

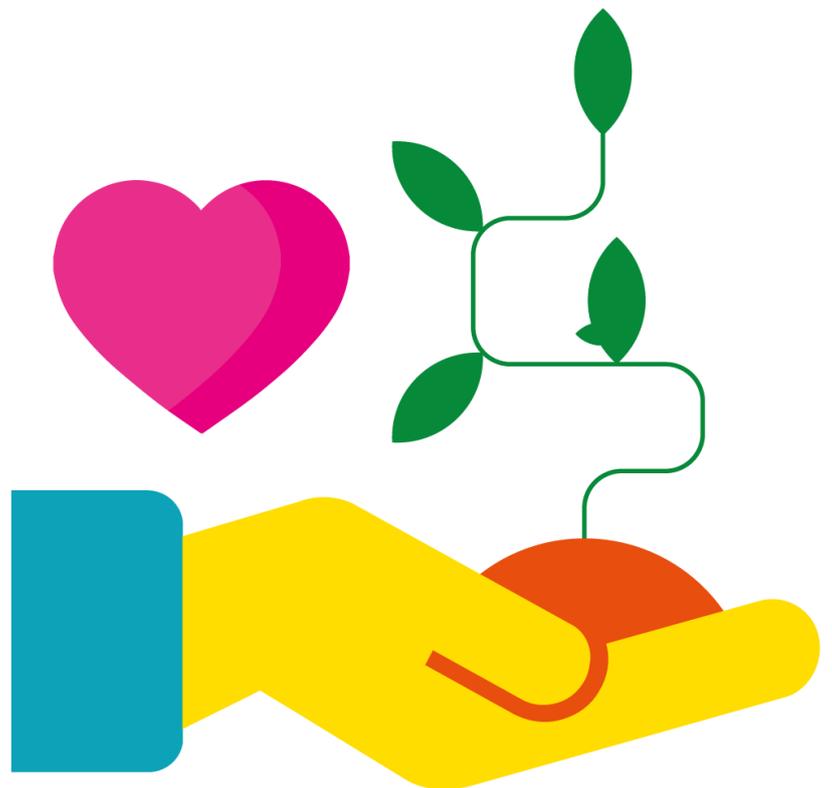
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Charity legal update

Legal updates for in-house charity lawyers

June 2020



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Since the last edition, the lockdown period appears slowly to be coming to an end, but the effects of the pandemic are still hitting charities and social enterprises hard.

In this update...

We summarise the main points of which charities should be aware in relation to the Corporate Insolvency and Governance Act 2020, new legislation designed to help some organisations postpone their AGMs during the pandemic.

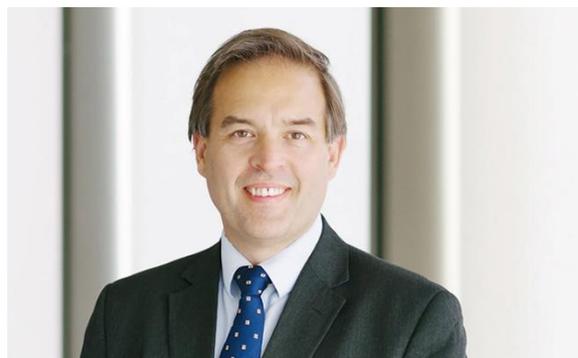
We also set out the key points in helpful new Charity Commission guidance on reporting serious incidents relating to the pandemic, and look at the contents of a recent regulatory alert, warning certain large charities of the need for transparency and accountability in their governance, which no recipient of the alert can afford to ignore...

We also have...

- Details of the new guidance issued by the Fundraising Regulator and the Chartered Institute of Fundraising in relation fundraising as lockdown eases
- A consideration of the situation in relation to Social Investment Tax Relief – will we see the relief extended to 2023?
- Information about an initiative by funders aiming to enable increased understanding, closer alignment, and opportunities for collaboration in the post-emergency phase of Covid-19.

Finally, we have the usual summaries of cases decided over the last couple of months, which have included a decision that charity proceedings cannot proceed until mediation is attempted, and a consideration of the duty of members of a CIO to exercise their powers in good faith.

We hope you find the update useful. If you have any comments or suggestions for improvement, please don't hesitate to contact us.



