



**BIGGART BAILLIE**  
S O L I C I T O R S

# **TRUSTEES' DUTIES**

**Generally and under the  
Charities and Trustee Investment (Scotland) Act 2005**

## **GOVERNANCE AND INDEPENDENCE**

Under the existing law the duties of trustees, though nowhere codified, are clear, and can be found not so much in Statute but in numerous cases decided in court over several hundred years.

Briefly, they can be summarised as follows:-

### **USE GOOD FAITH AND UPHOLD THE TRUST**

A Trustee's primary obligation is to carry out the Trust purposes in accordance with the Trust Deed or other foundation documentation.

The utmost good faith is required of anyone aspiring to be a Trustee. A high degree of probity, honesty, and integrity are required in undertaking to ensure the fulfilment of the Trust.

Once the purposes of a public Trust have been declared, the donor is not entitled to intervene or change them.

### **JOINT RESPONSIBILITY**

Trusteeship imposes a duty on each Trustee to ensure that the actions of his fellows comply with the Trust Deed and with the law.

Even although day-to-day management may be, and sometimes practically must be, delegated, overall supervision lies with the Trustees as a whole. Trustees are not entitled through good nature or embarrassment or indolence or ignorance to allow co-Trustees free rein to do as they see fit.

Allowing a co-Trustee to commit a breach of trust, whether expressed or implied, will involve both Trustees in the consequences of breach of trust.

### **CHARITY TRUSTEES AND QUASI TRUSTEES**

The responsibility for charities extends beyond those who are formally Trustees - already by statute all who are "concerned in the management or control" of bodies recognised as charities in Scotland, whether Trustees or not, are bound to administer the charity honestly and ensure the sound management and proper application of its assets.

**OWN OPINIONS**

Trustees are entitled to have their own opinions but must distance themselves from these and not allow them to undermine the Trust. They cannot allow themselves to be influenced by matters extraneous to the terms and purposes of the Trust and must uphold Trust strategy.

**ADVICE**

It is the duty of Trustees to take advice but make their own decisions in the light of the advice

**AVOID CONFLICTS OF INTEREST**

Trustees must separate their own interests and personality from the interest and personality of the Trust.

If a Trustee finds he cannot do that, he should abstain from participating in relevant decisions and if it goes further than single issues should resign as a Trustee.

**STANDARD OF CARE**

The general standard of management is the same standard of care that a prudent man of business would take in his own affairs. This involves having a reasoned and reasonable basis for decisions taken.

**AVOID BREACH OF TRUST**

Trustees must not allow a conflict of interest to develop between themselves and the Trust - to do so is a breach of trust and for charitable trustees it is a breach of the Act.

Breach of trust can involve dishonesty but can also consist in failure to observe the law or failure to seek proper advice.

It includes any form of bad management or neglect or any act that goes against the purposes of the Trust. Allowing a co-Trustee to commit a breach of trust is itself a breach of trust.

It is no defence that the other Trustees concurred nor that they acted in good faith.

Similarly, it is no defence that Trustees in breach have exercised the same prudence that they do in their own affairs; a Trustees' actions must be measured against the objective standards of prudence and ordinary diligence.

## **LIABILITY FOR ACTIONS**

The general rule is that Trustees incur personal liability on a joint and several basis. The liability of the Trust Estate is determined by the liability of the Trustees, not their ability to pay.

Trustees can take out their own insurance to cover liability for their actions but this can only be met from Trust funds where there is authority in a Deed of Trust or a scheme approved by the court. However, if insurance cover is justified by the nature of the Trustees' activities the expenditure on premiums may be justified.

## **WHAT DOES THIS MEAN IN PRACTICE?**

### **Constitutional Issues**

The first duty of any trustee or board member is to ensure that the organisation concerned acts at all times within its powers and fulfils its responsibilities.

This involves being aware of the trust's policy generally, helping to frame that policy of the future, and implementing its strategy.

### **Employees**

Trustees will not ordinarily themselves be trustees of the bodies in which they serve, but it does happen occasionally.

It is all a question of degree, but the trustees and in particular any chairman should be on good terms with employees, particularly the senior employee or employees, and chief executives.

If there is a hierarchical staff structure, the senior employee or employees will be responsible for the day-to-day management of those they supervise, but are themselves accountable to the trustees, whose job it is to monitor their performance.

Trustees may also become involved with matters of discipline and complaints, in which case they need to be fully au fait not only with any internal regulations but with the general law on such matters as employee rights.

Confidentiality is an issue here, as indeed it is in all organisations delivering services to individuals.

## **Skills and Knowledge**

Trustees need to have, or to acquire, appropriate skills and knowledge for the body they are serving. That does not mean to say that they need to know in detail the technicalities of what is involved in delivering what the Charity delivers, but they need to be able to exercise their monitoring rôle effectively. Part of that is to recognise and avoid conflicts of interest.

Trustees should take a genuine interest in the affairs of the body concerned.

They should be familiar with the terms of the foundation document, read and understood the annual report and accounts, be frequent attenders at meetings, read the minutes carefully, and be aware of changes.

These changes might be domestic to the body concerned, or they could involve the wider world in which the body operates, such as legislative changes including those brought in by the Charities and Trustee Investment (Scotland) Act 2005 and the most recent statement of recommended practice and charitable accounting, SORP 2005.

