

THE CUP TRUST – THE TRIBUNAL DECISION

Mountstar (PTC) Limited v The Charity Commission for England and Wales

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The Trustee of the Cup Trust - an organisation which had already become notorious for being a registered charity whilst engaging in activities under donors stood to obtain more in the way of tax relief than was ever applied for charitable purposes, and whose investigation by the Public Accounts Committee of the House of Commons (PAC) in late 2012 had led to public criticism of the Charity Commission - incurred further disparagement by the First-tier Tribunal (Charity) in its Decision and Reasons published on 17 October 2013 on two applications brought by the Trustee (Mountstar).

In a 55 page judgment, the Tribunal exhaustively examined the history and activities of the Cup Trust and dismissed both of Mountstar's applications: (i) for the review of the Charity Commission's decision on 12 April 2013 to open a statutory inquiry under s 46 of the Charities Act 2011 into the affairs of the Cup Trust, so that the order should be quashed, and (ii) an appeal against an order made under s 76(3) a fortnight later, without prior notice, to appoint an interim manager and restrain Mountstar from parting with any of the Trust's property. In order to make such an order the Commission had to be satisfied either that there had been misconduct or mismanagement of the Trust or that the property of the Trust, or its proper application, was at risk.

The Trust took the form of a charitable trust established by Mr Matthew Jenner and registered with the Commission in 2009. Mountstar was the corporate trustee, being a company incorporated in the British Virgin Islands of which there were three directors including Mr Jenner. Mr Jenner and one of his co-

directors had for some years been in business together as owners and directors of a company marketing tax avoidance schemes, an area of special expertise on Mr Jenner's part. Straightforward donations of £115,000 were made to the Trust during its first three years and grants totalling about £184,300 odd were distributed in the period up to the appointment of the interim manager. During that time the funds generated for the Trust by means of a gift aid tax avoidance scheme amounted to £155,000. Mr Jenner proposed the scheme to the Trust in late 2009 on behalf of another tax advice business in which he was interested. Crucially, he told the Commission and the Tribunal that he was not aware of the scheme at the time when the Trust was founded.

The scheme was more complex than the following description. It involved the Trust borrowing money and purchasing gilts at full value from a private settlement, selling them at a nominal price to an intermediary who then sold them to wealthy individuals at a nominal price. The wealthy individuals then sold the gilts back to the settlement for the full price and paid the profit to the Trust, purportedly under gift aid. The Trust then repaid the loan. Assuming that the scheme worked, the amount of (mainly higher rate) tax relief which the wealthy individuals could claim from HMRC by this means amounted to £55m whereas the Trust could £46m.

Mr Jenner's business received fees amount to over £6m from individual clients who participated, and Mr Jenner or his family were in one way or another entitled to most of the net profits through a web of companies, partnerships and trusts.

One of the Commission's reasons for opening the inquiry in April 2013 was the refusal of the directors of Mountstar to co-operate with HMRC's investigation, a state of affairs which continued and led to the decision to appoint the interim

manager. An independent, but internal, 'Decision Review', which took place in July 2013 when Mountstar challenged the Commission's decision, concluded that there was ample evidence for the inquiry.

Before the Tribunal, Mountstar argued (i) that the Commission had failed to take account of certain factors which explained or excused Mountstar's actions, (ii) that it was motivated by improper considerations, principally the restoration of the Commission's reputation, and (iii) that its actions were disproportionate.

The Tribunal dismissed the first argument as immaterial, commenting that the opening of the inquiry followed the Commission's own guidance, that and that the reasons for it to wish to examine what was going on in the Trust were entirely rational given among other things that Mr Jenner whilst appearing co-operative had evidently been seeking to obstruct the provision of relevant information to the Commission and HMRC.

The second argument was dismissed on the basis that after it had been criticised by PAC it did not respond with a knee-jerk reaction but maintained its previous stance until further developments intervened to justify its decision to take action before HMRC had concluded its own investigation. There was nothing to impugn the documentary and oral evidence about the Commission's thinking and in particular its chairman's public comments, when suggesting that the Commission had previously been 'too lenient', were consistent with its internal reasoning.

The third argument was also found to be without substance since the concerns arising from the scheme and the serious conflicts of interest themselves justified the inquiry, which had not been opened only because of Mountstar's failure to co-operate with HMRC.

Likewise, the Tribunal found that the appointment of the interim manager, whilst a significant step for any charity in that it prevented the trustee from operating the Trust, ought not to be terminated. It disagreed with the Commission's argument that a breach of fiduciary duty by a director of Mountstar was equivalent to a breach by Mountstar itself, where Mountstar was the trustee and owed its duty to the Trust, whereas the directors owed their fiduciary duties to Mountstar and not to the Trust as such. However, the fact that Mountstar was a charity trustee placed it in a position which required it to be more transparent than might be acceptable for a private individual dealing with HMRC. In fact, Mountstar was being used to protect the interests of 'donors' and failed to disclose to the Commission a 'myriad' of conflicts. One of the major flaws in the scheme was that it was impossible for Mountstar to obtain advice or take action independently of Mr Jenner and his interests, given that any benefit accruing to the charity could only follow successful claims for tax relief on the part of his clients.

The Tribunal carefully considered all the arguments made by the Commission, and commented that Mr Jenner was incapable of viewing the situation through the lens of a charity trustee as opposed to a tax adviser accustomed to acting for high net worth individuals, indicating that a cultural flaw. It also took a very poor view of the fact that five signed, blank cheques were found among the charity's documents.

Interestingly, the Tribunal stated near the end of the judgment that, even if they had found that the Commission had acted unlawfully in opening the inquiry - which they did not - they would still have refused to quash the order. It also found that the Commission should not avoid looking in detail at arrangements such as the scheme merely because it cannot adjudicate on tax matters.