we have held members of CIFF to be). Numerous trust cases show that to be the case. In *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, Robert Walker J explained (at 717) that trustees must "act in good faith, responsibly and reasonably" and "inform themselves, before making a decision, of matters which are relevant to the decision". As, however, Lord Walker (as he had by then become) noted in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 (at paragraph 73), it is not enough to justify judicial intervention to show that "the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way". Rather longer ago, Lord Truro LC said in *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 (which, as the name indicates, related to a charity) (at 448):

> "in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases".

Again, in *Tempest v Lord Camoys* (1882) 21 Ch D 571 Jessel MR said (at 578):

> "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The Court says that the power, if exercised at all, is to be properly exercised."

51. Ms Cooper and the Attorney General, however, maintain that different principles apply in relation to charities. It is their case that the Court can give directions to members of charitable companies (or, as appropriate, directors of such companies or trustees of charitable trusts) where it considers that expedient in the administration of the charities.

52. It is, of course, very well-established that the Attorney General and the Court have important functions in relation to charities. In *Gaudiya Mission v Brahmachary* [1998] Ch 341, Mummery LJ observed (at 350) that "[u]nder English law charity has always received special treatment" and that "[a]lthough not a state institution, a charity is subject to the constitutional protection of the Crown as *parens patriae*, acting through the Attorney-General, to the state supervision of the Charity Commissioners and to the judicial supervision of the High Court". In *Stanway v Attorney General* (5 April 2000, unreported), Sir Richard Scott V-C said:

> "Charities operate within a framework of public law, not private law. The Crown is *parens patriae* of the charity and the judges of the courts represent the Crown in supervising what the charity is doing and in giving directions …. The Attorney General's function is to make representations to the court as to where lies the public interest as he sees it."

53. Lord Pannick relied on *Construction Industry Training Board v Attorney General* [1973] Ch 173 and *In re J. W. Laing Trust* [1984] Ch 143 as demonstrating the breadth of the Court's jurisdiction in relation to charities. Taking these in reverse order, the *J. W. Laing* case involved an application by the trustee of a charity for a scheme enabling the trustees for the time being to be discharged from an obligation to distribute capital within 10 years of the settlor's death. The trustee contended that the scheme should be ordered under either section 13 of the Charities Act 1960 (dealing with cy-près schemes) or the inherent jurisdiction of the Court. Peter Gibson J decided that section 13 was not applicable, but approved the scheme in exercise of the inherent jurisdiction, taking the view (at 155) that the requirement as to distribution of capital was "inexpedient in the very altered circumstances of the charity". He had earlier (at 153) accepted a submission that, in the context of the inherent jurisdiction, "the court is not fettered by the particular conditions imposed by section 13(1)(e)(iii) [of the Charities Act 1960], but can, and should, take into account all the circumstances of the charity, including how the charity has been distributing its money, in considering whether it is expedient to regulate the administration of the charity by removing the requirement as to distribution within ten years of the settlor's death".

54. We do not think that this authority is of any help in the present case. Schemes are a distinctive feature of charity law. There is more than one species. A scheme may be made (by the Attorney General on the Crown's behalf under the sign manual if no trust has been imposed and otherwise by either the Charity Commission or the Court) where property is given for charity, but the purposes are uncertain. A cy-près scheme involves altering a charity's purposes. An administrative scheme enables changes to be made to the administrative provisions governing a charity. In the *J. W. Laing* case, Peter Gibson J approved a scheme of the last of these types. In the present case, in contrast, no one has ever applied for any kind of scheme and there is nothing in either the Chancellor's judgment or his order to suggest that he was approving a scheme. In the course of his oral submissions, Lord Pannick suggested that "the term 'scheme' is simply the label given to an order in relation to its judgment as to what is expedient, advantageous, in the interests of charity", but we do not think that is right. The Chancellor cannot, as we see it, be taken to have made an order for a scheme when no one had asked him to do so and he was not purporting to exercise any scheme jurisdiction. In that connection, it is noteworthy that in *Chinachem Charitable Foundation Ltd v The Secretary of Justice* [2015] HKCFA 35, Lord Walker NPJ referred to a scheme as "a written instrument approved by the court to regulate, in whole or in part, the future management and administration of the trust". The Chancellor's order did not provide for the approval of such a "written instrument". The circumstances in which the Court can make a scheme are not, in the circumstances, relevant. In any case, we cannot see either how a scheme could obviate a need to comply with section 217 of the Companies Act 2006 or that the Court's scheme jurisdiction could enable it to interfere with a member's vote on a resolution under that provision where it would not otherwise be entitled to do so.

