



Lehtimaki v Cooper [2020] UKSC 33

- Considered the nature and extent of the duties of a member *qua* member (the member not being a trustee) of a corporate charity limited by guarantee
- Considered the Court's jurisdiction over that member



Lehtimaki v Cooper [2020] UKSC 33

- Determined the issue of whether a member is a fiduciary
- Notwithstanding 33,000+ Guarantee Companies registered as Charities the issue had never been determined by the Court
- Factual matrix unique
- Charity Commission chose not to authorise the proposed transaction and instead authorised the bringing of proceedings



Facts:

- CIFF was a charitable company - £4 billion assets
- Founded by Sir Christopher Hohn & Ms Cooper
- Sir Christopher & Ms Cooper were Trustees & were two of the three members: Dr. Lehtimaki was the third
- TCI Fund Foundation had 2 tier governance structure
- Trustees authorised by Articles to manage operations
- Members unable to interfere in decisions but some decisions required resolution of company in a general meeting



The Divorce Settlement – *The Grant Agreement*

- Agreed that CIFF would make significant grant of \$360 million over 5 years to a charity set up by Ms Cooper (BWP)
- Ms Cooper would resign as Member and Trustee of CIFF
- Constituted a payment for loss of office to a person connected with a director
- S. 215 & s.217 Companies Act 2006 applied
- Payment had to be approved by members (& Charity Commission)



First Instance: Vos Decision

- The Grant Agreement was a s. 217 resolution
- Directed Lehtimaki as the sole unconflicted member to vote in favour of the resolution of members and approve the Grant
- Lehtimaki was a fiduciary
- The vote vested in him for the benefit of CIFF and not vested in him personally
- To ensure that court's decision was not overridden by the unaccountable membership



A reasonable fiduciary could disagree

- Vos expressly stated that *“I am not saying that no reasonable trustee or fiduciary could disagree with my view”*
- Debatable whether a transfer out of \$360 million – was a practical furtherance of Cliff’s objectives
- Lekhimaki did not agree that the court could tell him him to vote
- His position was that he was entitled to consider the issue subjectively



Court of Appeal

- Agreed with Lehtimaki on this point
- It was for a member to decide in good faith what would be the most likely to further the charitable purpose of CIFF
- The duty was subjective – what mattered was the member’s state of mind
- Court could not direct a fiduciary to substitute its view for that of its own unless there was a breach of duty
- Lehtimaki’s choice whether to approve transaction – he could disagree
- Had been prevented from playing part Parliament intended



Supreme Court

- Ms Cooper appealed
- Three issues to resolve:-
 - Was Dr L *qua* member a fiduciary in relation to the objects of the charity?
 - If 'yes' can the Court exercise jurisdiction over him and direct he vote in favour of the Grant?; and
 - If 'yes', does s. 217 permit the Court to make that direction where it provides for *members* to approve?

(Focus will be on the first and second issue).



Q1: Is a member a fiduciary?

- Much discussion of the special place that charities enjoy under English law and of the liberal approach adopted by the Court
- Consideration of Charity Commission's view [48] and that in relation to CIOs ([30])



Q1: Is a member a fiduciary?

- “The court has to determine whether there is a fiduciary relationship between the charitable objects of CIFF and Dr Lehtimäki in his capacity qua member of CIFF. In my view that question falls to be answered in the affirmative, and what applies to Dr Lehtimäki and CIFF will apply to all other members of charitable guarantee companies which, like CIFF, contain restrictions which in general prevent members receiving profits from the company.” [78]



Q1: Is a member a fiduciary?

- “The important point in my judgment is that the law allows the duties of a fiduciary to be fashioned to a certain extent by the arrangements between the parties. In the case of a member of a charitable company this means that the duties of a member can be fiduciary even if the memorandum and articles of association impose restrictions which mean that he cannot discharge all the obligations which a fiduciary would have under the general law..” [78]



Q1: Is a member a fiduciary?

- “The precise circumstances in which the member of a charitable company has fiduciary duties in relation to the charitable purposes and the content of those duties will have to be worked out when they arise. The point of principle is the point made by P D Finn in *Fiduciary Obligations* (1977), para 4 that “A fiduciary for one obligation is *not* ipso facto a fiduciary for all”. [101]
- Lending libraries and opera houses.



