

ILM Factsheet

A Legacy Officer's Discretion

Agreed notes from the presentation by Kenneth Dibble, Director of Legal Services, the Charity Commission of England and Wales, at CLOM 2005

There is a regulatory framework for charity trustees but trustees also have the discretion to act within this framework in what they consider to be the best interests of the charity – that is, as we say in the Commission, ‘freedom within a framework’.

The duties of charity trustees include the following:

- To act in best interests of charity and to exercise such skill and care as is reasonable in the circumstances
- General principle: trustees must seek to secure all assets due to the charity – following obligations as a trustee

Whilst a charity’s Trustees must seek to secure all assets due to the charity, they also have broader responsibilities to consider. They may:

- Consider wider reputational issues which may affect public perception and future income
- Consider cost of exercising strict legal rights
- Consider moral obligations, ex gratia jurisdiction

Legacy Officers can exercise this discretion, on behalf of Trustees as part of their delegated duties, though agreement to ex-gratia payments must be as a result of the opportunity of all the charity’s trustees to give their views (or such smaller number of trustees as are empowered to take such decisions on behalf of the full body).

There are a number of parameters for Trustees in considering the matter of discretion, including a ‘business-like sense’. This is relevant to a number of specific examples which have been put forward by the Institute of Legacy Management:

A. Statutory Interest

- Legal right to interest may exist under general law relating to administration of estates, that is that interest may be payable after one year
- Whether it is claimed will depend on:

- Impact on wider reputational issues

- business efficacy
- proportionality – cost of exercising rights
- existence of moral obligation

The same considerations will obtain, for instance, in deciding whether or for how long to chase for outstanding tax credits, tax deduction certificates.

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B. Agreeing for family members to have items of sentimental value

Waiving an entitlement to items of sentimental value is certainly an area of discretion for Trustees. The values of the items have to be small in relation to the value of the estate and the sum the charity is due to receive from the estate and relinquishing them must be felt to be in the best interests of the charity. There is an opportunity here also to consider ex-gratia jurisdiction. Requests must be treated with sensitivity.

C. Agreeing payment of non-testamentary costs, such as headstones.

The charity's Trustees may have discretion if the cost is reasonable in all the circumstances and if felt to be in the best interests of the charity. Again, the charity trustees may consider if there is a moral obligation (ex gratia jurisdiction).

D. Ex-gratia payments

If the total cost of application, which includes internal costs such as time of assessment and preparation and process, and also includes the cost of dealing with Commission queries, exceeds the amount to be given away AND if it is within the Trustees' policy, then the charity can agree to make the payment without reference to the Commission if it is thought likely that the Commission would agree.

E. Valuation of significant assets

Should charity legacy officers press for the valuation of significant assets? It is not an immutable rule; if Trustees have significant concerns about the value of the asset they can press for a valuation (or ask the Executors to justify the value shown, say, in the Estate Accounts).

F. Requesting more general information

Charities should only request more general information where they have particular concerns.

G. Enduring Powers of Attorney – seeking accounts relating to the Power.

Broadly speaking, this is not a matter for beneficiary charities to look into.

H. Does the Commission have a view on the level of professional fees?

If these are high, the charity can press for an assessment of costs under the Solicitors Act.

I. Gaining information such as the Estate Administration Accounts and regular Trust Accounts where a charity is a remainderman of a Will Trust.

Charities should monitor Will Trusts where they have an interest as remainderman – that is have a marker down on a regular basis.

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J. Should charities treat lay executors differently from professional estate administrators?

Strictly speaking, no, BUT for a lay executor there would be particular sensitivities and the lay executor may not have professional knowledge. Therefore Trustees should be very mindful regarding how the reputation of the charity might best be preserved.

To re-iterate:

General principles

- Trustees have a right to compel due administration of the estate
- Trustees under a duty to secure all property due to the charity

Mitigated by

- Overall consideration of the best interests of the charity
- Proportionality
- Amount involved
- Business efficacy
- Reputational issues

Questions from the floor.

Q: What is meant by 'proportionality'?

Trustees may take account of several factors: the law, their duties, the best interests of the charity and what are their strict legal rights (if any). Against that need to be balanced the costs of enforcement, the reputation of the charity, what people might think, what are the more general costs, the public repercussions. In those few applications under s27 Charities Act 1993 that come to the Commission, the Commission generally looks favourably.

Q: To what extent can charity Trustees delegate their discretion?

Generally they do have powers to delegate to officers, but not under s27 1993 Act (ex-gratia payments). Trustees can set a framework for staff at different levels according to the level / type of issue. Find decision on moral obligation for the Trustee for ex-gratia payment. It is a question of balance and degree.

Q: Should such a framework be established by resolution?

It would certainly be helpful to have such policy recorded at Trustee level for clarity and indeed for the protection of the staff involved in the use of discretion.

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Q: If we are asked to agree an ex-gratia payment which is de minimis, can you confirm that no referral to the charity's Trustees is necessary?

Yes, provided that agreement follows the Trustees' policy. See text above. Any application to the Charity Commission has to be from the Trustees.

Q: To what degree can or should charities request information as residuary beneficiaries?

You do not have powers to interfere with the administration of the estate. Asserting any 'rights' is just part of a wider picture.

Q (related to above): It seems that you are saying that we must proceed on a case-by-case basis, that we must use not only our brains but our hearts – you will appreciate that perhaps our concern is that we have to be consistent.

Broadly speaking, that is correct. Overall trustees have to act within the scope of their responsibilities and powers and in the best interest of the charity. Reputational issues and sensitivity in certain situations are very important considerations.

Q: As far as ex-gratia discretion goes, is there a concept of 'wasting the Commission's time'?

It is not possible for the Commission to put a figure on how much it cost the Commission to assess an application; in other words, he was not going to give out a de minimis figure. A figure of £1,000 had been bandied about and indeed a charity might consider that that may be right; however it was up to charities to assess the costs in each case and for the Trustees to make policy accordingly and in the light of their duties as already described.