



**FIRST-TIER TRIBUNAL (CHARITY)
GENERAL REGULATORY CHAMBER**

Appeal number: CA/2017/0013

DAVID SWETTENHAM

Appellant

- and -

**THE CHARITY COMMISSION FOR
ENGLAND AND WALES**

Respondent

Before: Judge Alison McKenna

Sitting in public at Fleetbank House on 4 January 2018

Appearances: Mr Swettenham in person

Ms Freed, in house lawyer, for the Respondent

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DECISION

The appeal is dismissed.

REASONS

The Appeal

1. In September 2017, the Charity Commission opened a statutory inquiry into Jole Rider Friends (“the Charity”) and made Orders under s. 76(3)(d) and (f) of the Charities Act 2011¹, restricting transactions through the Charity’s main bank account and an associated bank account at Lloyds bank, also restricting the use of its credit card without the Charity Commission’s prior authorisation. These Orders are temporary protective measures, pending the conclusion of the statutory inquiry. They are subject to review by the Charity Commission under s. 76 (6) of the 2011 Act.
2. There has been no appeal to the Tribunal against the opening of the inquiry, which is on-going. This Decision concerns the two Orders made under s. 76(3) of the 2011 Act, which by his appeal the Appellant asked the Tribunal to quash.
3. An appeal against the Charity Commission’s Orders under s. 76 of the 2011 Act requires the Tribunal to “*consider afresh*” the Charity Commission’s decision (s.319 (4) (a) of the 2011 Act). In so doing, the Tribunal may consider evidence which has become available subsequent to the Charity Commission’s Order (s.319 (4) (b) of the 2011 Act).
4. It follows that the issue for the Tribunal in determining this appeal is whether the Tribunal would itself make the Orders under appeal on the basis of all the evidence available to it at the hearing. In the usual way, the Appellant (who brings the appeal as a charity trustee under column 2 of schedule 6 to the 2011 Act) bears the burden of proof to persuade the Tribunal to allow his appeal.
5. Tasked by Parliament with making a fresh decision, the Tribunal has no power to review the procedures followed by the Charity Commission when making the Orders or to consider its conduct prior or subsequent to the making of the Orders.

Background

6. The Charity is an unincorporated association and a registered charity (1112914)². Its main activity is running a “*Bikes 4 Africa*” programme from its premises in Gloucestershire, collecting and refurbishing donated bicycles with the aim of sending them to Africa for the use of school students. The Charity has for most of its life had only two trustees, David Swettenham and Helen King, who live together, established

¹. Pages 31 and 42 of the Consolidated Hearing Bundle.

² Its Objects are: “*to advance education, in particular by providing or assisting in the provision of facilities and equipment at schools and other educational institutions on the continent of Africa*”.

the charity together, and both work for it in an executive capacity. They refer to themselves as the “Director Trustees”. For a period of months last year, the Charity had three additional charity trustees, but they have all since resigned.

7. The Charity’s governing document is a constitution dated 9 September 2005, which contains standard provisions limiting the remuneration of its trustees. These are discussed in more detail below but, in short, the Charity Commission’s view is that there has been unauthorised remuneration to Mr Swettenham and Ms King of a sum totalling around £200,000 over the life of the Charity. Mr Swettenham accepts that he and Ms King have been remunerated, but disputes that this was unauthorised and/or asks the Charity Commission to use its statutory powers to regularise the remuneration because it was in the interests of the Charity. He has also suggested that some of the money paid to the Director Trustees was reimbursement of out-of-pocket expenses.
8. The Charity Commission contacted the Charity in 2015, raising concerns about the remuneration of Mr Swettenham and Ms King. In 2016, the Charity Commission served the trustees with an “Action Plan,” advising that certain steps should be taken to address what it regarded as unauthorised trustee remuneration, including a clear statement that the remuneration must stop³. Mr Swettenham acknowledged receipt of the Action Plan promptly⁴ but never responded to it substantively. He initially told the Tribunal that he had not received the Action Plan⁵, but later said that he had forgotten about it due to other pressing concerns⁶.
9. The pressing concerns to which he refers are a number of disputes between the Charity and other persons, whom Mr Swettenham describes as the Charity’s “detractors”. Mr Swettenham provided the Tribunal with a narrative about each of the “detractors”⁷. Some of these disputes have resulted in litigation. A complaint about statements made on the Charity’s website was upheld by the Advertising Standards Authority (“ASA”) in December 2016⁸ following a complaint made by a former employee of the Charity. The ASA concluded that “*As we had not seen evidence to substantiate the claims about the charity’s operations in Africa, we concluded that the claims were misleading*”. The Charity was told by ASA to ensure that it did not make objective claims about its operations unless it held sufficient evidence to substantiate them.
10. On the date of the hearing before me, the Charity was in default of its obligations under sections 163(1), 164(1) and 169(3) of the 2011 Act, requiring it to file with the Charity Commission its accounts, reports and returns for the year ended March 2016 and also for the year ended March 2017. The Charity has a history of late filing in earlier years, as the last set of accounts available (2015) were filed 95 days late,⁹ and

³ Page 152, Consolidated Hearing Bundle.

⁴ E mail of 4 October 2016, page 7 Supplementary Bundle.