Neil Burton

Partner

+44(0)1223 222455

neil.burton@mills-reeve.com

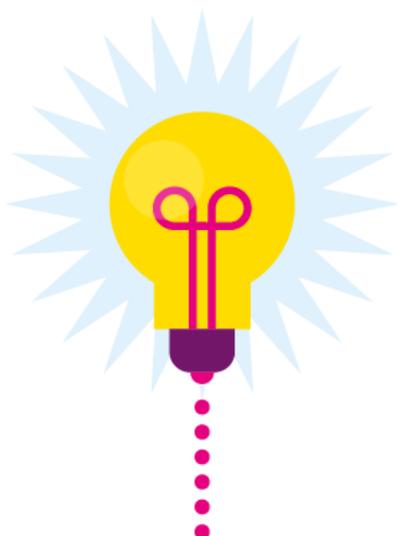


Tori Spratt

Professional support lawyer

+44(0)1223 222323

tori.spratt@mills-reeve.com



Postponing AGMs during the pandemic

Legislation to assist companies with holding their AGMs during the coronavirus pandemic, the Corporate Insolvency and Governance Bill has received royal assent, and is now the [Corporate Insolvency and Governance Act 2020](#) (the “Act”), with almost all its provisions commencing on 26 June 2020 (but see below about the temporary business protection measures).

The legislation was confirmed in a [letter](#) from Baroness Bloomfield as applying to charitable companies, their subsidiaries, mutuals, Charitable Incorporated Organisations (CIOs) as well as social enterprises structured as companies and Community Interest Companies (CICs).

It is not intended to apply to charities incorporated and regulated by an Act of Parliament or by royal charter, or to unincorporated charities such as charitable trusts and charitable associations.

Trustees of unincorporated charities may, however, be able to alter the requirements in their governing documents as to the timing of AGMs.

Charities governed by an Act of Parliament or by royal charter will have to rely on, as Baroness Bloomfield’s letter states, the Charity Commission’s indication that it will take “a pragmatic and proportionate approach where members’ meetings need to be postponed or held virtually in order to comply with social distancing, even where this may appear to be contrary to the rules of the charity’s governing document.”

Helpfully, the Commission has swiftly updated its Coronavirus (Covid-19) guidance for the sector to summarise the key points of interest in the legislation for charities in relation [to postponing AGMS and other meetings](#), and [insolvency help for charitable companies and CIOs](#).

Postponing AGMs and other meetings

The guidance states that the Act allows charitable companies and CIOs to delay any AGM that had to be held between 26 March and 30 September this year until 30 September 2020 at the latest. It is possible the Government may extend this deadline further, if necessary. The provisions of the Act effectively override any timing requirements included in the organisation’s governing document.

In the case of members’ meetings held between 26 March and 30 September this year by charitable companies, CIOs, or exempt charities that are community benefit societies or friendly societies, the Act also provides in relation to such meetings that:

- they can be held by phone or video, even if the governing document requires them to be held physically face-to-face;
- the charity or other organisation can require members’ voting to be carried out electronically, or by other means such as post; and
- members will not have a right to attend the meeting in person, or to participate in the meeting beyond exercising their right to vote.

Any decision to take advantage of these provisions of the Act should be recorded in the minutes of the charity appropriately, and all other meeting requirements should be met.

Again, these provisions in the Act will be available until 30 September this year, but the Government may extend the deadline further if necessary.

Coronavirus hub

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Insolvency help for charitable companies and CIOs

The Act also contains provisions to help charitable companies and CIOs avoid insolvency, including provisions relating to:

- moratoriums
- limiting termination clauses in supply contracts
- temporary suspension of wrongful trading provisions and the use of statutory demands, and a restriction on winding up petitions, and
- support for viable companies struggling with debt to restructure using a new procedure – but note that this particular provision does not apply to CIOs.

Most of these temporary business protection provisions have retrospective effect from 1 March 2020.

More information on all these provisions has been [published](#) by BEIS and The Insolvency Service, but it would be prudent for charities and CIOs considering relying on any of these provisions relating to insolvency to seek legal advice at the earliest opportunity.



CBILS: more charities now eligible following rule change at the end of April

The rules for the Coronavirus Business Interruption Loan Scheme (CBILS) changed at the end of April, to remove the requirement for charities to generate more than half of their income from trading activities in order to be eligible for the scheme.

This means that a greater number of charities may now be able to access loans, overdrafts, invoice finance and asset finance through the scheme, of up to £5 million for up to 6 years.

