Trinity Term
[2020] UKSC 33
On appeal from: [2018] EWCA Civ 1605

JUDGMENT

Lehtimäki and others (Respondents) *v* Cooper (Appellant)

before

Lord Reed, President
Lord Wilson
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

29 July 2020

Heard on 14 and 15 January 2020

Appellant
Lord Pannick QC
Simon Taube QC
Edward Cumming QC

(Instructed by Bates Wells)

Respondent (1)
Guy Morpuss QC
Professor Sarah Worthington QC
Theo Barclay
Ryan Turner
(Instructed by Macfarlanes LLP)

Respondent (2)
William Henderson
(Instructed by Linklaters LLP)

Respondent (3)
Robert Pearce QC
(Instructed by The Government Legal Department)

Respondent (4)
Jonathan Crow QC
(Instructed by Withers LLP (London))

Respondents:-

(1) Dr Marko Lehtimäki
(2) The Children's Investment Fund Foundation (UK)
(3) HM Attorney General
(4) Sir Christopher Hohn

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LADY ARDEN:

OVERVIEW

1. The Children's Investment Fund Foundation (UK) ("CIFF") is a charitable company with more than $4bn in assets helping children in developing countries. It was founded by Sir Christopher Hohn ("Sir Christopher") and Ms Jamie Cooper ("Ms Cooper") in 2002, but it became difficult to manage when their marriage broke down. To resolve those difficulties, Sir Christopher and Ms Cooper agreed that in exchange for a grant ("the Grant") of $360m, to be paid over five years, to Big Win Philanthropy ("BWP"), a charity founded by Ms Cooper, she would resign as a member and trustee of CIFF. CIFF, Sir Christopher and Ms Cooper entered into a grant agreement ("the Grant Agreement") for this purpose on 25 July 2015.

2. The main legal issues in the case stem from the special combination of three factors. First, the relevant arrangements came about with a view to resolving the governance issues resulting from the breakdown in the relationship between Sir Christopher and Ms Cooper, not for a reason derived from the activities of the charity. Second, CIFF is both a charity and a company limited by guarantee (not having a share capital) formed and registered on 8 February 2002 under the Companies Act 1985. I will call such companies "guarantee companies". As a guarantee company, CIFF has a two-tier governance structure, namely members and directors, the latter being called trustees, and the Companies Act 2006 ("the 2006 Act") applies to it. Dr Lehtimäki, the first respondent and a central figure in this appeal, is a member of CIFF, as are Sir Christopher and Ms Cooper. They were the original subscribers to the memorandum of association. CIFF has no other members. Third, the recipient of the Grant under the arrangements is a new charity established and already endowed by a $40m payment made by TCI Fund Management Ltd pursuant to a Deed of Covenant made by Sir Christopher on 25 July 2015.

3. In very brief outline, Sir Geoffrey Vos, the Chancellor of the High Court [2018] Ch 371 decided on CIFF's application for directions that the Grant was in the best interests of the charity and directed the sole unconflicted member of CIFF, Dr Lehtimäki, the first respondent to this appeal, to vote in favour of a resolution of the members of CIFF to approve it pursuant to section 217 of the 2006 Act (see para 10 below). Dr Lehtimäki, however, prefers to be free to exercise his own judgment on how to vote as a member. He appealed to the Court of Appeal to set aside this part of the Chancellor's order. The Court of Appeal

(Gloster VP, David Richards and Newey LJJ) [2019] Ch 139 acceded to his appeal on this issue, and Ms Cooper now appeals to this Court.

4. The other respondents to this appeal are Sir Christopher, CIFF and HM Attorney General. Dr Lehtimäki and Sir Christopher argue that the appeal should be dismissed and the decision of the Court of Appeal upheld on additional grounds. This is because - while Dr Lehtimäki and Sir Christopher agree that the Court of Appeal was right to conclude that it did not have the power to direct Dr Lehtimäki to vote in favour of the Grant - they do not want the Supreme Court to uphold every aspect of the Court of Appeal's decision. In particular, they contend that the Court of Appeal was wrong to conclude that the members of CIFF owe fiduciary duties. CIFF and HM Attorney General have made submissions for the assistance of the Court, and CIFF also advances positive criticisms of the conclusion of both courts below that a member of a charitable company is a fiduciary. (This is the subject of Issue 1, below). The Attorney General must be joined to proceedings of this nature and represents the Crown in its role as *parens patriae* or protector of charities, an important and very long-established role. In the words of Lord Eldon LC:

> "It is the duty of the King, as parens patriae, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the Attorney General in such cases to obtain by information the interposition of a court of equity" (*Attorney General v Brown* (1818) 1 Swans 265, 291; 36 ER 384, 394-395)

5. Because of the joinder of the Attorney General, the Charity Commission for England and Wales ("the Charity Commission") has properly played no part in this appeal.

Requirements for making the Grant

6. The making of the Grant is governed by several matters: the terms of the Grant Agreement, the provisions of the Companies Act 2006, the provisions of the Charities Act 2011 ("the 2011 Act") and the general law applying to charities, trustees and directors and members of companies.

7. The Grant Agreement is conditional on either the Charity Commission having approved or made no objection to this payment or the approval of the court. Both Sir Christopher and Ms Cooper agreed separately to donate $40m to

BWP. Ms Cooper's agreement in this regard was conditional on the making of the Grant.

8. Prior to the Grant Agreement, Sir Christopher and Ms Cooper signed a letter of intent dated 14 April 2015 in which they stated that they would not vote on the proposed Grant on account of their conflict of interest. Sir Christopher also agreed:

> "to support the application before the Board of CIFF, and in the board's application for approval to the Charity Commission or any tribunal or court that may have jurisdiction. For the avoidance of doubt such support shall not require any active steps to be taken by Sir Chris beyond confirming the same in writing in the form of Appendix 1 when required to do so."

9. By a Deed of Resignation dated 9 July 2015, Ms Cooper agreed to resign as a member and trustee of CIFF. That resignation will be effective when the court approves or refuses to approve the Grant.

10. The implementation of the Grant Agreement necessitates the passing of a resolution of CIFF in general meeting under section 217 of the 2006 Act because the payment of the Grant constitutes "a payment for loss of office … to a person connected with a director" for the purposes of section 215 of the 2006 Act. The relevant provisions of sections 215 and 217 of the 2006 Act provide:

> "A company may not make a payment for loss of office to a director of the company unless the payment has been approved by a resolution of the members of the company." (section 217)

> "A 'payment for loss of office' means a payment made to a director or past director of a company - … (c) as consideration for or in connection with his retirement from his office as director of the company …" (section 215)

> "For the purposes of sections 217 to 221 (payments requiring members' approval) -

> (a) payment to a person connected with a director … is treated as payment to the director." (section 215(3))

11. Moreover, under section 201 of the 2011 Act, the Grant requires the consent of the Charity Commission. Section 201 provides that:

> "(1) In the case of a charitable company, each of the following is ineffective without the prior written consent of the Commission -
>
> > (a) any approval given by the members of the company under any provision of Chapter 4 of Part 10 of the Companies Act 2006 (transactions with directors requiring approval by members) listed in subsection (2), …
>
> (2) The provisions of the 2006 Act are -
>
> …
>
> > (f) section 217 (payments to directors for loss of office); …"

12. The means by which the Grant is made must also comply with CIFF's own constitution, which consists of its memorandum and articles of association.

13. The memorandum of association of CIFF contains various prohibitions on trustees receiving benefits from CIFF. In particular, clause 5.2 provides that a trustee must not receive any payment of money or other material benefit, directly or indirectly, from CIFF except in certain circumstances which do not apply in this case or with the prior written approval of the Charity Commission.

14. The articles of association of CIFF provide for the appointment of trustees who perform the functions of both directors of the company and charity trustees. The trustees are authorised by the articles of CIFF to manage its operations (see article 6.8 of CIFF's articles of association). Some matters, however, require a resolution of the company in general meeting, including the approval of payments to directors for loss of office under section 217 of the 2006 Act. The

members cannot interfere with the decisions of the trustees unless they amend the articles to enable them to do so (see *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113, 134 approving a passage in *Buckley on the Companies Acts* (1930) 11th ed, p 723).

Only Dr Lehtimäki will vote at the meeting of CIFF on the section 217 resolution

15. Because the making of the Grant involves a conflict of interest on the part of both Sir Christopher and Ms Cooper, it is proposed that only one member, Dr Lehtimäki, will vote on any resolution required to carry the Grant into effect. The court has not been concerned with any issue about how this meeting is to be summoned, assuming that Dr Lehtimäki is not able to approve a written resolution.