⁵ E mail of 5 December 2017, page 57 Supplementary Bundle.

⁶ Appellant’s Written Submissions, page 7.

⁷ Page 297, Supplementary Bundle and page 312, Consolidated Hearing Bundle.

⁸ Page 157, Consolidated Hearing Bundle.

⁹ These cover the period 31 March 2014 to 29 March 2015 (not a full year) and report income of £204,461 with expenditure of £189,004 - page 117, Consolidated hearing Bundle. The Independent Examiner formally discloses trustee remuneration not properly authorised by the constitution - page 121 of the Consolidated Hearing Bundle.

the 2012 accounts were filed 360 days late. Mr Swettenham told the Tribunal that this situation was attributable to the Charity prioritising the use of its scant resources on charitable activities rather than on its accounts, and said that many other small charities have filed their accounts late without the Charity Commission intervening. He had stated before the hearing that the late accounts would be filed so as to be available to the Tribunal at the hearing¹⁰. However, at the hearing itself they had still not been filed with the Commission or produced, even as drafts, in evidence. Mr Swettenham told the Tribunal that their unavailability was due to the sickness of the Charity's Independent Examiner. Mr Swettenham has since e mailed the Tribunal to say that the overdue accounts will be filed very shortly and reported that the Independent Examiner has no concerns about them¹¹.

The Hearing

11. Mr Swettenham asked the Tribunal for the earliest possible hearing. A half-day oral hearing was convened on 4 January 2018, at which Mr Swettenham represented himself and Ms Freed, one of the Charity Commission's in-house lawyers, represented the Commission. I am grateful to them both for their clear oral and written submissions. They addressed me for around two hours each, following which I reserved my Decision.
12. The Charity Commission had prepared and served a hearing bundle (comprising over 1000 pages) in accordance with the Tribunal's Directions. Mr Swettenham complained that it had been served on him only two days prior to the hearing, but the Charity Commission explained to the Tribunal that its attempted delivery the previous week had been unsuccessful because there was no one present at the Charity's premises. Mr Swettenham complained that some of the documents he had requested to be included had not been placed in the bundle, but he sent the missing items to the Tribunal afterwards and I have read them all.
13. Neither Mr Swettenham nor Ms King made witness statements for the Tribunal. The Charity Commission did not rely on any witness evidence. Mr Swettenham provided the Tribunal with witness statements from three supporters of the Charity (discussed further below) which the Tribunal accepted as their evidence in chief. As the Charity Commission did not wish to cross examine them, I did not find it necessary for them to attend to give oral evidence.
14. Mr Swettenham asked for one of his witnesses, Mr Ian Ord, to give additional oral evidence to the Tribunal at the hearing itself. Mr Swettenham had not provided the Charity Commission or the Tribunal with a further witness statement from Mr Ord, despite having been advised to do so before Christmas. He said this was because Mr Ord had been away then had been unwell. The Charity Commission, understandably, objected to the admission of late evidence which had not been served in the usual way. I concluded that it would not be fair and just to permit Mr Ord to give oral evidence at the hearing and so I refused that application, but relied on Mr Ord's previously submitted written evidence (discussed below).

¹⁰ Page 55, Consolidated Hearing Bundle.

¹¹ E mail of 5 January 2018 (unpaginated).

15. The Charity Commission also applied for permission to rely on late evidence, consisting of the replies recently given by two of the former charity trustees to its questions, issued under s.47 of the Charities Act 2011. I considered that, as the inquiry is on-going, it was appropriate for me to have sight of the most up-to-date information obtained by it and so I allowed the request. Obviously, this is background information only as I did not hear from the former charity trustees directly.

The Law

16. Section 76 of the Charities Act 2011 provides (where relevant) as follows:

“(1) Subsection (3) applies where, at any time after it has instituted an inquiry under s. 46 with respect to any charity, the Commission is satisfied –

(a) that there is or has been ...or any other¹² misconduct or mismanagement in the administration of the charity, or

(b) that it is necessary or desirable to act for the purpose of –

(i) protecting the property of the charity, or

(ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity.

(2)...

(3) The Commission may of its own motion do one or more of the following-

(a)...

(b)...

(c)...

(d) order any person who holds any property on behalf of the charity, or of any trustee for it, not to part with the property without the approval of the Commission;

(e)...

(f) by order restrict (regardless of anything in the trusts of the charity) the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity without the approval of the Commission;

(g)...

(4)...

(5)...

(6) The Commission –

(a) must, at such intervals as it thinks fit, review any order made by it under paragraphs...(c) to (g) of subsection (3), and

¹² As amended by the Charities (Protection and Social Investment) Act 2016.

(b) if on any such review it appears to the Commission that it would be appropriate to discharge the order in whole or in part, must so discharge it...

(7)...”.

17. There is no statutory definition of the terms “mismanagement” or “misconduct” so the terms carry their ordinary meaning. The Charity Commission’s published guidance defines them as follows:

“misconduct includes any act (or failure to act) in the administration of the charity which the person committing it knew (or ought to have known) was criminal, unlawful or improper”.

“mismanagement includes any act (or failure to act) in the administration of a charity that may result in significant charitable resources being misused or the people who benefit from the charity being put at risk”.