For more information about the changes, and what newly eligible charities should do next, read Neil Burton's short [article](#) on our [Coronavirus Hub](#).

HMRC publishes new guidance on relief from import duty or VAT on donated medical equipment

The new [guidance](#) published by HMRC may assist charities that support medical research, which are eligible to claim the relief subject to having obtained prior approval from the National Imports Reliefs Unit, along with health authorities, hospital departments and medical research institutions.

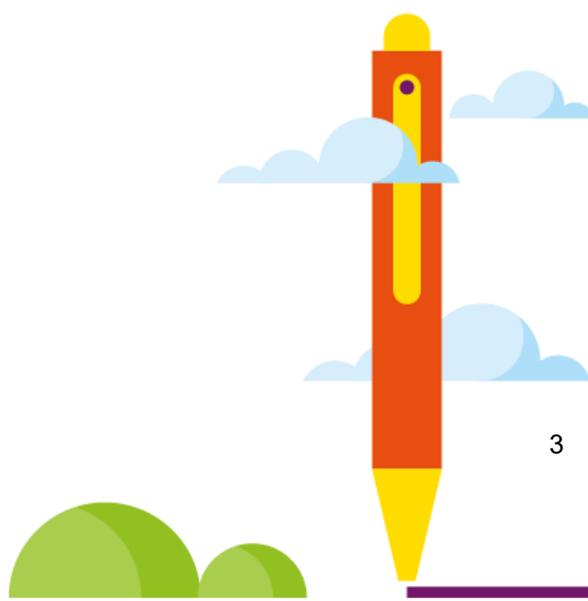
The goods in respect of which the relief can be claimed are set out in the guidance note, which also states that the relief should be claimed at the time of import and provides details of how to claim the relief.

The guidance also sets out steps to be taken, and records to be kept, if you claim the relief and subsequently;

- dispose of the goods, including by way of a loan or transfer to another entity or
- break the conditions of the relief

New expectations of charities that own land in Scotland

Charities that own Scottish land should be aware of a new protocol issued by the Scottish Land Commission recently, which places new expectations on the charitable owners of Scottish land – whether or not they are Scottish charities. For more details, read this informative [blog post](#), written by Alan Eccles of Scottish law firm Bannatyne Kirkwood France & Co



Charity Commission: new and updated guidance, and alerts

Serious Incident Reporting: new coronavirus guidance published

New [guidance](#) has been published by the Charity Commission to help trustees decide when they must notify the Commission of a serious incident relating to the coronavirus pandemic.

While the main [guidance on serious incident reporting](#) remains in place, the new guidance helpfully highlights to charity trustees that:

- The fact that a charity has to take a particular action, such as the closure of premises, to comply with Government legislation should not be considered notifiable. The impact of such an action on the charity, such as a significant loss of income, however, may result in a serious incident report needing to be made to the Commission.
- The thresholds contained in the main guidance on serious incident reporting which are applicable to losses sustained by a charity not as a result of crime, of an amount in excess of £25,000 or 20 per cent of the charity's income, do not apply to financial losses arising as a result of the pandemic. Instead, trustees need to consider the significance of the impact of the financial loss to the charity.

More examples to consider...

Trustees will particularly welcome the inclusion of a further coronavirus pandemic-specific table of examples in the new guidance, setting out examples of situations that the Commission would expect to be notified of as a serious incident, and those that they wouldn't.

For example, the new table explains that the Commission only expects a charity to report an outbreak of the coronavirus amongst employees, volunteers, trustees or beneficiaries of an operating charity that results in the charity being unable:

- To deliver vital services to at risk beneficiaries, as in the case of a residential care home, for example, which has insufficient staff to care for the residents safely as a result of staff illness.
- To continue its normal operations, for example because of the serious illness of a large number of beneficiaries.