The decisions of the Chancellor and the Court of Appeal

16. CIFF applied to the Charity Commission for approval of the overall transaction. The Charity Commission did not give its approval but instead made an order under section 115 of the 2011 Act authorising the bringing of proceedings to obtain the court's approval of the Grant and directions regarding the resolution under section 217 of the 2006 Act.

(a) Judgment of the Chancellor

17. *Grant approved*: The Chancellor of the Chancery Division of the High Court, Sir Geoffrey Vos, held that the trustees had surrendered their discretion whether to make the Grant to the court.

18. The Chancellor, at para 64, cited a passage from an unreported judgment of Robert Walker J in *In re Egerton Trust Retirement Benefit Scheme*, cited by Hart J in *Public Trustee v Cooper* [2001] WTLR 901 in which Robert Walker J analysed the nature of various applications by trustees to the court, including the surrender of discretion by trustees. He made the important point that this was conceptually different from seeking the court's approval for a transaction since the court would be exercising its own discretion. The Chancellor found that that was the nature of the application which CIFF was making.

19. On the basis of the evidence presented to him, the Chancellor held that, in the exceptional circumstances of the case, the court would exercise its

discretion in favour of approving the Grant. The Chancellor held, at para 128, that in the "unique circumstances" of this "extremely unusual" case, the Grant was in the best interests of CIFF. In approving the Grant, the principal reasons given by the Chancellor were that the parties should not be allowed to renege on the deal they had made in good faith, that Ms Cooper would be contributing a further $40m to her new charity and that approving the Grant would bring finality and avoid further legal costs. The Chancellor referred to the considerable talents of Ms Cooper. The Chancellor expressly stated that, while he had come to a clear conclusion that he should approve the Grant, he was "not saying that no reasonable trustee or fiduciary could disagree with [his] view" that the Grant was in the best interests of CIFF or that "anyone who disagreed with [his] view would automatically be acting in bad faith" (Judgment, para 135).

20. *Section 217 resolution*: The Chancellor held that the Grant would constitute a payment in connection with Ms Cooper's resignation as a director and that BWP is a person connected with Ms Cooper within sections 252(2)(b) and 254(2)(b) of the 2006 Act. There was no applicable exception from these provisions. Therefore the 2006 Act requires CIFF to disclose the Grant to members and obtain their approval by resolution. This is now common ground, and I will refer to the required resolution as "the section 217 resolution". As the Chancellor put it, section 217 of the 2006 Act applies as much to charitable companies as it does to ordinary trading companies.

21. *Reasons for making a direction that Dr Lehtimäki should vote in favour of the section 217 resolution*: Dr Lehtimäki was not one of the original parties to these proceedings but the Chancellor ordered him to be joined after the hearing started and he had an opportunity to make submissions to the court.

22. Dr Lehtimäki filed a witness statement on 17 May 2017 in which he explained his difficulties and concerns about voting to approve the Grant. These may be taken from his conclusions and I have set out these conclusions below at para 106, when I come to apply the law to the facts of this case.

23. The Chancellor wanted to ensure that the court's decision was not overridden by "an unaccountable membership" (Judgment, para 38). The Chancellor noted that the position of Dr Lehtimäki, a Harvard and Stanford-trained economist, was one of "studied neutrality" and that it was "perhaps" more likely than not that he would vote against any section 217 resolution but the Chancellor stated that he would not take any suspicion on that point into account as Dr Lehtimäki had not been cross-examined (para 121). Dr Lehtimäki did not consider that he was bound to vote in favour of the section 217 resolution (para 132).

24. The Chancellor further held (at para 46) that:

> "Generally a member of a commercial trading company may vote his shares at a general meeting in accordance with his own interests or wishes. Even a vote to amend the articles of association may be cast in accordance with the member's own view of what is in the best interests of the company, and the court will only determine that the votes of a member have not been cast in such a case for the benefit of the relevant company if no reasonable person could consider that it was for its benefit. See *Pender v Lushington* (1877) 6 Ch D 70, 75-76, *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589, 593, *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, and *In re Charterhouse Capital Ltd*; *Arbuthnott v Bonnyman* [2015] 2 BCLC 627, para 90."

25. However, in the judgment of the Chancellor, Dr Lehtimäki was a fiduciary in that his power as a member of CIFF to vote on the section 217 resolution was vested in him for the benefit of CIFF and not vested in him personally. The Chancellor distinguished the rule that the members were not obliged to vote other than in their own interest (citing, at para 141, *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 1 WLR 1133) as not decided in the context of charitable companies. In his judgment, members of a charitable company were bound into the regime in the 2011 Act, under which the assets of a charitable company could only be used for charitable purposes (para 144). He further held that the members could not use assets for non-charitable purposes. Accepting, at para 145, the submissions made on behalf of the Attorney General and Ms Cooper that the members did not "stand outside the charity", the Chancellor held that the members of CIFF were an integral part of the administration of the charity. Accordingly, in his judgment, a member was bound to exercise his right to vote in the best interests of the charity of which he was a member.

26. The Chancellor concluded that he should give the direction to Dr Lehtimäki because it was inappropriate to defer to the situation in which the court's decision could be undermined, there was a risk of extremely expensive litigation, charity generally would suffer and finality could only be achieved by the court's exercising its discretion to make a direction against the member. The member was a fiduciary and would not be acting in the best interests of the charity if he came to a different conclusion from that of the court. He did not have a free vote in this case, because he was bound by the fiduciary duties described above and was subject to the court's inherent jurisdiction over the

administration of charities. In addition, the Attorney General and the Charity Commission considered that such a direction could be made.

(b) Judgment of the Court of Appeal

27. The Court of Appeal agreed with the Chancellor with respect to the question whether the members of CIFF were fiduciaries but went on to hold that the Chancellor should not have made the direction against Dr Lehtimäki.

28. On the question whether a member was a fiduciary, the Court of Appeal distinguished the decision in *Bolton v Madden* (1873) LR 9 QB 55. It further held that a member was part of the internal workings of the charity and his powers were exercisable for the benefit of the charity. It accepted, however, that the position might be different in relation to companies with a large membership, which it called "mass-membership charities":

> "46. It does not necessarily follow that members of charities such as the National Trust also have fiduciary obligations. Since we are not dealing with such an organisation, we do not need to decide whether their members are in the same position as CIFF's. There may possibly, moreover, be scope for argument as to whether it is less reasonable to expect those belonging to mass-membership charities to act exclusively in the charities' interests. That said, it is far from clear that it should be legitimate for members of, say, the National Trust to vote to obtain benefits for themselves from an entity with exclusively charitable objects."

29. The Court of Appeal held that the members of a charitable company have no proprietary rights. As to the content of their fiduciary duty, the Court of Appeal held (at para 48) that it was unnecessary:

> "to rule on the precise scope of the fiduciary duties owed by members of CIFF. It is sufficient to say that a member of CIFF owes, in our view, a duty corresponding to that specifically imposed on members of CIOs by section 220 of the Charities Act 2011. In other words, the member must exercise the powers that he has in that capacity in the way that *he* decides, in good faith, would be most likely to further the purposes of CIFF. It should be stressed that this

> duty is subjective: in other words, that what matters is the member's state of mind (compare eg *Regentcrest plc v Cohen* [2001] 2 BCLC 80, para 120, dealing with company directors)."

30. A charitable incorporated organisation or "CIO" is a form of charity incorporated under the 2011 Act (which repealed provisions of the Charities Act 2006 introducing the CIO). The suggestion of a new legal form for charities was first made by the Company Law Review Steering Group, set up by the Department of Trade and Industry, of which I was a member (*Modern Company Law for a Competitive Economy* (2001), Final Report, para 4.63 et seq). A CIO has a separate legal personality from the individual trustees, and limited liability. Like a charitable company, a CIO has two tiers of governance: (1) the trustees and (2) the members. On incorporation, the CIO is registered only with the Charity Commission so it is not subject to dual regulation under the 2006 Act. Section 220 of the 2011 Act, to which the Court of Appeal referred in the citation in the preceding paragraph, provides:

> "Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO."

31. However, the Court of Appeal allowed the appeal on the basis of the non-intervention principle (described in para 36 below). The Court of Appeal concluded that the court could not direct a fiduciary to substitute its view for that of his own unless there was a breach of duty.

