

## Trustees' legal responsibilities and liabilities

**What are the Risks of Becoming a Trustee? Andrew Studd and Sukanya Ransford of the law firm Russell-Cooke give their expert view**

The rewards of being a trustee, and giving back to society, should outweigh any worries about liabilities which potential trustees might have. However, anyone considering taking up the role will want to know what legal duties, responsibilities and potential liabilities are involved. While most people in the sector would find it difficult to name a single situation in which a trustee has actually suffered personal loss and liability for innocent trustees, anyone wishing to become a trustee should know what the potential risks could be.

Many of us are concerned about managing risk in the activities we undertake. Trustees will want to know what risks they could potentially face and claims that may be brought against them. Despite the potential risks, cases where action has been taken by the Charity Commission or by the Courts against trustees are almost unheard of amongst the 164,000 registered charities in England and Wales. The Charity Commission and the courts appreciate that trustees are only volunteers and they do not seek to punish them except in the most serious cases of fault or neglect. So don't be put off.

### Trustees' Duties

Liabilities arise out of the duties the trustee takes on for the organisation they are appointed by and apply whether the organisation is unincorporated, a trust or a charitable incorporated organisation. By accepting the 'job' of trustee, you agree to do the 'job' properly. The law and the governing document set out the minimum that must be done to achieve this. If you fall below that minimum, the charity itself, the Charity Commission or the courts may take action which may result in personal liability. Such action is in fact very rare. Personal liability generally only arises if the failure to discharge duties actually causes loss to the charity or improper gain to the trustee.

Key trustees' duties include:

- Managing conflicts of interest - a trustee must act with integrity and must disclose any conflict of interest to the charity
- Not accepting personal benefits - a trustee cannot accept or direct any benefit from being a trustee unless it is authorised by the charity's governing document or by the Charity Commission
- Acting within the objects and the powers of the charity's governing document
- Safeguarding the assets - this means ensuring that money is invested prudently
- Acting with care - using specialists and advisers when required
- Acting collectively - trustees must act as a group despite any dominant individuals on the Board

If trustees do not discharge these duties they may be personally liable to replace the loss, be liable to criminal prosecutions or be barred from being a trustee in the future. One of the main duties of a trustee is not to receive any personal benefits or payments, be they direct or indirect, unless the governing document or the Charity Commission has authorised it. Any such benefit that a trustee does receive could result in the trustee being obliged to repay the benefit he received. This is why individuals cannot be paid for carrying out their duties as trustees.

## Duties of Company Directors

Trustees of charitable companies have additional statutory duties albeit very similar to charity trustee duties but as trustees of a charitable company they will also be directors. Company directors have a series of duties under the Companies Act 2006. Like trustee duties, these arise because they are directors of an incorporated body and can be enforced against them personally. These can be summarised as:

- a duty to act within the powers of the governing document
- a duty to achieve the charitable purposes of the company but having regard to other factors such as the consequences for employees
- a duty to exercise independent judgement
- a duty to exercise reasonable care, skill and diligence - this means not just being careful, but using the general knowledge, skill and experience that would be reasonably expected of someone carrying out your functions as well as any special skills or knowledge that you had
- a duty to avoid conflicts of interest
- a duty not to accept benefits from third parties by reason of being a director and doing or not doing something
- a duty to declare an interest in any proposed transaction or arrangements

The Charity Commission has produced a number of helpful documents summarising what trustees' duties are, in particular **CC3 The Essential Trustee** and **CC60 Hallmarks of an Effective Charity**. The Charity Commission emphasises that it is only likely to enforce personal liability where a trustee has acted dishonestly or recklessly however recent criticism of the Charity Commission, and the practices of certain charities, mean the Commission is taking a tougher stand. The Commission's chief executive has stated that charities will no longer be given the benefit of the doubt.

Under the Charities Act 2006 the Charity Commission has the ability to relieve a trustee from personal liability for breach of trust or breach of duty if the trustee has acted honestly and reasonably and ought fairly to be excused.

## Where do liabilities come from?

Liabilities fall into the two categories of governance liabilities and operational liabilities. Governance liabilities arise from the duties that a trustee has. For example, where a trustee has entered into a contract with an organisation that benefited the trustee. The trustee has to repay the improperly obtained profit.

### Operational liabilities

Operational liabilities are liabilities incurred by the organisation because of what the organisation does. For example, where the trustee of an unincorporated charity signed a lease for the organisation and it fails to pay the rent. Unlike governance duties, they do not arise from the trustees' personal duties. Where operational liabilities ultimately fall will depend upon whether the organisation is incorporated i.e. whether it was established as (or has become) a company limited by guarantee, a charitable incorporated organisation or other corporate entity. If the charity is incorporated then operational liabilities generally fall on the organisation.

Incorporation will reduce the risks trustees will face as the charity has its own legal personality and therefore the charity is able to enter into contracts in the name of the charity rather than in the trustees' names. The trustees and the members will have limited liability and therefore the charity itself will be responsible predominantly for the liabilities of the charity. Members' liability is limited to the amount of their guarantee for a company limited by guarantee. If the charity is not incorporated and cannot meet its obligations, the trustees are personally liable and the members of an association may be liable as the charity does not have its own separate legal personality.

If an incorporated organisation cannot meet the liability, it may have to be wound up. But the trustees are not themselves personally liable except for in circumstances where they have breached their trustees' duties or where, for example, they have been involved in wrongful trading. Wrongful trading is an offence of carrying on running the operation and incurring debts once it becomes clear or should have become clear to a reasonable person that there is no prospect of the organisation being able to meet those obligations. Once an incorporated body becomes insolvent, the duties of its trustees are to ensure that creditors are protected and that no steps are taken which would prejudice creditors or increase their losses.

As operational liabilities arise out of what the charity does or does not do, there is an enormous range of acts or omissions that could cause liability. The services you provide, the property you own, the staff you employ, the statements and publications you produce, the people you interact with, the co-operations and collaborative relationships you enter into, the contracts you sign, the funding agreements you enter into and the advice your organisations give all carry potential liability for the organisation and may in certain cases cause potential liability for the trustees.

Remember incorporation alone will not protect you from all liabilities. Even if you are incorporated, there are some pieces of law under which a trustee may still be liable if they have contravened the law, e.g. health and safety. Similarly, if a trustee directly authorises a wrong, for example libels someone or instructs someone to act in a way that leads to loss being caused by trespass, then a trustee as well as the organisation may also be liable.

By registering as a company or charitable incorporated organisation you receive the protection of limited liability, but registration requires a number of obligations such as filing annual returns and keeping proper registers of who are the members and who are the directors. If you fail in these duties, the company and you may be fined or in extreme cases imprisoned.

## **Insuring the Organisation**

Insurance of the organisation and its activities and assets is always an important duty for trustees and trustee indemnity insurance can offer protection for trustees. The Charities Act 2006 permits charities to pay for trustee indemnity insurance unless the governing document prevents it, but remember although such insurance does provide some cover, trustees may be surprised at how limited a range of cover they will get for their premium and many charities do not for that reason take out such insurance. Typically it covers omission or negligence, breach of statutory duty, errors in investment decisions, breach of trust, libel and slander, wrongful trading and a wrongful act in respect of an employee (e.g. discriminatory behaviour).

Like any insurance policy it will have a number of exceptions and limitations and it will generally not cover personal liability of trustees for contractual claims, not provide protection against financial claims or debt which the organisation cannot meet, and not protect against situations where the trustee could be described as having been reckless.

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