18. The Charity Commission’s statutory objectives under s. 14 of the 2011 Act include a public confidence objective, a compliance objective and an accountability objective. Its statutory functions under s. 15 of the 2011 Act include encouraging and facilitating the better administration of charities, identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action. Its duties under s. 16 of the 2011 Act include a duty to have regard to best regulatory practice in performing its functions. This requires regulatory activities to be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.
19. The Charity Commission has published a Risk Framework¹³ which outlines how it decides when and in what way it will engage with a charity. It has also published a Revised Regulatory Statement which sets out its strategic priorities in furtherance of its statutory objectives¹⁴. It has published Guidance to charity trustees on managing conflicts of interest¹⁵ and Operational Guidance OG117-8 on its investigations work and when it will use temporary protective powers to protect charity assets¹⁶.
20. I was not referred by either party to any case law in respect of s. 76(3) of the 2011 Act.
21. Mr Swettenham referred me to published case reports of instances where trustee remuneration has been authorised by the Charity Commission¹⁷. These cases each depend on their own facts and set no precedent for me to follow. He also referred me to the Law Commission’s recent report on Technical Issues in Charity Law, and to sections 105, 185 and 191 of the 2011 Act. I did not find these relevant to the issues I must decide.

¹³ Page 276, Consolidated Hearing Bundle.

¹⁴ Page 289, Consolidated hearing Bundle.

¹⁵ Pages 71 to 101, Authorities Bundle.

¹⁶ Page 292, Consolidated hearing Bundle.

¹⁷ Pages 134 to 195, Authorities Bundle.

Evidence

22. As noted above, the Tribunal heard no oral evidence but it did consider written witness evidence. The hearing proceeded on the basis of both parties making oral and written submissions.

(i) Witness evidence

23. The witness evidence relied on by Mr Swettenham was admitted in written form. Witness statements from Mark Fuller, Graeme Richardson and Ian Ord all describe their involvement with the Charity as volunteers and supporters and state that they have been impressed by the dedication of Mr Swettenham and Ms King. However, Mr Fuller and Mr Richardson do not mention the involvement of the Charity Commission at all, so I cannot be satisfied that they were aware of the Charity's problems when they made these statements. Mr Ord makes clear that he was aware of the Charity Commission's inquiry and the Orders, having been told about them in person by Mr Swettenham and Ms King. He describes telephoning the Charity Commission to ask for more details (which were not given to him, as he is not a trustee). However, his expression of bafflement as to why the Orders should have been made at all suggests that he was unaware of the Charity Commission's concerns about unauthorised trustee remuneration when he made his witness statement.

24. I am grateful to all three witnesses for their statements, but in all the circumstances I did not find their evidence to be helpful to me in determining the issues which I must decide in this appeal.

25. I would have found it very helpful to have received witness evidence from Mr Swettenham and/or Ms King, but they chose not to provide it. That is their prerogative, but it left me without information from the best source of evidence available about some of the matters in dispute. Mr Swettenham's failure to provide up-to-date accounting information to the hearing was particularly regrettable, as it deprived me of important evidence about the financial position of the Charity. This meant that his submissions about the Charity's finances and his statement of disagreement with the Charity Commission's own accountant's report¹⁸ were both unsupported by primary evidence. I clearly cannot take account of his unsubstantiated self-reporting about the missing 2016 and 2017 accounts.

26. Mr Swettenham was critical of the Charity Commission's decision not to rely on witness evidence. However, I did not find this to affect the clarity of its case on the key issues, as presented to me in Ms Freed's submissions and the bundle of documentary evidence.

(ii) Documentary evidence

27. The hearing bundle comprised well over 1000 pages. I have read them all, but I refer here only to the most salient.

¹⁸ Page 296 Supplementary Bundle.

28. The Charity's constitution provides at clause 16 for there to be a minimum of two trustees. Clause 4 governs the issue of trustee remuneration as follows¹⁹:

"4. Application of Income and Property

- (1) The income and property of the Charity shall be applied solely towards the promotion of the Objects.*
- (2) A Trustee may pay out of, or be reimbursed from, the property of the Charity reasonable expenses properly incurred by him or her when acting on behalf of the Charity.*
- (3) None of the income or property of the Charity may be paid or transferred directly or indirectly by way of dividend bonus or otherwise by way of profit to any member of the Charity. This does not prevent:*
 - (a) a member who is not also a Trustee from receiving reasonable and proper remuneration for any goods or services supplied to the Charity;*
 - (b) a Trustee from:*
 - (i) buying goods or services from the Charity upon the same terms as other members or members of the public;*
 - (ii) receiving a benefit from the Charity in the capacity of a beneficiary of the Charity, provided that the Trustees comply with the provisions of sub-clause (6) of this clause, or as a member of the Charity on the same terms as other members;*
 - (c) The purchase of indemnity insurance....*
- (4) No Trustee may be paid or receive any other benefit for being a Trustee.*
- (5) A Trustee may:*
 - (a) sell goods, services or any interest in land to a Charity;*
 - (b) be employed by or receive any remuneration from the Charity;*
 - (c) receive any other financial benefit from the Charity;*

If:

 - (d) he or she is not prevented from so doing by sub-clause (4) of this clause; and*
 - (e) the benefit is permitted by sub-clause (3) of this clause; or*
 - (f) the benefit is authorised by the Trustees in accordance with the conditions in sub-clause (6) of this clause.*
- (6) (a) If it is proposed that a Trustee should receive a benefit from the Charity that is not already permitted under sub-clause (3) of this clause, he or she must:*
 - (i) declare his or her interest in the proposal;*
 - (ii) be absent from that part of any meeting at which the proposal is discussed and take no part in any discussion of it;*
 - (iii) not be counted in determining whether the meeting is quorate;*
 - (iv) not vote on the proposal.*

¹⁹ Page 126, Consolidated Hearing Bundle.