32. Additionally, the Court of Appeal considered that their conclusion was reinforced by the fact that, in enacting section 217 of the 2006 Act and section 201 of the 2011 Act, Parliament had specifically and expressly entrusted the responsibility of approving payments such as the Grant to the members of the charitable company, subject only to the prior written consent of the Charity Commission. The Chancellor's order would prevent Dr Lehtimäki from exercising his choice as to whether to approve the transaction in accordance with section 217 and stop him from playing a part which in the circumstances Parliament had assigned him. There was no significant evidence of breach of duty and the Court of Appeal noted that the Chancellor had expressly accepted that he was not saying that no reasonable trustee could disagree with his decision that the Grant should be approved (Judgment, para 135). It was therefore reasonably open to Dr Lehtimäki to disagree.

Issues on this appeal

33. On this appeal, there is no challenge to the Chancellor's finding that CIFF's trustees had surrendered to the court their discretion on the question whether to make the Grant or to his conclusion that the Grant was in the best interests of the charity. Dr Lehtimäki has not surrendered his discretion as a member of CIFF as to how to vote on the section 217 resolution.

34. The overarching question on this appeal is whether the Chancellor could in law make the direction. Leaving to one side the concurring judgment of Lord Briggs, with whom Lord Wilson and Lord Kitchin agree, to which I respond at paras 174 to 199 below, this question involves resolving three issues.

35. ***First***, is Dr Lehtimäki in his capacity as a member of CIFF a fiduciary in relation to the objects of the charity? A person has to be a fiduciary for the court's jurisdiction over fiduciaries to be engaged. This is a threshold question. Both the Chancellor and the Court of Appeal decided this issue in favour of the appellant, but Dr Lehtimäki contends that it should have been decided in his favour. I have added the words "in relation to the objects of the charity" because, as Frankfurter J held in *Securities & Exchange Commission v Chenery Corpn* (1943) 318 US 80, 85-86:

> "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?"

36. ***Second***, if Dr Lehtimäki is a fiduciary, have circumstances arisen with respect to the section 217 resolution in which the court can exercise its jurisdiction over fiduciaries in relation to Dr Lehtimäki? The jurisdiction to intervene in relation to the discretionary actions of trustees is in general governed by the principle, known as "the non-intervention principle", that (in the absence of evidence of breach of duty) the court does not intervene in the exercise by a fiduciary of a discretion. The Court of Appeal decided this issue against the appellant, but Lord Pannick QC contends that it was wrong in law to do so.

37. The parties to this appeal have presented their arguments on the non-intervention principle on the basis that it applies where the fiduciary owes duties to a charity's charitable purposes as well as where a fiduciary acts with respect to a private trust, but in my judgment the application of the principle in the two cases may not be co-terminous. A major reason for a distinction between the court's jurisdiction over fiduciaries who owe duties to the purposes of a charity

and its jurisdiction over those who owe duties to the beneficiaries under a private settlement is in relation to schemes, which are not available for private trusts. However, this may not be the only distinction because the fact that the trust is charitable is clearly part of the circumstances, and the court must have regard to all the circumstances when considering whether to intervene in relation to a trustee's exercise of a discretionary power.

38. The order which the Chancellor made against Dr Lehtimäki was a direction that he should vote in a particular way on the section 217 resolution. Lord Pannick, for the appellant, submits that the court could also grant the relief sought in this case against Dr Lehtimäki under its separate jurisdiction to make a scheme for a charity. However, the direction sought against Dr Lehtimäki does not fall within the meaning of scheme since it neither relates to the purposes of CIFF nor affects the management and administration of the charity. Lord Pannick points out that in *Chinachem Charitable Foundation Ltd v The Secretary for Justice* [2015] HKCFA 35, para 41, Lord Walker of Gestingthorpe NPJ (formerly a Justice of this Court and sitting in the Court of Final Appeal of Hong Kong) referred to a scheme as "a written instrument approved by the court to regulate, in whole or in part, the future management and administration of the trust", but it is important not to take this observation out of context. I do not consider that Lord Walker's observation is intended to remove the distinction to be drawn between on the one hand schemes, which may operate in the way Lord Walker described or concern the charity's purposes, and on the other hand directions which may be given in the operation of a charity by the Charity Commission or the court.

39. ***Third***, does section 217 of the 2006 Act allow the court to direct a member how to exercise his discretion when Parliament has provided for members to approve the resolution, subject to the prior written consent of the Charity Commission? The Chancellor decided this issue in favour of the appellant, but the Court of Appeal disagreed with him. The appellant appeals against the Court of Appeal's ruling on this issue.

Discussion

Summary of conclusions

40. In my judgment, the three issues should be decided in the appellant's favour. I have summarised my reasons at the end of this judgment.

41. I will now consider each of the three issues in turn.

Issue 1: Is Dr Lehtimäki qua member of CIFF a fiduciary?

(1) *What the term "fiduciary" means and why it matters in this context*

42. The question whether a person is a fiduciary is important because of the duties which follow. But in this case the additional significance of the question whether Dr Lehtimäki is a fiduciary in his capacity as a member of CIFF is that the court will, subject to Issues 2 and 3 below, be able to direct him as to how to vote on the section 217 resolution.

43. Equity imposed stringent duties on persons who were appointed trustees of trusts: Lord Eldon is said to have held that these duties were imposed with "relentless jealousy" in order to ensure that trustees fulfilled their duties, and that trustees had to be "watched with infinite and the most guarded jealousy" (see *Ex p Lacey* (1802) 6 Ves Jnr 625, 626; 31 ER 1228 and note 2 to the report). The words "infinite" and "relentless" aptly indicate the capacity of equity to develop to meet new challenges. Over the years these duties were also imposed on directors, agents, solicitors and others. The term "fiduciary" is used to cover all persons subject to these duties, including trustees, and it is therefore a wider term than that of trustee.

44. There has been considerable debate as to how to define a fiduciary, but it is generally accepted today that the key principle is that a fiduciary acts for and only for another. He owes essentially the duty of single-minded loyalty to his beneficiary, meaning that he cannot exercise any power so as to benefit himself. In *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 Millett LJ described the duties of a fiduciary as follows:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."

45. So "the distinguishing obligation" of a fiduciary is that he must act only for the benefit of another in matters covered by his fiduciary duty. That means that he cannot at the same time act for himself.

46. If a person is a fiduciary then, as part of his core responsibility, he must not put himself into a position where his interest and that of the beneficiary conflict ("the no-conflict principle") and he must not make a profit out of his trust ("the no-profit principle"). The fiduciary is likely to owe other fiduciary duties as well, such as the duty to act in the best interests of the person to whom the duty is owed. Section 178(2) of the 2006 Act expressly makes this a fiduciary duty in the case of company directors. It is not necessary to consider whether these duties are fiduciary duties in all cases. It is not enough that a person has agreed to perform certain duties by agreement. As the Privy Council held in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98 "The essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself".

47. The Court of Appeal adopted the following test put forward by Finn J, sitting in the Federal Court of Australia, in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 287 ALR 22, para 177:

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

48. This formulation introduces the additional concept of reasonable expectation of abnegation of self-interest. Reasonable expectation may not be appropriate in every case, but it is, with that qualification, consistent with the duty of single-minded loyalty. There was a suggestion in this case that a member would not expect to find that he was a fiduciary. However, there was no evidence about that, and Mr Robert Pearce QC, for Her Majesty's Attorney General, pointed to a publication of the Charity Commission available since 2004 and entitled *RS7-Membership Charities*. This makes it clear that the Charity Commission takes the view that members of a charitable company have an obligation to use their rights and exercise their vote in the best interests of the charity of which they are a member (p 18), and that "the rights that exist in relation to the administration of a charitable institution are fiduciary" (p 33). (There are similarities here with the duty imposed on members of a CIO by section 220 and indeed *RS7-Membership Charities* contemplates that members of a CIO would be placed under that duty.)

49. Leading works on charities, such as *Tudor on Charities*, 10th ed (2015), paras 6-051 and 17-005 and *Picarda, The Law and Practice Relating to Charities*, 4th ed (2010), p 287 considered it doubtful or an open question whether members were fiduciaries. This view derives support from a number of decisions where that was assumed to be the case: see, for example, *Bolton v Madden* LR 9 QB 55, 57 where the Court of Queen's Bench (now the High Court) on appeal from the Lord Mayor's Court held that they could "find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases". However, it seems to me that when it comes to finding whether there is a reasonable expectation in the public at large, the Charity Commission's published guidance must have more weight than even much respected legal commentaries. For the reasons given below at para 104, I do not consider that *Bolton v Madden* is necessarily inconsistent with members of a charitable company owing a fiduciary duty.