55. Turning to *Construction Industry Training Board v Attorney-General*, the question here was whether the Construction Industry Training Board was registrable as a charity. This turned on whether it was "subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities" within the meaning of section 45(1) of the Charities Act 1960 (see now section 1(1) of the Charities Act 2011). The Court of Appeal had to consider the significance of (a) "the court's jurisdiction with respect to charities" and (b) "subject to the control of the High Court". With regard to the former, Russell LJ, having noted that the term "charity proceedings" was defined to refer to proceedings "brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes", said this (at 181):

> "The court has always had a general jurisdiction in respect of enforcement of trusts, and in relation to trusts of property dedicated to a charitable purpose a special jurisdiction by way of scheme to amend defects in machinery and further to direct in proper cases a cy-près application of assets. But I do not think that the double aspect of the definition of 'charity proceedings' indicates that 'jurisdiction with respect to charities' must be restricted to such jurisdiction that is unconnected with the enforcement of trusts. Rather I should have said that it was to avoid argument on a plainly vexed question."

Buckley LJ likewise did not consider "the court's jurisdiction with respect to charities" to be confined to its jurisdiction to approve schemes. He explained (at 186-187):

> "It is a function of the Crown as *parens patriae* to ensure the due administration of established charities and the proper application of funds devoted to charitable purposes. This it normally does through the instrumentality of the courts, but this is not the only way in which the Crown can regulate charities or the application of charitable funds. Where a charity has been incorporated by Royal Charter, the Crown may amend its constitution or vary its permitted objects by granting a supplemental charter. Where funds are given for charitable purposes in circumstances in which no express or implied trust is created, the Crown can regulate the application of those funds by means of a scheme under the sign manual. Where the Crown invokes the assistance of the courts for such purposes, the jurisdiction which is invoked is, I think, a branch of the court's jurisdiction in relation to trusts. In such cases the relief granted often takes the form of an order approving a scheme for the administration of the charity which has been laid before the court, but this is not the only way in which the court can exercise jurisdiction in respect of a charity or over charity trustees. The approval of a scheme of this nature is, so far as I am aware, a form of relief peculiar to charities, but it does not constitute relief of a kind given in the exercise of a jurisdiction confined to giving relief of that sort. The court could, for instance, restrain trustees from applying charitable funds in breach of trust by means of an injunction. In the case of a charity incorporated by statute this might, as was suggested in the present case, be explained as an application of the doctrine of ultra vires, but I do not think that this would be a satisfactory explanation, for a similar order upon unincorporated trustees could not be so explained. Or, by way of further example, the court could order charity trustees to make good trust funds which they had misapplied, or could order them to account, or could remove or appoint trustees, or could exercise any other kind of jurisdiction available in the execution of trusts other than charitable trusts. In every such case the court would be acting upon the basis that the property affected is not in the beneficial ownership of the persons or body in whom its legal ownership is vested but is devoted to charitable purposes, that is to say, is held upon charitable trusts. Any relief of this kind is, in my judgment, appropriately described as relief granted in the exercise of the court's jurisdiction with respect to charities, and, where the relief is such as to bind the body of trustees as a whole, this would, in my opinion, constitute control of the charity by the court in the exercise of its jurisdiction with respect to charities. I consequently feel unable to accept the suggestion put forward on behalf of the Attorney-General that

> the reference in section 45 of the Act of 1960 to the court's jurisdiction with respect to charities is in some way confined to its jurisdiction to approve charitable schemes."