(b) In cases covered by sub-clause (5) of this clause, those Trustees who do not stand to receive the proposed benefit must be satisfied that it is in the interests of the Charity to contract with or employ that Trustee rather than with someone who is not a Trustee and they must record the reason for their decision in the minutes. In reaching that decision the Trustees must balance the advantage of contracting with or employing a Trustee against the disadvantage of doing so (especially the loss of the Trustee's services as a result of dealing with the Trustee's conflict of interest).

(c) The Trustees may only authorise a transaction falling within paragraphs 5 (a) to (c) of this clause if the trustee body comprises a majority of Trustees who have not received any such benefit.

(d) if the Trustees fail to follow this procedure, the resolution to confer a benefit upon the Trustee will be void and the Trustee must repay to the Charity the value of any benefit received by the Trustee from the Charity.

(7) A Trustee must absent himself or herself from any discussions of the Trustees in which it is possible that a conflict will arise between his or her duty to act solely in the interests of the Charity and any personal interest (including but not limited to any personal financial interest) and take no part in voting upon the matter.

(8) In this clause 4, "Trustee" shall include any person firm or company connected with the Trustee."

29. Clause 6 (1)(c) of the constitution provides that no amendment to clause 4 may be made without the prior written consent of the Commission.

30. The Charity Commission has provided to the Appellant and the Tribunal copies of its contemporaneous internal decision Log²⁰ and Statements of Reasons²¹ for making the Orders. These refer to its reliance on findings of misconduct and mismanagement in the administration of the Charity arising from the on-going accounts default, the history of late filing of financial records, and the on-going unauthorised remuneration. Its reasons for concluding that it was necessary or desirable to act for the purpose of protecting the property of the Charity refer to the charity trustees' failure to comply with the Action Plan, in particular by continuing to pay themselves unauthorised remuneration after they had been advised this should stop. The Charity Commission noted that the Charity could continue to operate under the terms of the Orders, by seeking the Commission's authorisation for legitimate expenditure.

31. The minutes of the Charity trustees' meeting on 27 January 2017 record the appointment of three new trustees on that date: Dr Simon Lenton ("SWL"), Dr Finn Spicer ("FNCS") and Mr Nigel Wood ("NDW").

32. The minutes of the next trustee meeting on 27 February 2017²² record the following:

"7.1 To satisfy the need to agree the Directors' salaries.

²⁰ Pages 29 and 40, Consolidated hearing Bundle.

²¹ Pages 32 and 43, Consolidated hearing Bundle.

²² Page 328, Consolidated Hearing Bundle.

- *DCW stated that DCW and HMK drew a combined salary of 54k.*
- *SWL asked if there were any other benefits such as pension contributions. DCW stated that their expenses for their car, cell phones and house phone and internet were met by JRF and confirmed that there were no other benefits.*
- *At this point DCW and HMK left the meeting so that the unconflicted Trustees being SWL, FNCS and NDW could discuss the subject. It was felt that there was a clear need to alleviate the pressure on DCW and HMK with the employment of more paid staff. It was agreed that the above combined salary and benefits should continue but be subject to further review at the next Trustees meeting and after further review of the Strategic reorganisation.*
- *DCW and HMK re-joined the meeting and were informed of the decision.*
- *...*

33. Following the meeting on 27 February 2017, Mr Swettenham and Ms King wrote to the three new trustees in rather strong terms on 5 March, criticising them for not being sufficiently productive and for leaving them with issues they were unhappy and deeply concerned about²³. Mr Wood promptly resigned as a charity trustee on 7 March 2017²⁴. There was not another trustee meeting until 3 June 2017²⁵. Dr Lenton resigned on 16 June 2017. Dr Spicer resigned on 15 June 2017²⁶. These resignations left Mr Swettenham and Ms King once again as the only charity trustees and unable validly to take decisions about their own remuneration.

34. The correspondence between the parties shows that Mr Swettenham's initial position regarding the remuneration issue was as follows:

*"The remuneration was not authorised correctly as you have pointed out with regard to the charity's constitution. Although this is clearly an error, it is not an error that was consciously made by the trustees. Further, the trustees consider that repayment of any incorrectly authorised remuneration would not be in any way in the interests of the charity..."*²⁷.

Mr Swettenham's correspondence with the Charity Commission at this time states that if he and Ms King cannot be paid, they will have to resign and the Charity will have to close²⁸. Mr Swettenham's Reply to the Charity Commission's Response to the Notice of Appeal suggested that the Commission should have assisted him to amend the constitution so as to authorise the remuneration retrospectively.