50. I should add here that *Tudor* in the passage first cited, at footnote 485 criticises a learned article by Professor J Warburton *Charity Members; duties and responsibilities* [2006] Conv 300 for overlooking the fact that any fiduciary duty owed by a member of a charitable company is owed to the company itself. The Court of Appeal in this case also expressed that view. As will hereafter become clear, I take the view that any fiduciary duty is owed not to the company (viz CIFF in this case) but to the charitable purposes or objects of the charity. The Attorney General or a duly qualified individual can bring charity proceedings to enforce this duty: see section 115 of the 2011 Act. (That section imposes limits on the bringing of proceedings: see section 115(2), which requires an order of the court or of the Charity Commission, and the case law on section 115). My conclusion is consistent with section 172(2) of the 2006 Act which provides that directors of companies set up for altruistic purposes owe their fiduciary duty to promote the purposes of the company:

> "Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes."

51. A person can be a fiduciary in relation to another party with whom he has a contractual relationship in respect of some only of his contractual obligations: see, for example, *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2012] Ch 613, especially at paras 212-216 and 223 per Sales J (as he then was). This is only one of the situations in which a fiduciary duty may arise. It is important to examine the very specific context in which it is said that a fiduciary duty arises. This point was made by Sales J:

> "The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply *in the particular context*, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises." (para 223) (Emphasis added)

(2) Companies as charities

(a) Backdrop

52. It will seem extraordinary to many people that, despite the fact that there have been charitable companies for many years and that there are now some 33,000 guarantee companies which are registered charities, the issue whether a member is a fiduciary has never before been decided. There is also little scholarship or textbook commentary on this issue. However, there are other signposts to guide the courts: first, the liberal interpretation taken to charities by the courts, second, the recognition of charitable companies by Parliament, and, third, the decision of Slade J (as he then was) in *Liverpool and District Hospital for the Diseases of the Heart v Attorney General* [1981] Ch 193 ("the *Liverpool and District* case"). I consider each signpost in turn.

(b) Liberal approach taken to charities by the courts

53. The first signpost is to be found in the case law and it is the general approach of the courts, which is to uphold charitable gifts wherever possible. As Lord Macnaghten, with whom Lord Watson and Lord Morris agreed, held in *Income Tax Special Purposes Comrs v Pemsel* [1891] AC 531 at 580-581:

> "The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void."

54. Examples of the approach of the court can be seen in marshalling, where the deceased's debts were in some cases required to be paid out of the residue of

the deceased's estate rather than at the expense of some charitable gift made by the will (see generally, Gareth Jones *History of the Law of Charity 1532 to 1827* Cambridge University Press (1969) pp 96-97, read with pp 156-157), and, most importantly, in the way in which gifts which failed, because, for example, the purpose was against public policy, were nonetheless applied by the court "cy-près" to charitable purposes provided that a general charitable intention was shown. The latter point is described by Lord Simonds at *National Anti-Vivisection Society v Inland Revenue Comrs* [1948] AC 31, 64:

> "Nowhere perhaps did the favour shown by the law to charities exhibit itself more clearly than in the development of the doctrine of general charitable intention, under which the court, finding in a bequest (often, as I humbly think, on a flimsy pretext) a general charitable intention, disregarded the fact that the named object was against the policy of the law ..."

55. So, too, in *Gaudiya Mission v Brahmachary* [1998] Ch 341, 350, Mummery LJ observed that "[u]nder English law charity has always received special treatment". The *Liverpool and District* case considered below (paras 67-73) provides a further example of the courts adopting an approach designed to uphold an intention to make a charitable gift rather allow the gift to fail on a technicality.

(c) The recognition of charitable companies by Parliament

56. An important signpost to the correct way to approach the law as it applies to charitable companies is the recognition of charitable companies in statute law and the conclusions to be drawn from this statutory scheme.

57. The legislature has modelled charitable companies on the normal registered UK company. Thus, in section 353(1) of the 2011 Act, unless the context otherwise requires, the word "'company' means a company registered under [the 2006 Act] in England and Wales or Scotland". Section 193 of the 2011 Act then provides that:

> "In this Act 'charitable company' means a charity which is a company."

58. It is a short step from this to see that the provisions of the 2006 Act, for example as to alterations of the memorandum and articles of association and

financial statements, then apply to a charitable company as they do to other registered companies. In some cases, however, the 2011 Act makes further or different provision. These provisions are engrafted on to the model established by the companies legislation so that charitable companies may be subject to two levels of regulation. A notable example of this is section 198 of the 2011 Act, which places restrictions on the amendments which a charitable company may effectively make to its memorandum and articles of association:

> "198. Alteration of objects by companies and Commission's consent
>
> (1) Any regulated alteration by a charitable company -
>
> (a) requires the prior written consent of the Commission, and
>
> (b) is ineffective if such consent has not been obtained.
>
> (2) The following are regulated alterations -
>
> (a) an amendment of the company's articles of association adding, removing or altering a statement of the company's objects,
>
> (b) any alteration of any provision of its articles of association directing the application of property of the company on its dissolution, and
>
> (c) any alteration of any provision of its articles of association where the alteration would provide authorisation for any benefit to be obtained by directors or members of the company or persons connected with them …"

59. There is nothing surprising in this section, or indeed in section 30(2) of the Charities Act 1960, now section 197 of the 2011 Act. Section 30(2) for the first time prevented a charitable company from altering its objects and then treating the assets as part of its general assets in response to the Report of the

Committee on the Law and Practice relating to Charitable Trusts (the Nathan Committee), Cmd 8710 (1952), para 573, cited by Mr Pearce. A company still has the powers conferred by the Companies Acts to alter its memorandum and articles of association even though it is also a charitable company. The 2011 Act remedies the consequences for charitable companies. The ruling of Slade J in the *Liverpool and District* case that a company is not a trustee in the strict sense of the charitable assets but has a beneficial interest in them is entirely consistent with the approach taken in section 30(2).

60. Section 201 of the 2011 Act, which is set out in para 11 of this judgment, follows the pattern I have identified since it provides for the stapling of a requirement for the Charity Commission's prior written consent on to the consents already required by the 2006 Act.

61. In turn the 2006 Act (as amended) contains a handful of references to the 2011 Act, but it does not define the term "charitable company", though the expression "companies that are charities" is used (see for example section 42 of the 2006 Act). Neither the 2006 Act nor the 2011 Act further analyses the effect of the incorporation of a charity.

62. One can speculate as to how this dual system of legislative regulation came about. It must have occurred to charity trustees (assuming the charity was not incorporated by Royal Charter or a statutory corporation) that it would be useful if charities could be incorporated under a general Act of Parliament by about 1870 because in 1872 Parliament passed the Charitable Trustees Incorporation Act 1872 ("the 1872 Act") providing that trustees could apply to the Charity Commissioners to be incorporated. This secured the perpetual succession of the trustees, which meant there was no need to convey property or transfer securities to new persons every time there was a change of trustees. This system continues to exist (see now section 251 of the 2011 Act).

63. Some charities avoided the problems resulting from the lack of perpetual succession by vesting land and securities in the Official Custodian, but where this was not sufficient, a form of incorporation was needed. The form of incorporation originally provided by the 1872 Act and now by section 251 of the 2011 Act is not generally satisfactory since it does not provide that the incorporated body would have limited liability or provide any rules for its internal management or dissolution, and an early edition of *Tudor on Charities* stated in the footnotes that "[t]he powers of the Act are in practice never used."

64. It is quite possible that what happened was that the need for incorporation was satisfied by charities being incorporated through companies registered under

the Companies Acts and that they sought to register names dispensing with the word "limited". That gave the Board of Trade as it then was the power to impose conditions (which applied to other types of company as well) that the memorandum of association should state that the property and funds of the company should be used only for promoting the objects of the charity and do not belong to the members of the charity and no portion would be distributed to members with minor exceptions for reasonable and proper remuneration for services provided, interest up to 5% on loans and proper rent. To dispense with the word "limited", the memorandum also had to state that the persons fulfilling the role of directors should be accountable for the company's property which came into their hands and for their own acts and omissions as if the company had not been incorporated. This wording may have been based on section 5 of the 1872 Act which provided that despite incorporation all the trustees should be "chargeable for such property as shall come into their hands, and shall be answerable and accountable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity and its property, in the same manner and to the same extent as if no such incorporation had been effected" (see *Palmer's Company Precedents*, 17th ed (1956), vol 1, p 290). This provision assumed that on incorporation the charity continued, but now encased in corporate form. It also provided for all corporators who were trustees to be liable to the charity as they were before without making any distinction between directors and members.