56. The Court divided on whether the Construction Industry Training Board was "subject to the control of the High Court", the majority (Buckley LJ and Plowman J) considering that it was and, hence, that it was a charity, Russell LJ disagreeing. As to this, Russell LJ said (at 184):

> "On the whole, I consider that the reference in the definition to the control of the court in the exercise of the stated jurisdiction is designed to point to a charitable institution in respect of which the court has power generally to supervise and direct the administration, to supply any defects in the regulations when such are revealed, to remove and appoint where necessary for the due administration of the institution trustees or governors, to make orders where necessary for that due administration as to vesting and otherwise of assets of the institution, and to make schemes for the cy-près application of assets in appropriate cases. In any given case it may be a question of degree whether an institution can fairly be said to be, within that jurisdiction, under the control of the court. But my conclusion is that an institution so closely under the control of the executive as is one of these training boards, with such minimal occasion for intervention by the court, is outside the statutory definition of 'charity.'"

57. Lord Pannick submitted that the broad nature of the Court's jurisdiction can be seen in, for example, Buckley LJ's observation that "an order approving a scheme for the administration of the charity which has been laid before the court … is not the only way in which the court can exercise jurisdiction in respect of a charity or over charity trustees" and Russell LJ's reference to the Court having "power generally to supervise and direct the administration". We do not think, however, that the *Construction Industry Training Board* case in fact casts any light on whether the Court can give directions to members, directors or trustees of a charity wherever it considers that expedient, in the absence of either a scheme or a breach of duty. The Court did not need to consider, and did not attempt to rule on, any such issue. Its concerns were essentially as to, first, whether "the court's jurisdiction with respect to charities" extended beyond scheme-making (in particular, to the Court's "general jurisdiction in respect of enforcement of trusts") and, secondly, whether powers that the Minister of Labour had in relation to the Construction Industry Training Board rendered it insufficiently "subject to the control of the High Court".

58. Lord Pannick also made reference to the rule in *Saunders v Vautier* (1841) Beav 115. The rule is summarised in Snell's Equity, 33rd. ed., as follows (at paragraph 29-030):

> "Although the beneficiaries cannot, in general, control the trustees while the trust remains in being, or commit them to a particular dealing with the trust property, they can, if sui juris and together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust

> property as they direct; and this is so even if the trust deed contains express provisions for the determination of the trust."

In the case of a charity, Lord Pannick said, the Attorney General represents the beneficial interest. Nonetheless, it is hard to see how the rule can apply in the case of a charity and, more specifically, there is no question of "put[ting] an end" to CIFF. The rule cannot, therefore, be applicable.

59. For his part, Mr Mullen took us to *Attorney General v Gleg* (1738) 1 Atk 356, a decision of Lord Hardwicke LC. The brief report includes this:

> "But though this is such an authority coupled with an interest as would survive, yet it is so far a trust, that in case of misbehaviour the court may interpose, for it must be allowed, that the court has a particular free and extensive jurisdiction in the case of a charity, and not confined to the proper or formal methods of proceeding requisite in other cases."

Given, however, the reference to "misbehaviour", the case does not assist on the extent of the Court's powers absent a breach of duty.

60. Mr Mullen relied, too, on *Attorney General v Dedham School* (1857) 23 Beav 350. That case, however, involved an order for a scheme and so is not in point here. Nor, for similar reasons, is *In re Royal Society's Charitable Trusts* [1956] Ch 87, a case to which we were taken by Lord Pannick, where Vaisey J concluded (at 92) that the Court had jurisdiction, "at the instance of the trustees … where the Attorney-General consents or does not object", to authorise certain proposals "*by way of scheme*".