35. As to the position from March 2017 onwards, Mr Swettenham's position in the correspondence was that *"valid authorisation of remuneration did not require further input from Nigel Wood after the authorisation on 27 February 2017"*.²⁹

²³ Page 335, Consolidated hearing Bundle.

²⁴ Letter of resignation, page 369 Consolidated Hearing Bundle.

²⁵ Page 347, Consolidated Hearing Bundle.

²⁶ Accordingly, when the resignations became known to the Commission, the Order restricting use of the Charity's credit card was amended on 8 December 2017 so that it mentioned only Mr Swettenham and Ms King by name as subject to its requirements.

²⁷ E mail of 9 February 2016. Page 146, Consolidated Hearing Bundle.

²⁸ Letter of 24 May 2016, page 669 Consolidated Bundle.

²⁹ E mail of 6 December 2017, page 62 Supplementary Bundle.

36. Finally, the documentary evidence shows his position to be that the “*minutes...could have been clearer about the duration of the authorisation. It was intended to apply...up to the time the re-organisation was...effected.*” Further, “*it was envisaged that the remuneration would most likely be increased due to the expansion plans and funding availability*”³⁰. I note from the former trustees’ answers to the Charity Commission’s questions that there is a factual dispute between Mr Swettenham and at least two of the three former trustees as to how much they knew about the Charity Commission’s concerns at the time of their appointment and as to the intended effect of their minuted agreement about the remuneration of Mr Swettenham and Ms King.
37. Looking forward, Mr Swettenham produced documents for the Tribunal³¹ consisting of a “*Directors Reward Justification*” and a “*Loan Statement*”. These documents appeared to be undated, but Mr Swettenham explained that the formula “DX7491A” and “DX7492C” in the top right-hand corner of the documents was derived from the Charity’s internal documents management system and could be correlated to a date in the Gregorian Calendar. I note that the Reward Justification includes a list of duties to be undertaken for payment, starting with: “*1. Acting as Trustees for the Charity and 2. Acting as Directors at Board level and managers at floor level*”. I also note that the Loan Statement refers to “*The balance due to the founder Trustees...assessed as £28,609,58 plus unpaid remuneration in Oct+Nov+Dec 17*”.
38. These documents gave me the clearest indication that Mr Swettenham intends not only to return to the previous remuneration arrangements if the Orders are quashed, but also to reimburse himself and Ms King from the Charity’s funds for the remuneration which they regard themselves as having foregone during the period of the Charity Commission’s Orders. I specifically put this scenario to him at the hearing and he confirmed that I had understood him correctly.
39. In some of the correspondence, Mr Swettenham refers to himself and Ms King as “employees” of the Charity,³² but he readily accepted that there were no employment contracts in place³³. Later, Mr Swettenham produced for the Tribunal a “*Directors Service Agreement*” which refers to payment for services provided to the Charity by his professional trading vehicle and partnership, apparently known as “*Pireaus M3*”. This document describes himself and Ms King as self-employed contractors. The Service Agreement is stated at the top to “*result from the meeting of the Board of Trustees on 27 February 2017*” but was clearly produced after the resignation of Mr Wood in March, as this event is referred to in the document itself. I do not understand this Agreement ever to have been executed but to represent a statement of intention of how the Charity should operate in the future.

Submissions

40. Both parties provided the Tribunal with written submissions for the hearing. Mr Swettenham additionally provided the Tribunal with a copy of his speaking notes. Both parties made oral submissions and Mr Swettenham replied orally to the Charity

³⁰ E mail of 5 December 2017, page 56 Supplementary Bundle.

³¹ Pages 362 to 367, Consolidated Hearing Bundle.

³² Page 144, Consolidated hearing Bundle.

³³ Page 643, Consolidated hearing Bundle.

Commission's oral submissions. I have taken into account everything that was submitted, but here summarise the parties' positions on the key issues.

41. In respect of both Orders, it was common ground between the parties that a statutory inquiry pursuant to s. 46 of the 2011 Act had been instituted at the time the Orders were made and that it remains in force.

(a) The Charity Commission's Case

42. The Charity Commission helpfully divided its submissions on the remuneration issue into three parts, as follows:
- (i) the period from the inception of the Charity up until the appointment of the new trustees on 27 January 2017, in relation to which it was submitted that the constitutional provisions had clearly not been complied with in taking the decision to remunerate (there being no non-conflicted trustees to take the decision under clause 4 (6) (c)) and therefore that clause 4 (6) (d) takes effect, so that the decision to remunerate is void and the trustees must repay the benefits they have received;
 - (ii) the period when Mr Wood was still a trustee, between 27 January and 7 March 2017, in relation to which it was submitted that a decision to remunerate trustees could not have been validly taken, because there was no longer a majority of non-conflicted trustees able to take the decision in accordance with clause 4 (6) (c) of the constitution;
 - (iii) the period after 7 March 2017 until the remuneration ceased, in relation to which it was submitted that as Mr Swettenham and Ms King were once again the only trustees, the position was as at (i) above.
43. With respect to the trustees' decision to remunerate Mr Swettenham and Ms King, minuted as having been made at the 27 February 2017 meeting, Ms Freed explained that the Commission was still gathering information about this issue, in particular whether the new trustees had been properly briefed before they made their decision. The Commission did not accept Mr Swettenham's contention that the decision on 27 February 2017 authorised the remuneration of himself and Ms King for the two further periods but will take a final view on this issue once its inquiries are complete.
44. The Charity Commission's case was that both limbs of the statutory grounds in s. 76 (1) of the 2011 Act were met in this case, so as to justify the Order Not to Part under s. 76 (3) (d) of the 2011 Act.
45. In relation to the first limb, it was submitted that there has been misconduct and/or mismanagement in the administration of the Charity because Mr Swettenham and Ms King have made significant payments to themselves for an extended period of time, in breach of the constitution. Further, that they continued to make such payments despite the Charity Commission's advice in the Action Plan that this should stop. Further, that they have taken no steps to remedy the situation by applying for authority for the payments, or by applying to amend the constitution, or by making proposals for restitution.