It also clarifies that the Commission expects a charity to report incidents involving the ceasing of the charity's operations (whether as a result either of the coronavirus lockdown, or a decision on the part of the trustees), a loss of income, or the furloughing of staff only if as a result of the incident the charity is:

- Unable to deliver vital services to at risk beneficiaries, and / or
- Is insolvent/forced to close permanently, or
- Is highly likely to be insolvent/forced to close permanently within the next 12 months

Other incidents relating to the coronavirus pandemic included in the new examples table include:

- Scam emails linked to the pandemic and causing loss or harm to the charity
- Fraud linked to the pandemic
- The investigation of a charity, either by HMRC for alleged abuse of the furlough scheme or by the police for alleged breach of government lockdown measures
- An allegation of significant harm being suffered by an employee of the charity as a result of their working conditions during the pandemic
- An allegation of abuse of a beneficiary by a charity's employee or volunteer during the pandemic

...but trustees will still need to consider the facts of each incident and decide whether it is reportable

The guidance provides many useful points for trustees to consider, but whether or not a serious incident is reportable to the Commission is still very much a matter for the trustees of a charity, and any decision as to the impact of an incident on a charity will need to be made by the trustees taking into account all the relevant facts applicable to their charity and having obtained any appropriate professional advice.

It also contains a reminder to trustees that:

- While they can delegate responsibility for reporting serious incidents using the Commission's online form to others, such as employees, ultimate responsibility for ensuring such reports are made as appropriate remains with the trustees and
- if trustees consider whether an incident should be reported as a serious incident to the Commission, but decide against it, they should make sure they record both their decision and their reasons for making it.

It is to be hoped, however, that this new guidance from the Commission will help trustees come to the decisions they are now having to make about whether or not to report incidents linked to the coronavirus pandemic to the Commission.

Alert for large charities issued: the importance of transparency and accountable governance

Publication of the Commission's [decision](#) following its charity inquiry into The Royal National Institute of Blind People and RNIB Charity was accompanied by an alert issued to charities appearing to:

- have an income of over £9 million, and a more complex governance structure in that it is governed by a board of trustees but run by a separate body of executives; and

- be a service-providing charity, in that the charity's front-line staff directly serve and interact with beneficiaries (some of whom may be vulnerable) and / or provide amenities or facilities to the public.

highlighting the need for any such charity to put in place clear and adequate lines of accountability in the governance of the charity.

Recipients of the letter: do not ignore this alert...

Any charity that has received a copy of the alert accompanied by a letter from the Commission should note that the Commission intends, later this year, to contact a sample of the recipients of the alert "to understand what measures are in place to manage identified risks".

If a recipient of the letter and alert from the Commission is planning significant changes to the charity in the near future, or has not, within the last twelve months, reviewed:

- its existing general governance arrangements
- its risk management measures and
- assurance mechanisms in relation to the charity's people protection arrangements and activities

the alert contains the warning that they should do so. The Commission expects such charities to "be mindful" of the risks highlighted by the alert, and to take steps to mitigate them.

Advice for complex governance structures

The guidance highlights the risk that a more complex governance and management structure, involving a board of trustees, a group of executives and potentially sub-committee structures operating under different leaderships can lead to communication breakdowns, in particular if oversight is weak, or even compromised.

This in turn can lead to failures in the areas of safeguarding and governance.

The guidance contains advice both to trustees governing charities with such complex structures, and to executives of such charities, setting out steps to take to ensure effective oversight.

It emphasises that trustees must seek to have “robust oversight” of their charity’s operations and structure, taking into account the complexity, scale, nature and associated risks of its activities. They must be willing, and able, to hold the executive to account.

In its advice to executive groups, the guidance makes clear that a charity’s executive should be able to identify failures to protect people from harm, to learn from those incidents, and to disclose those incidents fully and frankly to the trustee board.

Advice for charities with front-line staff (including volunteers) working directly with beneficiaries

Safeguarding remains a priority for all charities, but it is particularly important in charities with staff and volunteers that work directly with beneficiaries, some of whom may be vulnerable.

The guidance advises that such charities should:

- establish effective safeguarding policies and procedures followed by all trustees, staff and volunteers;
- ensure sufficient resources (including trained personnel) to safeguard people;
- appoint a senior safeguarding lead, if appropriate;
- have a plan to deal with concerns raised overseas, if appropriate;
- embed a culture of “speaking up” in the charity, and put in place anti-retaliation policies;
- clearly set out how misconduct should be reported, how it will be investigated and managed, and the clear and proportionate consequences attached to misconduct;
- when working with other organisations, have appropriate safeguarding procedures in place, including clear lines of responsibility, reporting and escalation; and

- regularly review whether the arrangements put in place for safeguarding by the charity are sufficient.

Pandemic fraud alert issued

The Commission has also issued a [regulatory alert](#) to charities, warning of an increased risk of fraud and cybercrime as a result of the pandemic.