61. Support for the view that the Court does not have as wide a jurisdiction to give directions as Lord Pannick and Mr Mullen suggested is to be found, for example, in the passage from *Re Beloved Wilkes's Charity* quoted in paragraph 50 above; in Lewin on Trusts, 19th ed., which (at paragraph 29-338) expresses the view that charitable trusts are covered by the "Principle of non-intervention" applicable to private trusts; and in the decision of the Upper Tribunal (Tax and Chancery Chamber) (Warren J and Upper Tribunal Judges Alison McKenna and Elizabeth Ovey) in *R (Independent Schools Council) v Charity Commission* [2011] UKUT 421 (TCC), [2012] Ch 214. When considering what a school with charitable status must do to operate for the public benefit (in accordance with the Charities Act 2006), the Tribunal said (at paragraph 220 of its decision):

> "This is all a matter of judgment for the trustees. There will be no one right answer. There will be one or more minimum benefits below which no reasonable trustees would go but subject to that, the level of provision and the method of its provision is properly a matter for them and not for the Charity Commission or the court …. It is not for the Charity Commission or the tribunal or the court to impose on trustees of a school their own idea of what is, and what is not, reasonable. The courts have never done that in the context of their supervision of trustees of private trusts and the same should apply to charities. There is nothing in the 2006 Act

> (including the duty to issue the guidance) which changes that position. But trustees are under the ultimate control of the courts. There is always a range of actions which they can take in a given situation. There is, of course, a limit outside which they must not step."

62. The upshot, in our view, is that, apart from its scheme-making powers, the Court has no wider jurisdiction to control the actions of fiduciaries in the context of charities than, say, private trusts. The Court cannot, accordingly, direct a fiduciary (including a member of CIFF) how to exercise his powers unless he is acting in breach of duty. Important though its role in relation to charities is, the Court is not entitled, absent a breach of duty, to substitute its view for that of the fiduciary. If, contrary to the conclusion we reached above, a member of CIFF were not subject to any fiduciary duties, the Court could have no more (in fact, less) power to control the member. In short, the answer to the question posed in paragraph 49 above is "No".

63. That does not strike us as a surprising conclusion. It is very far from evident that the Court should be able to override the views of a charity's duly appointed organs if they are fulfilling their roles properly, the more so since those organs will typically be more familiar with the charity's affairs and work than a Judge. In fact, we agree with Mr Ham that there would be a risk of dis-incentivising not only donors, but also members and trustees, if the Court could order a charity's trustees and members to exercise their powers in ways that they did not consider appropriate merely because the Court thought that expedient.

64. In the present case, there is a further reason for thinking that the Court could not be justified in intervening unless it were apparent that Dr Lehtimäki was acting improperly. Between them, section 217 of the Companies Act 2006 and section 201 of the Charities Act 2011 require a payment such as the Grant to be "approved by a resolution of the members of the company" with "the prior written consent of the [Charity] Commission". It is significant that Parliament has entrusted this responsibility to the members of a company, not only for the generality of companies but specifically and expressly for charitable companies. The Chancellor considered that the Charity Commission should be afforded "its statutory opportunity … to consider whether to approve the making of a members' resolution under section 217 of the Companies Act", but made an order denying Dr Lehtimäki any choice as to whether to approve the transaction in accordance with section 217. In effect, Dr Lehtimäki is being prevented from playing the part that, in the circumstances, Parliament has assigned to him. We do not think that it could be appropriate to interfere with the statutory scheme in such a way unless there were impropriety.

The Present Case Issue

65. The conclusions we have arrived at thus far mean that the Chancellor would not have been entitled to order Dr Lehtimäki to vote for a resolution under section 217 of the Companies Act 2006 approving the payment of the Grant unless there was evidence of Dr Lehtimäki acting in breach of fiduciary duty.