46. The Charity Commission submitted that the Charity's failure to comply with its statutory duty to file its annual reports, returns and accounts on time or at all was also evidence of misconduct and/or mismanagement in the administration of the Charity.
47. In relation to the second limb of s. 76 (1), the Commission submitted that it was necessary or desirable to act to protect the property of the Charity because there was a material risk to it, arising from the continued payment of unauthorised remuneration after the service of the Action Plan advising that it should stop. It was further submitted that Mr Swettenham and Ms King had demonstrated an inability to recognise that they were unable to determine what was in the Charity's best interests in relation to this issue, due to their conflict of interest. They had asserted in correspondence that restitution of the unauthorised remuneration would not be in the best interests of the Charity, however, a majority of non-conflicted trustees were needed to make that decision. Further, that there is a legitimate concern about the Charity's property in circumstances where the three new trustees resigned soon after their appointment and have still not been replaced.
48. Also in relation to the second limb, the Commission's written submissions asserted that (a) according to the bank statements seen by the Commission, the Charity's expenditure had exceeded its income for the period March 2016 to March 2017 and (b) that funds belonging to the Charity were held in both the Lloyds bank accounts made subject to the Order Not to Part under s. 76 (3) (d) of the 2011 Act.
49. In relation to the Restricting Order under s. 76(3) (f) of the 2011 Act, the Commission's case as to both limbs being satisfied was based on the same facts as for the Not to Part Order. It was additionally submitted that the Charity's Barclaycard statement showed expenditure of around £23,000 between March 2016 and May 2017, so it would appear that it was used by the charity trustees to incur significant liabilities. Its continued use without the protective Order would have the effect of allowing the trustees to by-pass the Order which applied to the Charity's bank account by accessing funds without the Commission's prior approval, and in all the circumstances there was a material risk that it would be used for unauthorised expenditure by the trustees. The credit card could still be used for legitimate expenditure, subject to the Charity Commission's prior authority.
50. The Charity Commission submitted that the Tribunal should dismiss the appeal and maintain its Orders on the basis of the matters raised in these submissions. In relation to the new documents, provided for the first time to the Tribunal (see paragraphs 37 to 39 above), the Commission submitted that it would be considering these as part of its inquiry but that it did not accept that they assisted the Appellant's case.

(b) Mr Swettenham's Case

51. Mr Swettenham's written submissions focussed heavily on his criticisms of the conduct of the Charity Commission. He submitted that the Commission should have given him prior warning that it was going to make the Orders and that it should have visited the Charity's premises before making the Orders. I asked him to concentrate

his oral submissions on the question of whether the statutory criteria for maintaining the Orders was met, as I had to make a fresh decision on that matter.

52. On the issue of the first limb of s. 76 (1) of the 2011 Act, Mr Swettenham submitted that the statutory test had not been met. He submitted that the Charity Commission had leapt to conclusions without investigating the issues properly, and repeated that it ought to have met with the Charity before making the Orders. Mr Swettenham submitted that the charity trustees had only remunerated themselves “*when the Charity had sufficient funds to do so*” and that the remuneration was below market rate for the work the Director Trustees undertook. When asked how he knew this, he said it was self-evident. He said that some of the payments constituted reimbursement of expenses, including flights to Africa paid for with their own credit cards.³⁴ Mr Swettenham submitted that the trustees’ decision on 27 February 2017 had the effect of authorising the remuneration of himself and Ms King “*from that day forward*”³⁵. I understood this to be a submission that the trustees’ decision had continuing effect, notwithstanding the subsequent resignation of all those who took the decision.

53. Mr Swettenham submitted in writing that:

“The reasons refer to misconduct and mismanagement. These are terms understood by the Charity as used by the Commission to describe a situation where certain processes, protocols or actions haven’t been completed correctly or followed. The Charity has come to understand, they are words used to deliver maximum negative impression and, effectively therefore, they overstate and miss describe a situation or behaviour. There has been NO misconduct and NO mismanagement of the Charity, its funds, or anything, by anyone”.

54. On the question of the late filing of accounts, Mr Swettenham accepted that this “*could not be denied*”³⁶. However, he submitted that the Charity has made its VAT returns on time and that he has made his Self-Assessment Returns to HMRC on time. He also submitted that there are 10,500 charities who are late in filing their accounts, according to the Commission’s own website. He suggested that the Charity Commission should have prompted him to file the accounts.