Q2: Could the Court direct that the member vote in favour?

Non-intervention Principal Exception: 1 (Lady Arden JSC)

Breach of Duty Route: 3 (Lords Briggs, Kitchen & Wilson JJSC)



Q2: Could the Court direct that the member vote in favour?

“There is no doubt in my judgment that there is a well-established “non-intervention principle” which means that the role of the court is to ensure that the trustees of a charity exercise their discretion properly and that the court does not interfere in the trustees’ exercise of a discretionary power unless they act improperly or unreasonably.” [120]



Q2: Could the Court direct that the member vote in favour?

“The non-intervention principle reflects the judicial policy of not interfering with the acts or decisions of trustees in the absence of evidence of a breach of duty. any departure from the non-intervention principle calls for caution.” [187]

citing

Pitt v Holt [2013] 2 AC 108, [73] *per* Lord Walker:-

“It is not enough to show that ...the court would, on a surrender of discretion by the trustees, have acted in a different way.”



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Back to first instance

“The Chancellor expressly stated that, while he had come to a clear conclusion that he should approve the Grant, he was “not saying that no reasonable trustee or fiduciary could disagree with [his] view” that the Grant was in the best interests of CIFF or that “anyone who disagreed with [his] view would automatically be acting in bad faith” (Judgment, para 135).” [19]



Q2: Could the Court direct that the member vote in favour?

“Exceptional circumstances”....

“This was one of the cases in which the court can exceptionally intervene irrespective of any breach of duty, alleged or found, by any fiduciary. That is because an impasse is threatened in the performance of the trust if Dr Lehtimäki is unable to reach the same conclusion as the Chancellor has done.” [137]

Q.E.D?



Q2: Could the Court direct that the member vote in favour?

No!

“...once the court's decision about the merits of the transaction is made.... question finally resolved. It is binding on all those interested parties joined.... and the duty of the charity's fiduciaries (whether or not joined as parties) is to use their powers to [implement].plain breach of fiduciary duty for a relevant fiduciary to do otherwise, *a fortiori* to exercise a fiduciary power so as in effect to veto the very transaction which the court has decided should proceed in furtherance of the charity's purposes.” [208]



Q2: Could the Court direct that the member vote in favour?

“I accept that the principled basis upon which the Chancellor decided to direct Dr Lehtimäki to vote (with which I agree) does involve some limited departure from a purely subjective assessment of the question whether a fiduciary has committed, or is threatening to commit, a breach of duty. But the test for breach of fiduciary duty has never been purely subjective.....”

Cowan v Scargill [1985] Ch 270, 289_{B-C}, Sir Robert Megarry V-C



Q2: Could the Court direct that the member vote in favour?

So what?: alternative basis “if it were necessary to proceed on the basis that Dr L was neither committing or threatening a breach.... but I am unable to accept that premise” [217]

- Majority decision of Supreme Court: fiduciary duty of members can be objectively quantified and directed
- Scope for exploitation?



(Other) Unfinished Business.....

The test for fiduciary duties being owed

Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296,
[177]:

“a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest ...”

Approved (“reasonable expectation may not be appropriate in every case”): [48]



(Other) Unfinished Business.....

The test for fiduciary duties being owed

Snell's Equity (34th edition), para 7.005:-

- FDs imposed by law as a reaction to particular circs... “legitimate expectation” recognised by equity
- “The expectation is assessed objectively, and so it is not necessary for the principal subjectively to harbour the expectation. Nor is it relevant whether the person who is alleged to be a fiduciary subjectively considered himself to be undertaking fiduciary duties.”
- Reflection (see [91]) or (possible) extension?



(Other) Unfinished Business.....

- Contract – and – statute based model of fiduciary duty
 - Careful drafting (periodic review)
 - Irreducible minima
 - Minor benefits (ok, [102])
 - Mass-membership charities – for another day; hesitant about a different outcome (*per CA*) [105], [215]
 - Other structures –
 - unincorporated associations