The alert makes clear that all charities are at increased risk, but particularly those working to provide services and support to local communities, and highlights the key types of fraud that may be encountered:

- Scam emails (“phishing”), involving, for example, invitations to click on links or attachments in unexpected or suspicious emails.
- Procurement fraud, involving, for example, payment being made to a seller of goods by a charity, but the goods never being received by the charity, or the goods not meeting the standards required by the charity.
- Mandate or chief executive officer frauds, involving, for example, an apparent request from a senior member of a charity’s executive team to change bank account details or to make a payment to a new account.
- Advanced fee frauds, in relation to unsolicited offers of goods, services, or financial support, for example which will be provided after payment of a fee by a charity in advance.

The alert also warns charities to protect their electronic devices, and emphasises the need to protect the personal data of staff and beneficiaries when using, or switching to, digital communications and delivery platforms.



Help for charities wanting to avoid being victims of fraud or cybercrime

Charities may wish to access the free on demand webinar to assist with spotting possible fraud related to the coronavirus pandemic, created by the Fraud Advisory Panel and the Commission.

In addition, the Fraud Advisory Panel has a COVID-19 fraud watch group which publishes a weekly [update](#) setting out.

- current fraud risks
- anticipated or emerging issues and
- some simple, preventative tips.

The National Cyber Security Centre has advice on [keeping devices secure](#), and extra steps to take if employees are [working from home](#), including how to use [video conferencing](#) services securely.

In relation to mandate or chief executive officer fraud, the Commission has previously issued useful [advice](#) setting out steps charities should take to avoid this, including, importantly, the suggestion that charities should review internal procedures in relation to how transactions are requested and approved, in particular those relating to verifying the validity of such transactions.

What do charities have to do if they are victims of fraud or cybercrime?

Charities that fall victim to fraud or cybercrime should report it promptly to both Action Fraud and the Charity Commission. In addition, “phishing” emails should be reported to the National Cyber Security Centre through the [Suspicious Email Reporting Service](#).

Guidance for charities in financial difficulties published

Recent guidance from the Charity Commission emphasises the importance for charities of cash flow management, reducing costs, frequent monitoring of finances, and creating plans during the coronavirus pandemic.

Emphasising the need to act in the best interests of the charity, the new guidance seeks to summarise the more in-depth Commission guidance on managing a charity’s finances when a charity is in financial difficulty, and suggests a series of steps for Trustees to work through.

The guidance is aimed at small charities, but could provide a useful summary of key steps to take for a trustee of any size of charity if their charity is facing financial difficulties.

For more details of those steps, and what to do if the worst should come to the worst, read Neil Burton’s short [article](#) on our [Coronavirus Hub](#).

Restricted funds: new guidance for independent examiners published

The Charity Commission has recently issued new guidance to independent examiners “[Guidance for Independent Examiners during Covid-19 or in a time of national emergency](#)” which emphasises that independent examiners will need to be alert to the risk of restricted funds being used incorrectly, and take care to ensure this is not happening.

This shows that, although the Commission is well aware that charities are under financial pressure at present, it is also alert to the risk of charities incorrectly using restricted funds during the pandemic – and reinforces the need for trustees to manage their charity’s funds properly, even if their charity is facing financial difficulties.

Trustees have a duty to manage their charity’s funds properly. This means that, amongst other things, they must know which of their charity’s funds are restricted funds, and ensure those funds are only applied in accordance with the restrictions placed on the funds by the funds’ respective donors.

Failure to do so is likely to result in a breach of trust as well as that trustees’ duty, and may in some circumstances result in the trustees’ incurring personal liability for the consequences of the breach.

SORP: Guidance on energy and carbon reporting rules published for charitable companies

The SORP Committee has published a further helpsheet for charitable companies, addressing The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018-UK, as applied to charitable companies.

Information sheet 5, which can be found on the [SORP website](#), provides guidance to charities that:

- meet the definition of a "large company", and
- are required to prepare a director's report under Part 15 of the Companies Act 2006

on how they can comply with The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 ("the 2018 Regulations"), which were issued in November 2018 and came into force on 1 April 2019.

The 2018 Regulations require, subject to certain exemptions, the reporting of a large charitable company's UK energy use and associated greenhouse gas emissions as a minimum relating to gas, electricity and transport fuel, as well as an "intensity ratio" and information relating to energy efficiency action, through their annual reports in the directors' report.