65. The net result of this analysis for present purposes is that the legislature has by the 2011 Act simply stapled on to the 2006 Act the restrictions which it wished to impose on charitable companies. Those companies do not have a founding statute of their own but are subject to a mosaic of statutory provisions. Another key point is that Parliament clearly considered that a company with exclusively charitable objects should itself in law be a charity for the purposes of the 2011 Act.

66. On the basis that the legal framework is a mosaic, the next important issue is whether the courts will apply their liberal attitude to charities under the general law to making the mosaic work in places where there are evident difficulties not foreseen by the legislature. This brings me to the important *Liverpool and District* case.

(d) The Liverpool and District case and wider points to be drawn from it

67. The issue of the relationship of charity law to company law came to a head in the *Liverpool and District* case. A charitable company had been formed to provide a hospital and promote research into diseases of the heart and other

ailments. Its memorandum of association, but not its articles, provided that on winding up its assets should not be distributed amongst its members but transferred to an institution having similar objects. On the formation of the National Health Service, the hospital which it ran was transferred to the National Health Service. The company continued to do research until it discontinued its activities and was wound up on the petition of the Attorney General. At that point it was realised that, under section 302 of the Companies Act 1948 (now to be found in section 107 of the Insolvency Act 1986), surplus assets had to be distributed to the members of the company unless the articles otherwise provided. So the liquidator issued a summons in the liquidation for directions as to whether this statutory provision displaced the provisions of the company's memorandum of association. One of the arguments was that the assets of the charity did not belong to the company. The matter came before Slade J who considered the law in great depth.

68. Slade J concluded that the company's relationship to its assets was analogous to that of a trustee. It was not a trustee in the strict sense. It retained a beneficial interest in its assets and so they fell to be applied in accordance with the Companies Acts. However, the members had agreed to the memorandum of association and therefore this took effect and was binding on them. Even though there was no similar provision, as there is in CIFF's articles of association dealing with the distribution of surplus assets on winding up, the articles were subordinate to the memorandum and the provisions of the memorandum took effect. Finally, the court had jurisdiction now to order that assets be applied cy-près. This arose not only where there was a strict trust but also in relation to the assets of a charitable company where under the terms of its constitution there was a legally binding obligation to apply its assets for exclusively charitable purposes. Slade J accordingly directed that the company's assets should be applied cy-près.

69. In reaching his decision, Slade J relied on the judgment of Buckley LJ in two important cases which it is convenient to mention here. The first was *Construction Industry Training Board v Attorney General* [1973] Ch 173, where the principal issue was whether a body set up by statute and subject to the control of a minister of the Crown was a "charity" within the meaning of section 45(1) of the Charities Act 1960, for which purpose it had to be subject to "the control of the High Court in the exercise of the court's jurisdiction with respect to charities". The case highlights that the High Court has two relevant bases of jurisdiction that can be invoked in the case of charities: its jurisdiction over trusts generally and its jurisdiction over charities. However, the reference to the control of the High Court did not refer to the court's power over statutory bodies generally to control actions outside their powers. The majority (Buckley LJ and Plowman J, Russell LJ dissenting) held that sufficient control was vested in the High Court despite the fact that the minister had complete control over the

running of the board. That issue does not arise in this case, but it led to an illuminating description of the court's extensive jurisdiction over charities in the judgment of Buckley LJ:

> "It is a function of the Crown as parens patriae to ensure the due administration of established charities and the proper application of funds devoted to charitable purposes. This it normally does through the instrumentality of the courts, but this is not the only way in which the Crown can regulate charities or the application of charitable funds. Where a charity has been incorporated by Royal Charter, the Crown may amend its constitution or vary its permitted objects by granting a supplemental charter. Where funds are given for charitable purposes in circumstances in which no express or implied trust is created, the Crown can regulate the application of those funds by means of a scheme under the sign manual. Where the Crown invokes the assistance of the courts for such purposes, the jurisdiction which is invoked is, I think, a branch of the court's jurisdiction in relation to trusts. In such cases the relief granted often takes the form of an order approving a scheme for the administration of the charity which has been laid before the court, but this is not the only way in which the court can exercise jurisdiction in respect of a charity or over charity trustees. The approval of a scheme of this nature is, so far as I am aware, a form of relief peculiar to charities, but it does not constitute relief of a kind given in the exercise of a jurisdiction confined to giving relief of that sort. The court could, for instance, restrain trustees from applying charitable funds in breach of trust by means of an injunction. In the case of a charity incorporated by statute this might, as was suggested in the present case, be explained as an application of the doctrine of ultra vires, but I do not think that this would be a satisfactory explanation, for a similar order upon unincorporated trustees could not be so explained. Or, by way of further example, the court could order charity trustees to make good trust funds which they had misapplied, or could order them to account, or could remove or appoint trustees, or could exercise any other kind of jurisdiction available in the execution of trusts other than charitable trusts. In every such case the court would be acting upon the basis that the property affected is not in the beneficial ownership of the persons or body in whom its legal ownership is vested but is devoted to charitable purposes, that is to say, is held upon charitable trusts. Any

> relief of this kind is, in my judgment, appropriately described as relief granted in the exercise of the court's jurisdiction with respect to charities, and, where the relief is such as to bind the body of trustees as a whole, this would, in my opinion, constitute control of the charity by the court in the exercise of its jurisdiction with respect to charities. I consequently feel unable to accept the suggestion put forward on behalf of the Attorney General that the reference in section 45 of the Act of 1960 to the court's jurisdiction with respect to charities is in some way confined to its jurisdiction to approve charitable schemes." (pp 186-187)

70. Lord Walker commended this passage and the passage in the judgment of Slade J dealing with the question whether a charitable company was a trustee of the assets of the charity in *Chinachem* in the Court of Final Appeal of Hong Kong at para 45. A further factor which weighed with Buckley LJ was that the minister had no powers of enforcement: the minister would have to invoke the assistance of the courts. The court could make a scheme even if the charity was not a trust in the strict sense.

71. Slade J relied on the later judgment of Buckley LJ in *Von Ernst & Cie SA v Inland Revenue Comrs* [1980] 1 WLR 468, 479-480 in which he had specifically observed that the assets of a corporate charity were held on charitable trusts:

> "We were referred to certain authorities which give support to the view that a company incorporated for exclusively charitable purposes is in the position of a trustee of its funds or at least in an analogous position. The authorities were *In re French Protestant Hospital* [1951] Ch 567; *Soldiers', Sailors' and Airmen's Families Association v Attorney General* [1968] 1 WLR 313; *Construction Industry Training Board v Attorney General* [1973] Ch 173 and *In re Finger's Will Trusts* [1972] Ch 286. In the first two of these cases it seems to me that it was assumed, rather than decided, that a corporate charity was in the position of a trustee of its funds. In the third, the question was what was meant by the words 'in the exercise of the court's jurisdiction with respect to charities' in section 45(1) of the Charities Act 1960. In the course of my judgment in that case I certainly did express the view that the court would exercise its jurisdiction over corporate charities on the basis that their assets were held on charitable trusts and it appears to me that Plowman J, as I understand his very short

> judgment, agreed with me in that respect. *In re Finger's Will Trusts* turned on a question of whether or not a bequest to a charitable corporation, which ceased to exist in the testatrix's lifetime, demonstrated a general charitable intention capable of permitting a cy-près application. I do not think that it is a decision which is of assistance for present purposes."

72. That passage provided a strong footing for the decision of Slade J. The *Liverpool and District* case evidences two points which are wider than the point just described. It is a yet further example of the determination of the courts to give effect to the charitable objects and not to allow technical matters, such as the reference to the company's articles in section 302, to prevent the gift to charity taking effect. It would be a break with a long-standing tradition if this court was to depart from that approach. It also demonstrates another point, this time new as there had been little or no litigation about charitable companies registered under the Companies Acts in this regard before, namely the court's determination to make the statutory framework cohesive where this could be achieved.

