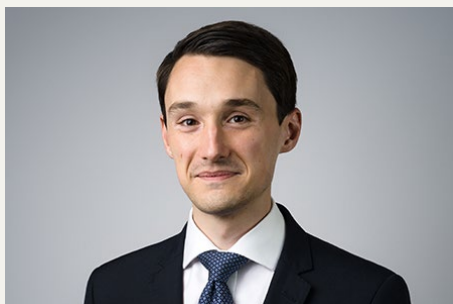




## *Lehtimaki v Cooper* [2020] UKSC 33 – an initial analysis

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*In this article Matthew Mills considers the judgment of the Supreme Court in *Lehtimaki v Cooper* [2020] UKSC 33. Robert Pearce QC of Radcliffe Chambers acted for HM Attorney General in this appeal, which is one of very few charity cases to reach the Supreme Court in recent years.*

*Please note that numbers in square brackets refer to paragraphs in the Supreme Court's decision.*

### The Background

The Children's Investment Fund Foundation (UK) ("CIFF") is a substantial charitable company limited by guarantee: [1]. It has three members: Sir Christopher Hohn, Ms Jamie Cooper, and Dr Marko Lehtimaki: [2].

In 2012, Sir Christopher and Ms Cooper's marriage broke down. As part of their divorce, they agreed that Ms Cooper would resign as a member and trustee of CIFF and in return CIFF would make a grant of \$360 million to Big Win Philanthropy, a new charity founded by Ms Cooper ("the Grant"): [1].

Because the Grant would be a payment in connection with a director's loss of office, it had to be approved by the members of CIFF and the Charity Commission: [10]-[11]. Dr Lehtimaki was the sole non-conflicted member so only he would vote on the resolution to approve the Grant: [15]. The Charity Commission did not authorise the Grant, but instead authorised the trustees of CIFF to bring proceedings to seek the court's approval: [16].

### The Decision

At first instance, Sir Geoffrey Vos, Chancellor, held that the Grant was in CIFF's best interest, although he accepted that reasonable fiduciaries could disagree with this conclusion: [19]. This finding was not appealed: [3] and [33]. Instead, the question on appeal was whether the court could order Dr Lehtimaki to vote in favour of

the Grant: [3] and [34]. This issue required the Supreme Court to answer three questions.

### Was Dr Lehtimaki a fiduciary?

*"The members of a charitable company can, but do not always, owe a fiduciary duty to further the charitable purposes or objects of the charity."*

Lady Arden gave the sole judgment on this issue. She held that the members of a charitable company can, but do not always, owe a fiduciary duty to further the charitable purposes or objects of the charity: [200]. In summary, her reasons were as follows:

- a. A member of a charity company owes the single-minded duty of loyalty: [90].
- b. It did not matter that a member would not be subject to the full range of fiduciary duties. As long as they owed the 'irreducible core' of a fiduciary duty to perform their role honestly and in good faith for the benefit of the charity, the fiduciary duty could be shaped by the charitable company's constitution and the relevant company law legislation: [79]-[82].
- c. The law already recognises exceptions to the general principle that shareholders do not owe fiduciary duties to the company or other members: [88]-[89].
- d. The public would reasonably expect the members of charitable guarantee companies to owe fiduciary duties: [91].
- e. "It will be easier for the court to exercise its inherent jurisdiction over charities, and the law of charities will be more internally coherent": [93].
- f. There is no evidence that this conclusion would dissuade people from becoming members of charitable guarantee companies: [94].

On the facts, Dr Lehtimaki owed a fiduciary duty to consider the best interests of CIFF's charitable purposes when voting on the Grant: [90].

### Can Dr Lehtimaki be compelled to vote in favour of the resolution?

The majority judgment on this issue was given by Lord Briggs, with whom Lord Wilson and Lord Kitchen agreed (Lady Arden dissenting on the reasoning: [119] to [152] and [179] to [199]). Lord Briggs held that where trustees had surrendered their discretion to the court, and the court has decided what would be in the charity's best interests, then the fiduciaries are obliged to ensure that the court's decision is implemented ([206]-[208]). In other words, unless there is an appeal, a significant change in circumstances or "something [went] badly wrong with the court proceedings", the surrendered issue "ceases to be a question for debate": [208] and [210]. It did not matter that Dr Lehtimaki was technically 'only' a member and not a trustee: both groups of people were bound by the same fiduciary duty: [222].

### Does s.217 Companies Act 2006 prevent the court from directing Dr Lehtimaki to vote?

Lady Arden gave the sole judgment on this issue. She held that section 217 did not prevent the court from directing a member how to vote on a matter of internal management: [165]. The purpose of section 217 is only to ensure that adequate disclosure is given to, and adequate approval is given by, a company's members: [159]. Furthermore, there was no policy objection to limiting the effect of

section 217. For example, the right to vote can be restricted by the company's constitution or legislation: [162]-[163].

### Analysis

It will take some time to evaluate the full scope and impact of the Supreme Court's 71-page decision in *Lehtimaki*. Nevertheless, five initial comments may be made.

First, it has been the Charity Commission's published view since 2004 that members of charitable companies are fiduciaries: [48]. Nevertheless, leading practitioner works had persistently doubted this conclusion: [49]. Furthermore, even though there are now over 33,000 registered charitable guarantee companies, there had been no reported decision on the status of charitable members: [52]. *Lehtimaki* definitively confirms the Commission's view.

Second, the Court of Appeal had expressly reserved its position on whether the members of 'mass membership' charities are fiduciaries: [28]. The Supreme Court did not. Lady Arden confirmed that the members of any charitable company could owe fiduciary duties, at least where the governing document restricts their ability to receive profits from the charitable company: [78] and [105]. It will require some careful thought to decide how in practice large charities should involve many members in day-to-day management.

Third, the Supreme Court's judgments do not resolve all of the practical problems caused by the conclusion that members are fiduciaries: [75]. For example, the Court expressly noted that a member may "not be able to obtain information relevant to the exercise of his fiduciary powers": [86] and [92]. It remains to be seen what impact, if any, this may have on a potential claim for breach of fiduciary duty against a member.

Fourth, the Supreme Court appeared to accept that the court has the power to implement a scheme even for charitable companies: e.g. [151]-[152], [157] and [170]. Although these remarks were obiter, they will hopefully point future cases in a consistent direction.

Fifth, both judgments recognised that the principle against intervening in the discretionary exercise of a fiduciary power is subject to exceptions: [119] and [216]. However, it is unclear precisely 'how exceptional' the facts must be. For example, nobody can deny that we are living in truly extraordinary times. Will the court view the impact of Covid-19 as a sufficiently 'exceptional' existential threat to a charity ([137] and [201]) such that the court can intervene in the exercise of fiduciary duties? Only time, and further litigation, will tell.

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