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Trustees' powers of investment

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Overview

*Butler-Sloss & Ors v (1) Charity Commission for England and Wales (2)
HM Attorney General*

- What is the case about?
- What did the Court decide?
- How does it impact trustees and trustees' decision-making?

Background

- The trustees of two charities (Ashden Trust and the Mark Leonard Trust) sought declarations that it was lawful for them to adopt their proposed investment policies
- Both charities have the charitable purpose of environmental protection or improvement
- The trustees of each charity want to adopt an investment policy that excludes investments, so far as practically possible, that are not aligned with the Paris Agreement – thereby avoiding a direct conflict with the charities' charitable purposes

The need for the Court's blessing

- *Harries v Church Commissioners for England* [1992] 1 WLR 1241 (the 'Bishop of Oxford' case)
- Proposed policy significantly limited the investable universe
- Financial detriment likely (at least in the short-term)

Important points to remember

- Powers of investment are conferred by the trust deed/governing document, and where applicable, the Trustee Act 2000
- Fiduciary duties of trustees are owed to the charitable purposes or objects of the charity (*Children's Investment Fund (UK) v Attorney General*)

Bishop of Oxford

- The 'starting point' is the maximising of financial return – in most cases, that will be in the best interests of the charity.
- Three exceptions to that starting point:
 - **direct conflicts** with the charity's purposes (eg. cancer charities investing in tobacco companies);
 - **indirect conflicts** – where an investment may alienate supporters or donors to the charity, or make recipients less willing to be helped;
 - **where trustees are justified in departing from what would otherwise be their starting point** (but should not be driven by moral considerations).

Direct Conflicts

Bishop of Oxford:

"If, as would be likely in those examples, trustees were satisfied that investing in a company engaged in a particular type of business would conflict with the very objects the charity is seeking to achieve, they should not so invest. Carried to its logical conclusion the trustees should take this course even if it would be likely to result in significant financial detriment to the charity. The logical conclusion, whilst sound as a matter of legal analysis, is unlikely to arise in practice. It is not easy to think of an instance where in practice the exclusion for this reason of one or more companies or sectors from the whole range of investments open to trustees would be likely to leave them without an adequately wide range of investments from which to choose a properly diversified portfolio."

Direct Conflicts

Michael Green J at [71]:

"It seems to me that the Vice-Chancellor was not, as a matter of law, distinguishing between a category 1 case of direct conflict and a category 2 case of indirect conflict".

Michael Green J at [72]:

"...I do not think that the Vice-Chancellor intended to be so categoric and his use of the word 'should' means something slightly less than 'must' and does not preclude the consideration of other important factors. It is just that a direct conflict is likely to be the most significant factor, and should be avoided if possible."

Paragraph 78

1. Trustees' powers of investment derive from the trust deeds or governing document (if any) and the Trustee Act 2000;
2. Charity trustees' primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes;
3. That is normally achieved by maximising the financial returns on the investments that are made. The standard investment criteria set out in s4 Trustee Act 2000 must be complied with, and advice should be taken when appropriate;
4. Social investments or impact or programme-related investments are made using separate powers than the pure power of investment;

Paragraph 78

5. Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made;

6. Where trustees are of the reasonable view that particular investments potentially conflict with charitable purposes, the trustees have a discretion to exclude that investment. They should exercise that discretion by balancing all relevant factors, including the likelihood and seriousness of the conflict, and the likelihood and seriousness of any potential financial effect arising from the exclusion;

7. When considering financial effect, trustees can take into account the risk of losing supporters or donors, and damage to the charity's reputation both amongst its beneficiaries and generally;

Paragraph 78

8. Trustees need to be careful in relation to making decisions as to investments on purely moral grounds – there may be differing legitimate moral views among a charity’s supporters and beneficiaries on certain issues;

9. Trustees must act honestly, reasonably, and responsibly, and with all due care and skill, when formulating an investment policy – they must exercise good judgment when balancing all relevant factors;

10. If the balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.

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Notes of caution

- The Court was not considering incorporated charities – but it would be prudent for trustees of incorporated charities to follow it
- The decision is concerned with the pure power of investment
- The Court's blessing was given in circumstances where it was anticipated that the investable universe would increase, and financial detriment would alleviate
- There must be a way of assessing whether an investment does or does not conflict with charitable purposes

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