73. No party to these proceedings has challenged the authority of this important case. This decision was cited with approval by Lord Walker in *Chinachem*. It recognised that registered companies could be charities, and that meant that the new charitable vehicle had to meet both the charitable and corporate model. The members would be affected by the fact that the company was charitable because the practice was and is that the memoranda of association of charitable companies should provide that the assets should only be applied towards its charitable objects and other restrictions. The memorandum and articles of the company "bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions" (see section 33(1) of the 2006 Act, which is derived from the Companies Act 1862, sections 11 and 16). So, members could not assert rights in disregard of their contractual obligations to the charity.

74. The next matter to be considered is the objections, principally those of CIFF, to members of charitable companies being fiduciaries as both the Chancellor and the Court of Appeal have held. The analysis conducted so far on this issue will shape my response to these submissions.

(3) Were the courts below in error in holding that the members of a charitable company are fiduciaries?

75. While Lord Pannick seeks to uphold the decisions of the Court of Appeal and the Chancellor that Dr Lehtimäki is a fiduciary, Mr William Henderson, for CIFF, impressed on us the difficulties which CIFF sees in members of charitable companies being fiduciaries. The practical difficulties he mentioned included:

(i) Whether there ought to be declarations of interest before meetings of members;

(ii) Whether a member with a conflict of interest can vote (which was particularly emphasised by Dr Lehtimäki on the grounds of the difficulties that this would cause where a member was a member of more than one charity in the same field);

(iii) Whether a member has a duty to attend and vote at meetings;

(iv) Whether a member can appoint a general proxy as permitted by section 324(1) of the 2006 Act;

(v) Whether a member can receive a benefit from the company;

(vi) Whether a member can fetter his discretion by making a voting agreement;

(vii) Whether a member would have to investigate a matter before he could vote on it;

(viii) What information a member could require from the company;

(ix) Whether a member is entitled to be indemnified for the cost of attending a meeting of the company or for the cost of taking legal advice;

(x) Whether a member would be liable to compensate the company if he exercised his right to vote in breach of duty.

76. Mr Henderson also raises several objections of principle to members being fiduciaries which I will address in the course of expressing my reasons for concluding that the Court of Appeal and the Chancellor were correct on this issue.

77. Mr Pearce submits that the members of CIFF have a range of powers. The property of the company is solely applicable to charitable purposes, so a member undertakes functions to promote charitable purposes to the exclusion of any benefit to himself. The members of CIFF fall squarely within the test of who is a fiduciary set out in *Grimaldi*. The obligations of the members are to serve the purposes of the charity. It is unnecessary to go further than to say that if a member exercises his powers he must do so in a way that he decides in good faith would be most likely to promote the purposes of the charity.

(4) My conclusions on the question whether a member is a fiduciary

78. The question who is a fiduciary has been considered above and I need not repeat those points again. The court has to determine whether there is a fiduciary relationship between the charitable objects of CIFF and Dr Lehtimäki in his capacity *qua* member of CIFF. In my view that question falls to be answered in the affirmative, and what applies to Dr Lehtimäki and CIFF will apply to all other members of charitable guarantee companies which, like CIFF, contain restrictions which in general prevent members receiving profits from the company. Moreover, such restrictions are generally contained in the memorandum and articles of association of charitable companies.

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

80. The decision in *Liverpool and District* was an important decision because it set the direction of travel. Slade J gave precedence to the fact that a member had agreed to become a member of a charity. The general principle is that, as a result of the agreement which is made when a person becomes a member of a company, the rights of a member against the company and his liabilities to it stem from the memorandum and articles and the obligations imposed by the Companies Acts and the general law.

81. Thus, the fiduciary duties which a member owes are tailored by the memorandum and articles. There is therefore no difficulty in a member delegating the right to vote to a general proxy if that is what the 2006 Act and the articles allow. Fiduciary duties take effect subject to the restrictions imposed by the nature of the corporate form which constitutes the charity.

82. Trust law allows the fiduciary duties to be diminished by an appropriate means and to an appropriate extent. As to means, the members can resolve to amend the memorandum and articles of association within the powers conferred by the 2006 Act and subject to compliance with restrictions imposed by the 2011 Act. As to the extent to which a person's fiduciary duties may be reduced before he ceases to be a fiduciary, the principle is that there is no difficulty with this so long as the duties of a fiduciary nature are not reduced below the "irreducible core" of obligations identified by Millett LJ in *Armitage v Nurse* [1998] Ch 241, 253-254:

> "there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts … The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient."

83. In *Citibank NA v QVT Financial LP* [2007] EWCA Civ 11; [2007] 4 All ER 736, the controlling noteholder of a series of notes issued by a company and secured by a trust deed argued that its extensive powers, while its notes remained outstanding, to direct the trustee of the trust deed how to exercise its discretion (for example, as to when to take enforcement action) diminished the role of the trustee below the irreducible core which a valid trust must have. The Court of Appeal (Sir Anthony Clarke MR, Arden and Dyson LJJ) rejected that argument by reference to various other powers which the trust deed vested in the trustee and the trustee's obligation to act in good faith. So, there must be some fiduciary duty which the court can enforce but it need not extend to the full range of fiduciary duties which a fiduciary might owe. I need not express a view on the further question whether, if the duties were reduced below the irreducible minimum, the court could in any circumstances declare that reduction to be ineffective.

84. The beneficiaries of a trust can, by giving their fully informed consent, agree to authorise or permit their fiduciary to act notwithstanding a conflict of interest or to receive certain profits: see, for example, *Ex p Lacey* 6 Ves Jnr 625.

In the present case, the memorandum of association as registered on incorporation contains exceptions from the no-conflict and no-profit principles. There is no reason why the memorandum of association should not validly authorise the trustees or members to be interested in the transactions within those exceptions or to retain the profits there mentioned. The exceptions include for example reasonable and proper remuneration for goods or services supplied to CIFF: see clause 5 of CIFF's memorandum of association.

85. The further significance of the provisions of the memorandum is that it is clear that the original corporators of CIFF took the view that the no-conflict and no-profit principles applied to members as well as trustees. The subscribers and other members also agree in the memorandum of association that the assets of the company should be applied for the objects of the charity. The memorandum of association is open to public inspection at the Companies Registry (sections 9 and 1085 of the 2006 Act) and it is also available for inspection at the Charity Commission (section 38(4) of the 2011 Act). The provisions of the memorandum of association are a further indication that members should be treated as fiduciaries. It represents the understanding of CIFF and all its members that the members are fiduciaries and they have agreed to represent that position to the entire world. So, it would require a good reason not to conclude that members are fiduciaries.

86. A member may therefore still be a fiduciary in his capacity as a member even if the company's articles of association mean that he will not be able to obtain information relevant to the exercise of his fiduciary powers.

87. Moreover, under charity law, there is no objection to a member receiving an incidental benefit provided that this is authorised by the memorandum and articles of association. That releases him from the no-profit principle. It does not, however, without more release him from any obligation of disclosure or entitle him to vote on any resolution allowing him a benefit, even one authorised by the memorandum or articles of association.

88. The point is rightly made that members of companies are not normally fiduciaries in relation to any of their powers. On the contrary, in the case of non-charitable companies having a share capital, the share is a right of property which the member can in general vote as he pleases even if it is in his own personal interests rather those of the company. There are, however, limitations on how a member may use his voting rights. For the purposes of this judgment, it is not necessary to go further on this than Briggs J (as he then was) did in *Assénagon Asset Management SA v Irish Bank Resolution Corpn Ltd (Formerly Anglo Irish Bank Corpn Ltd)* [2012] EWHC 2090 (Ch); [2013] Bus LR 266, para 44:

> "44. The basis for the application of that principle in relation to powers conferred on majorities to bind minorities is traditionally described as arising from general principles of law and equity, and by way of implication. In *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671 Lindley MR said this, in relation to a power conferred on the majority of shareholders to alter the articles of association:
>
> > 'Wide, however, as the language of section 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed.'
>
> In the same case Vaughan Williams LJ said, at p 676:
>
> > 'I also take it to be clear that the alteration must be made in good faith; and I take it that an alteration in the articles which involved oppression of one shareholder would not be made in good faith.'"

89. The principle is no different in relation to companies which do not have a share capital. However, where the company is also a charity, a member may, in my judgment, in some circumstances be a fiduciary in relation to the rights attached to membership, including the right to vote.