55. Turning to the Action Plan, Mr Swettenham submitted that it was not compulsory of binding for the Charity to follow its advice. He stated that the Commission’s advice in the Action Plan was only to cease remuneration and make restitution, and did not offer any other solutions. He was referred to the document itself, which advises that the constitution could be amended with the Commission’s prior consent if a request for this were to be made by non-conflicted trustees.³⁷ He said that as he had not heard from the Charity Commission for a long period of time, he had reasonably assumed that the issue was resolved.

³⁴ Appellant’s written submissions page 3.

³⁵ Appellant’s speaking notes, page 17.

³⁶ Appellant’s written submission page 22.

³⁷ Page 152, Consolidated Hearing Bundle.

56. Mr Swettenham submitted that the Not to Part order had incorrectly identified a second bank account as belonging to the Charity, whereas it belonged to the Jole Rider Foundation, which was a separate on-charitable organisation of which himself and Ms King were the only committee members and signatories of its bank account.
57. Finally, I asked Mr Swettenham if he would like to make any representations as to how the Orders might be modified so as to make it easier for the Charity to operate. He said that he did not, as he only wanted the Orders to be quashed.

Proportionality

58. Both parties addressed me on the issue of proportionality. In his Notice of Appeal, Mr Swettenham describes the Orders as “...*completely unnecessary, over-zealous, unprecedented and catastrophic for the charity*.”³⁸ His written submissions rely heavily on the impact of the Orders on the operation of the Charity, asserting that it has lost donations as a result of the Orders, that the bank has wrongly failed to process incoming payments, that the Charity Commission has been incompetent and slow in providing authority for legitimate expenditure (such as public liability insurance) and that it has been over-focused on *de minimis* levels of expenditure. His position, in short, is that the Orders are so unworkable in practice that they will soon have the disproportionate effect of causing the Charity to cease to operate unless they are quashed.
59. The Charity Commission’s case was that the Orders were justified by the risk that the Charity’s funds would not be used lawfully for their proper purpose but expended on unauthorised payments to Mr Swettenham and Ms King. The Commission submitted that the Orders were proportionate in allowing legitimate payments to be made, provided the Commission’s authority was first obtained. This allows the Charity to continue its operations.
60. In response to the Appellant’s arguments that the arrangements are unworkable and are impinging on the Charity’s operations, the Commission submitted that any practical problems arising after the imposition of the Orders cannot properly be taken into account in considering whether the Orders should have been made. It referred me to correspondence demonstrating that the Charity had not given the Commission the required documents or the necessary time in which to authorise legitimate payments, including instances of the Charity making the request for authorisation only after the date for payment had passed³⁹. I was also shown evidence that the Charity Commission had authorised multiple payments since September 2017.

Conclusion

61. There are a number of areas of disputed fact in this case. I am not in a position to resolve them all at this stage, as the Charity Commission’s inquiry is on-going and it has not yet finished the process of evidence-gathering or reached its final conclusions. However, some facts have already been agreed by Mr Swettenham

³⁸ Page 7, Consolidated Hearing Bundle.

³⁹ Page 82, Supplementary Bundle.

and/or are incontrovertible. I have concentrated on these matters in reaching my conclusions below.

62. Firstly, I have considered whether the statutory basis for making the Orders is met. I am satisfied that a statutory inquiry has been instituted and remains open. This was not disputed.
63. I remind myself that s. 76 (1) of the 2011 Act is drafted with several alternative scenarios in mind, so that I must consider whether there has been misconduct *or* mismanagement, *or* whether it is necessary or desirable to protect the property of the Charity in deciding whether the statutory test is met.
64. Turning to the first limb of s. 76 (1) of the 2011 Act, I am satisfied that there has been both misconduct and mismanagement in the administration of the Charity arising from the unauthorised remuneration paid to Mr Swettenham and Ms King. In reaching this conclusion, I have had regard to the interpretation of those terms set out at paragraph 17 above. I have relied upon the Appellant's own admission that the remuneration was not authorised in accordance with the Charity's constitution for the period from its inception until (in his submission) the trustees' resolution in late February 2017 (see paragraph 32 above). It is difficult to see how he could have argued otherwise, given the incontrovertible fact that he and Ms King were the only trustees in post for that period and that they authorised the remuneration for themselves. The question of whether they should be relieved of liability for making an innocent mistake is one that will have to be considered by others at the conclusion of the inquiry, and is not a matter I can consider in these proceedings.
65. In finding the first limb satisfied, I have not relied as evidence of "misconduct" on the disputed trustees' authority for remuneration from February 2017 onwards, as it seems to me that the Charity Commission's inquiry will need to consider further the evidence of the former trustees about that meeting and the legal effect of the decision they made, before reaching a firm conclusion. However, it does seem to me that the decision on which Mr Swettenham relies as authority for remuneration after February 2017 is such as to constitute evidence of "mismanagement" in the administration of the Charity. I make this finding because the decision made and recorded in the minutes did not apparently comply with the procedural requirements of the Charity's own constitution (clause 4(6) (b)) and I also find that the minutes taken about the trustees' decision on this important issue are inadequately drafted so as to be open to interpretation.
66. I am further satisfied that the Charity's failure to respond to, or take any steps to comply with, the Commission's Action Plan is further evidence of both misconduct and mismanagement in the administration of the Charity. I do not accept Mr Swettenham's contradictory statements that he did not receive the Action Plan, or that he forgot about it, or that he had more pressing concerns, as excusing his misconduct and mismanagement in this regard. Mr Swettenham is correct that an Action Plan is advisory in nature and not legally binding, but it is his failure to engage with it at all that I find constitutes the misconduct and mismanagement.
67. I am also satisfied that the Charity's failure to comply with its obligations to file accounts on time or at all constitutes both misconduct and mismanagement in the