The information sheet published by SORP is intended to provide guidance to those preparing, examining or auditing the accounts of large charities as to how to comply with the reporting requirements in their trustee reports.

Guidance on public fundraising published

The Fundraising Regulator and Chartered Institute of Fundraising (IoF) have [published](#) new guidance to support the return to public fundraising, to protect the safety and wellbeing of both fundraisers and the public, as the country sees the return of non-essential shops and other businesses beginning to resume their activities.

The guidance emphasises that fundraising should only begin again where it is safe to do so, and must be in line with Government advice, and in accordance with the social distancing guidelines.

It states that all fundraising organisations should read the guidance and carry out full risk assessments in relation to their proposed fundraising activities to inform their decisions. They should also consider consulting staff and volunteers before recommencing fundraising activities.

Charities should carefully document all relevant decisions, and the guidance suggests that they should be prepared to explain and justify those decisions if necessary.

The first piece of guidance addresses the [overarching principles applicable to all fundraising](#) methods, and the second contains specific advice on [public fundraising](#), including fundraising in the street, door-to-door and on private sites. Further guidance containing practical advice will be published by the Fundraising Regulator and the IoF in the coming weeks



Social Investment Tax Relief: what now?

With the tax relief due to come to an end in April 2021 unless the Finance Bill currently passing through Parliament is amended, more than 30 organisations have [written](#) to HM Treasury asking for the scheme to be extended until April 2023.

It suggests that, with the current focus on the coronavirus pandemic, there isn't the time available at present to repeal the relief and replace it with something new. In addition, it raises the concern that removing the relief at such a time of economic uncertainty will send the wrong signals to the market, and put capital that has already been committed to investing in charities and social enterprises at risk.

Mills & Reeve Partner [Neil Pearson](#), one of the signatories to the letter to HM Treasury, commented:

“Social enterprises are uniquely placed to address some of the problems we face in society and to create a positive impact in our communities. Extending SITR would be a big boost to social enterprises in the UK. Moving the deadline to April 2023 gives certainty in the shorter term for investors and fund-raisers, and creates breathing space to look in the longer term at potentially bigger and bolder schemes that could provide essential funding for social entrepreneurs on a much wider scale. Which can only be a good thing.”



Philanthropy insight

Funders' Collaborative Hub launched

A Funders' Collaborative Hub has been launched by ACF with the aim of enabling increased understanding, closer alignment, and opportunities for collaboration in the post-emergency phase of Covid-19.

The Hub, developing its principles from those of the Covid-19 Funders' Pledge, aims to support charities and civil society, focusing on recovery and renewal over the next 12-18 months and to help answer four key questions:

- What is happening already? It aims to do so by collating data / insights and collaborating on intelligence to assist funders to be more informed in their decision making and allocation of resources.
- Who else is involved or interested in this? It aims to enable funders to find out about existing collaborations which they can access.
- How can we best help? It aims to support foundations to align funding, practices and processes to help fund seekers access support more efficiently.
- What and where are the gaps? It aims to identify gaps in response, and draw funders together to attempt to plug those gaps.

In the future, it hopes that it might also be able to assist wider civil society by providing an answer to the question “Who can help me?”

With a view to answering these questions, the Hub wishes to encourage funders to connect with the Hub, to achieve a critical mass of engagement and data that is accessible. It aims to offer “a range of ways that foundations can collaborate that goes beyond either pooled funds or information sharing, including linking to existing or emerging networks and groups of funders in a “hub and spoke” model”.

Organisations involved in the Hub do not need to be members of ACF, but should be committed to sharing data, including through 360Giving, and insights/learning via the Hub.

The Hub will have an England focus initially, but aims to have a UK wide remit in the long run. The [blog post](#) published by ACF sets out next steps, and provides information on how funders can get involved.

CAF research shows shift in focus of giving, but levels of giving remaining high

Having mined CAF's giving data, a [blog post](#) published on 15 May sets out CAF's key findings that giving in the four weeks to 20 April had "shifted dramatically" towards support for hospitals and support, with 35 per cent of people responding to the latest survey saying that they had giving to causes working in this area. The long term average for giving in this area is 21 per cent.

Polling shows that this shift has come at the expense of giving to children's causes and animal welfare.