90. To answer the questions posed by Frankfurter J in *Securities & Exchange Commission v Chenery Corpn* 318 US 80, 85, in my judgment a member of CIFF owes a fiduciary duty to the charitable purposes, and that duty is one of single-minded loyalty. What does that involve in the present context? In my judgment, it requires that he considers whether the resolution should be passed and that he do so only by considering the best interests of the objects of the charity. That is because the resolution involves a disposition of assets that would otherwise be available for application by CIFF towards those objects. There is no basis for saying that a member was intended to have any separate interest in this transaction. On Dr Lehtimäki's case he neither provided those assets nor has any

legitimate competing interest in the application of those assets. That does not mean to say that he would be bound to approach every members' resolution of CIFF with only the charitable beneficiaries in mind. There may be some resolutions where a member may be able to take other interests into account as well.

91. It is useful to test the matter by reference to reasonable expectation, as did the Court of Appeal in this case and has been done in other cases, such as *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594, 598 (PC). The duty as I have found it to be exactly matches what Dr Lehtimäki for instance considers is required of him. More importantly it is also surely what both a potential beneficiary and member of the public would expect him to do. Moreover, and this harks back to my earlier discussion of the liberal approach taken towards charities by the courts, to hold that a member is a fiduciary is consistent with the "special" and "beneficent" treatment which the law gives to charities. That is no doubt because of their potential to benefit society and the public at large in a very major way. This is an appropriate consideration in this case because a charity must be established for public benefit. Sir Richard Scott V-C held in *Stanway v Attorney General*, 5 April 2000, unreported:

> "Charities operate within a framework of public law, not private law. The Crown is parens patriae of the charity and the judges of the courts represent the Crown in supervising what the charity is doing and in giving directions … The Attorney General's function is to make representations to the court as to where lies the public interest as he sees it." (transcript, p 4)

92. I consider that, because CIFF is a guarantee company, Dr Lehtimäki is not entitled to any further information than that to which members of a company registered under the Companies Acts are entitled by virtue of those Acts or the general law. That would include, for example, particulars of the proposed transaction: see section 217(3) read with section 215(3) of the 2006 Act. I consider that those limits mean that he cannot compel access to further information (though he could of course still ask the directors voluntarily to provide additional information). That is a limit on his role as a fiduciary, but that limit is not inconsistent with his position as a fiduciary because it is imposed by the structure which has been adopted for the administration of the charity. It is essentially a contract-and-statute-based model of fiduciary duty. The structure comprises both the statutory provisions in the Companies Acts and the agreement of the members and CIFF which is deemed to occur when the members agree to become members of it: see section 33(1) of the 2006 Act (set out in para 73 above). The 2011 Act (in addition to the general law) provides additional restrictions, but they are mainly from outside the structure.

93. Mr Henderson submits that it is unnecessary for a member of a charitable company to be a fiduciary. He submits that the interests of the charity are already well protected by the 2011 Act against the risk of members acting contrary to the charity's best interests (see for example sections 197 to 202 of the 2011 Act) and there are constraints on which members can exercise their voting rights. Mr Guy Morpuss QC, for Dr Lehtimäki, further cites a learned article by Professor Worthington in which she expresses the view that the law should only consider a person to be a fiduciary if the obligations imposed by contract or tort, or the duty to act for proper purposes, would be insufficient for the task (*Fiduciaries: when is self-denial obligatory*? Professor S Worthington, (1999) 58 CLJ 1999 500, 506). But I do not consider that it is necessary to go that far. If Dr Lehtimäki is a fiduciary, then a well-known set of rules and remedies come into play. It will be easier for the court to exercise its inherent jurisdiction over charities, and the law of charities will be more internally coherent.

94. On Mr Henderson's submission, which was not supported by any particular evidence, for this court to hold that a member was a fiduciary is likely to disincentivise a person from becoming a member when it is often desirable to give those who support a particular charity a stake in its affairs. I accept that this is an important point, but *RS7-Membership Charities* has anticipated the point so that there was guidance from an official source already available. Also, approximately 65% (or 3,203 in number) of new charities registered with the Charity Commission in 2018 were CIOs, which suggests that section 220 of the 2011 Act is not seen as a disincentive by those charities.

95. As an alternative to his submission that a company member does not owe a fiduciary duty, Mr Henderson submits that a member of a charitable company should owe the same duties as a member of a CIO by virtue of section 220 of the 2011 Act (set out in para 30 above). But this has a dual disadvantage: firstly, it would subject a member to this duty in all circumstances, and, secondly, it leaves open the full scope of a company member's duties since section 220 does not state that this is an exhaustive statement of the duties of a member of a CIO. (Nor yet does that section make it clear whether this is a fiduciary duty or not: contrast section 178(2) of the 2006 Act applying to directors.)

96. It is not suggested that Dr Lehtimäki has any conflict of interest in voting on the resolution. But suppose that he was going to be a trustee or member of BWP. This is not an interest which the memorandum or articles of CIFF has pre-authorised. The Companies Acts do not provide for the disclosure of this kind of interest by him as a member of CIFF. Moreover, there is neither any organ of the company which has the express function of receiving any disclosure of details of a conflict of interest nor any means of obtaining fully informed consent. But, certainly, he would not be able to vote as a member on any resolution concerning the benefit.

97. This problem does not require to be resolved in the present case. I do not, however, consider that it is correct to say, as Mr Henderson argues, that this problem undermines the initial conclusion. The solution may be that, if Dr Lehtimäki could be said to thereby potentially obtain a benefit, the articles should be amended to permit a member to have this interest. The prior written consent of the Charity Commission is required only if Dr Lehtimäki would obtain a benefit: section 198(2)(c) of the 2011 Act. It may also be the Charity Commission could issue guidance under section 15(2) of the 2011 Act on conflicts of interest in order to reduce practical difficulties. It may similarly be possible for the problem to be solved by a scheme or by way of sanction under section 105 of the 2011 Act.

98. Section 198(2)(c) reflects the decision of Danckwerts J in *In re French Protestant Hospital* [1951] Ch 567, and reinforces the conclusion that members of a charitable company who receive benefits from it are within the no-conflict and no-profit principles. In that case, the governor and directors of a charity set up by Royal Charter sought to exercise a power conferred on them by the charter to amend the byelaws to enable the directors' professional firms to be remunerated for their services to the charity. Danckwerts J held that, even though they were not trustees, the governor and directors had the same duty as the corporation to apply the assets in furtherance of the charitable objects because in reality they controlled the corporation. They could not therefore authorise a benefit for themselves. They had to act "in a fiduciary manner on behalf of the charitable trusts" (p 571). Therefore, in that case, the governor and directors could only proceed by way of scheme.

99. Mr Henderson also relied on *In re Girls' Public Day School Trust Ltd* [1951] Ch 400, but that case can have no bearing on the point under consideration because the company's purposes were not exclusively charitable. The company was therefore not a charity and so the question whether a member owes a fiduciary duty did not arise in the same way as it does in the case of a company which is exclusively charitable. In that case, the company had a share capital and had issued preference shares which had valuable rights on a winding up and sufficient votes to compel a winding up. The company was formed for charitable purposes but, because of the rights of the preference shareholders, those purposes were not exclusively charitable. Thus, the company failed in its bid to establish that it was a charity.

100. On this approach, the fiduciary duty of a member of a charitable company should in my judgment be more narrowly drawn than it was drawn by the Court of Appeal which held that a member of a charitable company would *in all circumstances* owe a duty to act in the way that would be most likely to further the purposes of that company. The Court of Appeal stressed that the duty was subjective: I agree that it is for the member to reach a conclusion on that matter

in good faith provided that he does not do so improperly or unreasonably, the court will not seek to intervene or to hold him liable if his view turns out to have been wrong in fact (see generally *Tempest v Lord Camoys* (1882) 21 Ch D 571, where the court declined to order one trustee to act in accordance with the proposals of the other).

101. The Court of Appeal understandably based their formulation of the duty on members of a charitable company on that adopted by statute for CIOs, but a CIO is not a vehicle incorporated under the Companies Acts and therefore there may be good reason for the difference in the duty of members which I have identified. Suppose, for example, that a charity runs a lending library but for those prepared to pay an annual subscription it also provides access to a small separate area for which the library has no use, but in which there has been installed a machine that dispenses coffee at cost. This is at no cost to the charity since the member pays an annual subscription to cover this cost. Suppose that the charity proposes a resolution at the annual meeting of the charity to reduce the opening hours of the separate area. It is difficult to see why a member should owe a duty of single-minded loyalty to the charitable objects on a matter on which only the members qua private individuals have an interest. Mr Pearce takes the different example of a separate arrangement between members and a charity: "if one becomes … a friend of the Royal Opera House, one pays them money and in return one gets priority booking. That is a completely different arrangement from anything to do with having a constitutional role in the affairs of the charity." The precise circumstances in which the member of a charitable company has fiduciary duties in relation to the charitable purposes and the content of those duties will have to be worked out when they arise. The point of principle is the point made by P D Finn in *Fiduciary Obligations* (1977), para 4 that "[a] fiduciary for one obligation is not ipso facto a fiduciary for all".