administration of this Charity. I have relied upon Mr Swettenham's admissions that the accounts have been filed late in the past and the incontrovertible fact that the documents for 2016 and 2017 remained outstanding as at the date of the hearing. I did not find any of his excuses for this situation persuasive.

68. My conclusions above as to the first limb of s. 76(1) are sufficient to dispose of this appeal, but I have also reached conclusions as to the second limb, as follows.
69. I am also satisfied that it is necessary or desirable to act for the purpose of protecting the property of the Charity. In reaching this conclusion, I rely on the Charity's failure to consider the advice set out in the Commission's Action Plan, Mr Swettenham's repeated assertion that his continued remuneration is in the best interests of the Charity (without recognising that he faces a conflict of interest in adopting that view), and his stated intention at the hearing to resume trustee remuneration if the Orders are quashed.
70. Without sight of the past two years' accounts, it is difficult to form any conclusions as to the financial health of the Charity or the extent of the assets at risk. I am reluctant to base any conclusions on the information obtained from bank statements only. However, I am satisfied that Mr Swettenham and Ms King intend to recommence their own remuneration as soon as possible and it appears they also contend that the Charity owes them £28,000 in addition to their seeking reimbursement of unpaid remuneration during the currency of the Orders. I am satisfied that the situation I have described here places the Charity's assets at risk, as there is in my judgement a strong likelihood that Mr Swettenham and Ms King would (a) recommence their own remuneration; (b) seek to implement repayment of the allegedly loaned sum of £28,000; and (c) recover the remuneration not paid during the currency of the Orders, if the Orders were not in place.
71. I was repeatedly struck by the thought in this case that Mr Swettenham is his own worst enemy. He is not a lawyer or a charity governance expert and he has not taken professional advice, but he had clearly spent much time and effort creating new documents for the hearing which gave me the poorest of impressions as to his grasp of the situation he is in or how he might try to resolve it. I refer here to the documents described at paragraphs 37 to 39 above which purport to justify his own and his partner's past remuneration, provide for their future remuneration and establish the Charity's liability to repay them a loan. These documents are evidence which was not before the Commission when it made the Orders under appeal (having been created later) but they provide evidence which I may take into account under s. 319(4)(b) of the 2011 Act. In doing so, I find that the creation of these documents by a charity trustee seeking to remunerate himself strongly supports my earlier findings that there has been misconduct and mismanagement in the administration of the Charity and that it is necessary or desirable to act to protect the Charity's property.
72. In all the circumstances, I am satisfied that the Commission's Orders represent a proportionate response to the situation this Charity is in, by preventing unauthorised expenditure but allowing for legitimate expenditure. Mr Swettenham has described operational difficulties in respect of the Orders, but I conclude that these difficulties cannot properly be relied on as supporting a case for the Orders to be quashed in circumstances where the statutory criteria for making the Orders is satisfied. It is

apparent from the correspondence I have seen that the process of obtaining authorisation for payments is difficult and time-consuming on both sides, but if the Commission's requirements for obtaining authorisation are properly followed by the Charity, I do not consider them to be unworkable.

73. I asked some questions at the hearing about the basis for the Not to Part Order applying also to the bank account of the Jole Rider Foundation. Mr Swettenham had submitted that this is a separate non-charitable organisation (although the Jole Rider Foundation had apparently been the name of Jole Rider Friends before it was registered as a charity). Mr Swettenham had not suggested that the application of the Order to that bank account had caused any problems, and the thrust of his submissions seemed to be that the Commission had incompetently misidentified that account as one belonging to the Charity. However, I was concerned to be sure whether it was said by the Charity Commission that this bank account held funds belonging to the Charity, or whether this part of the Order had been made in reliance on the phrase “...or of any trustee for it...” in s. 76 (3) (d), as Mr Swettenham and Ms King are also the only signatories to the Jole Rider Foundation's bank account. Ms Freed thought that the fact that the trustees of the Charity also controlled the other account was the basis for the Commission's Order, although she accepted that this had not been separately addressed in the papers before me. In conclusion, I am satisfied that I should uphold that aspect of the Order on that basis and in reliance on the matters referred to above as justifying the maintenance of the Orders. Nevertheless, it may be helpful for the Charity Commission to review the Not to Part Order as it relates to the Jole Rider Foundation in due course and to take the opportunity to make the nature of its concerns about that account clearer.
74. For all these reasons, Mr Swettenham's appeal against the Charity Commission's Orders is refused. I am satisfied that the protective Orders of 27 September 2017 should both remain in force unless or until varied or discharged by the Charity Commission.

(Signed)

Alison McKenna

Principal Judge

Dated: 10 January 2018