However, despite concerns about job security, and general economic uncertainty, levels of giving to charity have remained high, with 34 per cent of respondents to the April poll confirming that they had given to charity in the past four weeks – compared to 30 per cent in March.

Legacy Foresight's income forecasts for 2020 up slightly

Legacy Foresight is [reported](#) to have updated its legacy income forecasts, last produced in April, taking into account the latest economic, demographic and administrative information, and the result is a slight rise in its forecasts for legacy income for the year.

It has developed two different scenarios for the legacy market depending on how successfully the coronavirus pandemic is managed, which produce the following key findings for 2020:

- Cash legacy income may shrink between four per cent and 23 per cent.
- The average value of residual legacies are likely to drop between three per cent and seven per cent.
- A subdued property market may still increase the length of time to sell property assets, resulting in possible disruption of the flow of cash income.

In the longer term, over five years, Legacy Foresight expects legacy income to grow by between nine per cent and 13 per cent, increasing from £3.4 billion in 2019 to between £3.6 billion to £3.8 billion in 2024.



Decision update

High Court refuses permission to pursue charity proceedings until mediation attempted

This [decision](#) illustrates very well how a court will focus on the best interests of the charity, rather than those of the parties to the litigation, when coming to a decision as to whether to allow charity proceedings.

The case involved an internal dispute which started in 2013 as to the proper governance of the At-Taqwa Trust, a religious charity. The Charity Commission was a party to the application for permission to take charity proceedings.

The Court applied the decision in *Rai v Charity Commissioners of England and Wales* [\[2012\] EWHC 1111 \(Ch\)](#).

Key to the Court's decision in this case was the guidance in that earlier decision that the approach to take should be, even if the applicants had a legally sustainable dispute, "is the commencement of litigation the best (or the least worst) course in the interests of the charity as a whole to deal with that dispute?... it is the charity's interest (not that of the Applicants or proposed Respondents) that is the focus of the inquiry."

The Court in the present case was not convinced on the information provided to it that litigation was the "least worst option" available to the charity. The charity was not in a good financial position, and the dispute was likely to be harming the charity both financially and in relation to its charitable activities. Litigation was likely to make the situation worse for the charity.

It therefore agreed with the Commission that litigation should not be permitted until the parties had "engaged in a meaningful way in mediation with a professional mediator".

It further said that "the parties should make utmost efforts to ensure that mediation is successful", warning that if further consideration should be required by the Court in the future, the Court was likely to look closely at the extent to which each side did so.

Interpretation of charitable trust documents: do the standard principles of contractual interpretation apply?

Charitable trust documents can be difficult to interpret – particularly those where the charity has been in existence for a long time, and there seem to be one or more ambiguities in the documents themselves over the way in which charitable funds should be applied.

A recent [decision](#), however, relating to a dispute over who should have control of the substantial funds held on the trusts of the Greek Cathedral Cemetery Enclosures Trust, a charitable trust made in 1860, contains some useful consideration of the principles of interpretation for a charitable trust for anyone struggling to interpret such a document.

In summary, although interpreting a trust document is no different to interpreting a contract, in the case of a charitable trust, where there is some ambiguity in the terms of the trust and a long period has passed since the charitable trust document was completed, it is not only the facts that were known or assumed at the time at which the document was entered into that can be taken into account in its interpretation, but also subsequent practice.

Interpretation of an ambiguous charitable trust document: the evolution of a principle

While both parties to the dispute accepted the conventional view that interpreting a trust document is no different to interpreting a contract, which was confirmed by the Supreme Court in *Marley v Rawlings* [\[2014\] UKSC 2](#), in the context of the consideration of a Will.

The Court there considered that when seeking to interpret a contract:

“the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions”.

The Court of Appeal applied the same principles to the interpretation of a trust document in *First National Trustco (UK) Limited v McQuitty* [2020] EWCA Civ 107, and the judge in the case of the dispute in relation to the trusts of the Greek Cathedral Cemetery Enclosures Trust considered that there were no good reasons to depart from these principles for the interpretation of a charitable trust.

Unlike with a contract or a non-charitable trust document, however, in the case of a charitable trust it is not only the facts that were known or assumed at the time the document was entered into which can be taken into account when interpreting a charitable trust document, following the decision of the Lord Chancellor in *Attorney General v Sidney Sussex College* (1869) L.R. 4. Ch. 722. Subsequent practice can also be taken into account, provided there is some ambiguity in the terms of the trust and a long period has passed since the completion of the charitable trust document.