66. In that connection, the Chancellor said this (in paragraph 152 of his judgment):

> "It would be remarkable if the High Court, having reached a reasoned and considered decision as to the desirability of the Grant in the best interests of CIFF, had to defer to the eccentric, if good faith, decision made by a single member when all other members were conflicted. I say eccentric, because Dr Lehtimaki has made it abundantly clear that he is motivated entirely by an economic approach and regards himself as only acting in the best interests of unspecified beneficiaries of the charity, rather than by the correct legal principles that I have stated. It is anyway in my judgment questionable whether Dr Lehtimaki would be acting on a proper basis if he rejected the court's reasoned decision as to the appropriate course for CIFF to adopt."

67. In our view, however, there was (and is) no significant evidence that Dr Lehtimäki was acting (or proposing to act) in breach of duty. As already mentioned (paragraph 23(i) above), the Chancellor himself recorded that he was "not saying that no reasonable trustee or fiduciary could disagree with [his] view" or that "anyone who disagreed with [his] view would automatically be acting in bad faith". Now that the Chancellor has concluded that the Grant is in the best interests of CIFF, Dr Lehtimäki should obviously consider his views with care, but it remains the case, we think, that it is reasonably open to Dr Lehtimäki to disagree. After all, the Chancellor found the decision "not … entirely straightforward", recognised that "it is not entirely clear why disposing of assets of US$360 million should be regarded as being in the best interests of CIFF" and noted that he had arrived at his conclusion "perhaps counter-intuitively" (see paragraph 128 of the judgment, quoted in paragraph 21 above).

68. The Chancellor spoke of Dr Lehtimäki making an "eccentric" decision, on the basis that Dr Lehtimäki had "made it abundantly clear that he is motivated entirely by an economic approach and regards himself as only acting in the best interests of unspecified beneficiaries of the charity" (paragraph 152 of the judgment). In that connection, Dr Lehtimäki (an economist with degrees from Stanford and Harvard Universities) had said the following in a witness statement in which he explained his "decision-making process":

i) Although Sir Christopher was a very dear friend, he took his fiduciary duties seriously and would not allow his judgment to be impaired by personal factors;

ii) "The focus should always be on the best interests of CIFF's beneficiaries";

iii) The arguments for and against the Grant could be divided into "Direct factors" (comprising "The net effect on CIFF's charitable work" and "Solving the governance problem") and "Secondary factors" ("The overall impact on the UK charitable sector" and "The negative precedents of making the Grant");

iv) "I would reiterate that the only people I have a fiduciary duty towards are the intended recipients of CIFF's charitable work. While my reasoning is abstract, I find it useful to visualize the person to whom I am answerable for when taking decisions. To me, this is the HIV positive young woman with her HIV negative child I met in Mutare Hospital in Manicaland, Zimbabwe (whose husband was beating her up because taking the necessary medicines was an

embarrassment for his family). I am not a 'soft' person, but with that image in mind, choices become much easier";

v) "Thus the only consideration to the Grant is whether it is a net benefit to the children in developing countries. If it is, then it should be paid. If it is not, then it should not be paid. It is that simple"; and

vi) The analyses that he had carried out made him think that it was "very difficult – on the currently available evidence – to decide whether the Grant is in the best interests of CIFF's beneficiaries".

69. Dr Lehtimäki's evidence evidently jarred with the Chancellor, but we cannot see that it betrays any breach of duty on Dr Lehtimäki's part. It does not show Dr Lehtimäki to be acting otherwise than "in good faith, responsibly and reasonably" or to be failing to "inform [himself], before making a decision, of matters which are relevant to the decision" (to adapt slightly Robert Walker J's words in *Scott v National Trust for Places of Historic Interest or Natural Beauty*). In fact, we did not understand Lord Pannick or Mr Mullen to press any argument to the contrary.

70. In all the circumstances, we do not, with the greatest respect, consider that the Chancellor was entitled to order Dr Lehtimäki to vote in favour of the Grant's approval.

Conclusion

71. The appeal will be allowed.