## **Finances**

The basic requirement is to ensure that the body concerned has finances sufficient for its needs, both capital and revenue.

This involves being familiar with not only the accounts but any budgetary process, and monitoring the performance of its investments.

Charity trustees need to ensure that the report accompanying the accounts is a true, up-to-date reflection of the body's activities and that matters such as risk assessment, reserves policy and on-going matters are kept under review.

## **Investments**

Sections 93 and 94 of the 2005 Act extend trustees' powers in a general way, not merely those of charity trustees under the Act, except trustees of pension fund and unit trusts and bodies where these matters are regulated by statute.

By **Section 94** amendments are made to the investment powers conferred by Section 4 of the Trusts (Scotland) Act 1921, really setting out what was in any event best practice, including the following matters:-

**Suitability** for the trust's purposes

**Diversification**, so far as appropriate

Obtaining proper **advice**

Having said that, it is still the case that the trustees can decide that they do not need outside advice

It has been put beyond doubt (which many people did) that trustees can **appoint nominees** to exercise their investment powers, provided the use of nominees be forbidden by the foundation documents.

If they do, the appointment has to be **appropriate**.

Nominee has to have the necessary **knowledge** and **expertise**.

Any appointment must be in writing and **revocable**.

Unless it is reasonably necessary for them to do so, the trustees **must not allow**:-

the use of a **substitute**

liability to be **restricted**

**conflicts** of interest to arise

**They must retain** the **power** themselves to direct investment in a particular way if they consider it appropriate to do so.

It has also, and much less controversially, been declared in the Act that trustees have always had the power to authorise an agent to exercise any of the management functions of investment, ie, not deciding what the investments are to be or when they are to change, but actually looking after the portfolio and maintaining the records.

Separate from the part of the Act dealing with trustee investments generally, **Section 96** gives **every charity** “power to participate in **common investment schemes** and common deposit schemes” within the meaning of Sections 24 and 25 of the Charities Act 1993, which are the common investment schemes regulated and approved by the Charity Commissioners or the court. In terms of Section 24(8) “ a common investment fund shall be deemed for all purposes to be a charity, and if the scheme admits only exempt charities, the funds shall be in the exempt charity for the purposes of this Act.”

Let us now turn to **what the Act itself says** about, specifically, the **duties of charity trustees**.

## CHARITY TRUSTEES UNDER THE ACT

It may be worth noting in passing that the original term of art intended to be introduced was “charity steward” which would have emphasised the usual distinction between trustees generally, and persons concerned in the management or control of recognised charities. It would thus have had a clearer meaning, but the introduction of the English term “charity trustee” will at least mean that it is likely to be interpreted in the same way on both sides of the border.

It is not said whether the Scottish courts would have power to approve such a scheme, and on the face of it, neither would OSCR.

**Section 66** sets out the general duties of Charity Trustees:-

Subsection One reinforces by Statute the way some of the duties of trustees in general are to be exercised by charity trustees

- (1) to act in the Charity’s interests
  - (a) in **good faith**, consistent with its purposes
  - (b) with the **care and diligence** reasonably expected of someone managing **another’s affairs**.
  - (c) most disclose conflicts of interest, put the charity first, and not participate in deliberation or decision-taking by the other charity trustees.

The other subsections impose the following particular duties on them:-

- (2) to ensure **compliance** with any direction , requirement, notice or duty imposed by the Act.
- (3) all **without prejudice to** other such duties.
- (4) any **failure** under Sub-sections (1) and (2) to act in the Charity’s interests **in good faith** with **due diligence** and in **compliance** will count as **misconduct**, and
- (5) take such steps as are reasonably practicable to ensure that any breach of a duty under (1) or (2) above is corrected by any charity trustee concerned and is not repeated and, where there has been persistent breach, take steps to remove the charity trustee.

According to OSCR a charity trustee (or connected person) will remain entitled to receive remuneration if acting under a specific authorising provision of the charity constitution prior to 15 November 2004 (when the Bill was introduced).

This reference date means that charities cannot make changes to their constitution simply to allow payment to charity trustees before the Act came into force.

Here is a summary of what Sections 67 and 68 say:-

Apart from payment authorised by the Act, Charity trustees may also receive payment if other legislation or a court order specifically allows this. However, this proviso does not include a consent or direction from the Charity Commission and in these circumstances the remuneration provisions would still have to comply with the provisions of sections 67 and 68.

**Section 67** Charity trustees (and this includes “connected persons”) may only receive **remuneration** where the maximum amount is **reasonable** and subject to **written agreement**, and prior to the agreement the charity trustees were satisfied that this would be in the charity’s interests.

Less than half the total trustees must be entitled to remuneration unless there are three or fewer trustees.

Existing arrangements under existing constitutions, Court of Session orders, or enactments, are saved.

Remuneration paid in contravention hereof may be **recovered** and OSCR can direct a charity to do so.

**Section 68** provides definitions for terms referred to in Section 67. “**Connected persons**” includes spouses (or similar), bodies in which the remunerated charity trustee has a “substantial interest”, and a Scottish partnership of which he is a member.

## CAUSES OF DISQUALIFICATION

- Section 69** provides for **disqualification** from being a charity trustee of anyone
- ❖ convicted of an offence involving **dishonesty**,
  - ❖ **an offence under the Act**, or
  - ❖ who has been a **bankrupt** or
  - ❖ **removed from being concerned** in the management or control of any body.