In that case, a will in 1641 had left half of an estate to each of Sidney Sussex College in Cambridge and Trinity College in Oxford to be used for the education of certain of the testator's descendants – but if no descendants claimed the benefit of the gift, the colleges had been in the practice of using the funds for the general purposes of the colleges, or to fund exhibitions or scholarships. In 1869, the Court was asked to consider the question as to whether they were entitled to do so!

The Lord Chancellor decided that on a proper interpretation of the Will they were entitled to do so, and further considered that:

“the appellants are entitled to apply that principle of the Court which says, that if there be an ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reasons why the Court relies upon that rule with reference to charities, where there is anything doubtful in the construction of the will, is, that there have been persons alive who are competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such conclusion, a course of action has been adopted which has been a plain and clear breach of trust.”



The need for ambiguity to trigger the availability of this exception to the usual principles of interpretation is stated in another case, *Attorney General v Corporation of Rochester* (1854) 5 De G.M. & G. 797 43 E.R. 1079, referred to by the Lord Chancellor in the above case relating to the Cambridge and Oxford colleges, and in which it was stated that:

“Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to...But that is the case where the Court has not the trust before it, or at all events where the trust, if it is before the Court, is doubtful in its terms and interpretation. If the Court finds a clear trust expressed on a will, no length of time during which there has been a deviation from it can warrant this Court, as I apprehend, in making a decree in contradiction to such a trust.”

CIOs: members’ duty to exercise their powers in good faith is subjective – and a timely reminder can help

The duty of members of a Charitable Incorporated Organisation (CIO) to exercise their powers in good faith in furtherance of the CIO’s charitable purposes was briefly considered in the relatively recent Court of Appeal decision *Lehtimäki v Children’s Investment Foundation Fund (UK)* [2018] EWCA Civ 1605 (the Supreme Court decision on an appeal in relation to which is still awaited).

A recent [decision](#), however, involving an internal dispute between members of a religious charity, has confirmed that the duty of CIO members is subjective – what matters is the member’s state of mind.

The High Court decision also contained sensible advice for any chair of a meeting of a CIO at which a decision is to be voted upon by members: it “would do no harm” to remind members of the CIO that they owe a duty to the CIO to exercise an independent judgment and to vote in a way that they, in good faith, consider the interests of the CIO would best be furthered.

Attorney General must be a party to proceedings to determine whether property is held on a charitable trust

A recent High Court [decision](#) has held that the Attorney General must be a party to proceedings in disputes over whether or not property is held on charitable trusts.

It also highlighted the importance of directly asking the Attorney General whether or not it is their view that property subject to such proceedings is held under a charitable trust at the outset of those proceedings.

How did the Court come to consider these issues?

The case involved a dispute in relation to an old bus garage, which Brent LBC wished to sell and which the appellant in the case asserted was held on charitable trusts for the benefit of the local community.

Both parties had corresponded with the Attorney General about joining proceedings, and the Attorney General had declined to join the proceedings – but in circumstances in which it was unclear whether or not in her view there was a charitable trust in existence over the old bus garage.



The High Court held that the Attorney General represents the beneficial interest in a charitable trust (that is, the Objects of the charity). This means the Attorney General is entitled to join a case such as that involving the old bus garage in the position of a claimant advancing a claim that a charitable trust exists. It also means that if the Attorney General decides that, in their view, the property is not held on charitable trusts, then that decision is, in effect, binding.

It also, however, puts the Court in a bit of a quandary where the Attorney General's position on the question of the existence of a charitable trust is, as was the case here, unknown.

How could this situation have been avoided?

The decision of the High Court makes clear that the Attorney General should have been asked directly what their view was about whether the property was held under a charitable trust.

This would then have allowed the Attorney General to decide what to do next:

- if the Attorney General had wanted to, they could have joined the proceedings as a claimant
- if the Attorney General had wanted to take a neutral stance on the question as to whether a charitable trust exists or not, the Attorney General could be added as a defendant – allowing the point to be argued, and ensuring the outcome is binding, but not forcing the Attorney General to take part in the proceedings any more than they consider necessary, so reducing the costs of the proceedings.

If the existence of a charitable trust is to be considered at all, however, the High Court decision makes clear that the Attorney General is a necessary party.



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