102. While charities must be for public benefit, minor incidental benefits may be permitted. Parliament has enacted the gift aid scheme for tax relief on donations, and that relief is available if minor gifts are made unless certain limits are exceeded. So, Parliament has recognised that charities do sometimes, and without losing their charitable status, give members minor benefits in exchange for donations. Those charities may well be charitable companies, because that vehicle, together with the CIO is often a preferred option for a charity that wishes to encourage a wide range of persons to become members. In *Bolton v Madden* LR 9 QB 55, the subscribers obtained the right to vote in exchange for their subscription.

103. Mr Morpuss submits that members of CIFF had to use their section 217 power for a proper purpose but were not fiduciaries. That would mean that they did not owe a duty of single-minded loyalty even though their powers could, as in this case, result in a substantial grant out of the assets held on charitable trusts.

In my judgment the duty to exercise powers for a proper purpose does not adequately recognise the scope of members' powers and it would not be consistent with the obligations of members of a CIO. I should add that there is no evidence before us that the duties imposed on members of a CIO is causing any difficulty in finding members of CIOs or that it creates an unsatisfactory level of uncertainty. Mr Jonathan Crow QC, for Sir Christopher, submits that it would be "astonishing" if members could not vote on their own appointments as directors or trustees, but with respect it seems to me wholly reasonable to say that a person must not vote for himself.

104. The distinction which I have drawn between the duties which a member may owe which involve a duty of single-minded loyalty and those which do not may help explain the briefly reported case of *Bolton v Madden*, referred to at para 49 above. That concerned two subscribers to an incorporated charity (and assuming that the incorporated charity was a registered company they would be members: see now section 16(2) of the 2006 Act). The issue was the lawfulness of an agreement to vote in favour of each other's choice of charitable object. There is no suggestion that the parties to the agreement intended to select objects which did not qualify as charitable objects which were manifestly not appropriate for selection. When it comes to nominating charitable objects, the courts do not interfere with the choice made by the party entitled to nominate unless it is corrupt or outside the terms of the power or the person chosen is manifestly unfit. One example of this is *Attorney General v Dean and Canons of Christ Church* (1822) Jac 474, 486 where Sir Thomas Plumer MR held that he did not "know how any restriction on [the] power [of the Dean and Canons conferred by the testator to manage a school in Portsmouth and choose persons to be educated there] [could] be introduced". So long as that remains the law for charities generally it is difficult to see how members having a right of nomination as in *Bolton v Madden* could be held to a higher standard. But that is clearly a different situation from exercising a power which amounts to an effective veto on the disposition of charitable assets since that veto is a (negative) right of control comparable to the issue of payment in connection with a director's loss of office to the right of control in *In re French Protestant Hospital*.

Mass membership charitable companies

105. The above principles apply to charitable companies large or small. On this basis, the number of members which a guarantee company happens to have is not the deciding factor, and the Court of Appeal fell into error in suggesting that there might be some different outcome as regards members of mass membership charities. Since there is no comprehensive or statutory definition of such charities, the qualification made by the Court of Appeal introduced an element of uncertainty. It was suggested that we should not say more about these cases

until they arose, and I agree that it is not appropriate for the court to go further at this stage in this context.

Application of the principles to the facts of this case

106. In his witness statement dated 17 May 2017, Dr Lehtimäki summarised his difficulties and concerns over voting on the section 217 resolution:

> "Conclusion as to the Grant
>
> 34. The analyses that I have carried out above make me think that it is very difficult - on the currently available evidence - to decide whether the Grant is in the best interests of CIFF's beneficiaries. On the one hand there is a clear benefit in resolving the historic governance problems and achieving finality. On the other hand transferring $360m to BWP comes at a cost. How big a cost is unknown, particularly given the lack of available information in relation to BWP and its very limited track record. It may be large, and that is my biggest concern.
>
> 35. I would very much like CIFF to be able to draw a line under its difficulties, and move forward, with no further risk of litigation. However, I remain concerned about the cost of achieving that end. It is for that reason that I consider this a difficult decision. If I am - in the future - able to vote on this issue, the points set out above are the ones that are likely to influence my decision. I will of course give careful consideration to any further information that becomes available, as well as to the conclusions of the court and the Charity Commissioners."

107. These are telling passages. Dr Lehtimäki has rightly identified the charitable purposes and recognised the need to exercise his right to vote in their interests. As I see it, he implicitly recognises what is in law a fiduciary duty. He does not indicate that there is any practical difficulty in recognising or performing the obligations attached to his right to vote. Those are important obligations and, given their fiduciary nature, there is an onus on the court to consider carefully how they are enforced. It is of the essence of a fiduciary obligation that it should be capable of effective enforcement by the court.

Issue 2: Have circumstances arisen with respect to the section 217 resolution in which the Court can exercise its jurisdiction over fiduciaries in relation to Dr Lehtimäki?

The competing positions of the parties

108. This issue now falls to be considered on the basis that Dr Lehtimäki owes fiduciary duties in relation to the way in which he votes on the section 217 resolution. The Chancellor considered the Grant to be in the best interests of the charity, but he accepted that a person could reasonably come to a different view. He made a direction against Dr Lehtimäki for the reasons explained above. Those reasons are not open to challenge in this case.

109. The Court of Appeal did not consider that Dr Lehtimäki's stance represented a breach of any duty by him and I proceed on the basis that that is the case. That makes this issue particularly difficult because in the case of private trusts the court rarely intervenes in the exercise of discretionary judgment. In this section I only give a very brief summary of the submissions and it is more convenient to deal with other important points made by counsel as I set out my conclusions.

110. The law of charities is described by Buckley LJ in the *Construction Industry Training Board* case [1973] Ch 173 as a branch of the law of trusts (see the passage set out above at para 69), but, as Buckley LJ indicates, the law of charities has a number of different features which are unique to it and do not apply to charitable trusts, the best known of which is its jurisdiction to make a scheme for the application of the property of the charity cy-près.

111. Lord Pannick submits that the *Construction Industry Training Board* case shows that the powers of the court were very broad and that the court would be slow to substitute its own decision. There is a long-established jurisdiction to deal with alienations of property interests. The views of the Attorney General are material. The powers of the court are not confined to a scheme.

112. Lord Pannick relies on *In re J W Laing Trust* [1984] Ch 143 as demonstrating that the court may intervene in a charity when it is expedient in the interests of the charity to do so. Likewise, in *In re Royal Society's Charitable Trusts* [1956] Ch 87, Vaisey J made a scheme consolidating the investments of several special funds of which the society was a trustee in order to improve its management of these funds in a case where there was no suggestion of a breach of duty.

113. Lord Pannick submits that *Letterstedt v Broers* (1884) 9 App Cas 371 (see para 124 below) is an example of the court's broad jurisdiction since the court made it clear that the court could remove old trustees and substitute new ones where such a remedy was required. The main principle should be that the jurisdiction should be exercised for the welfare of the beneficiaries and the trust estate. He submits that this is a general principle. Accordingly, the court has power to decide whether a specific transaction is in the interests of the charity by reason of the inherent jurisdiction and surrender, and it can give directions to the members.

114. Mr Morpuss carried the burden of the case against the appellant for the first and fourth respondents on this issue. He submits that the court could not intervene in the decision of a fiduciary unless there was an actual or threatened breach of duty or the fiduciary had surrendered his discretion. The members had not surrendered their discretion to the court. Moreover, there was no question of any threatened or actual breach of duty. All the court could do in exercise of its special charitable jurisdiction was to direct a scheme, which it did not do. In any event there was no basis for directing a scheme because there had been no failure of machinery nor was an administrative scheme appropriate as that would involve changing the constitution of the charity. The present case does not fall within any exception to the non-intervention principle. Expediency was not enough: this was highlighted in *Chapman v Chapman* [1954] AC 429 where the House of Lords held that the court had no inherent jurisdiction to sanction a rearrangement of a private trust merely to gain a tax advantage.

115. Mr Morpuss essentially submits that there is no case cited which goes beyond the jurisdiction of the court as described by Russell LJ in the *Construction Industry Training Board* case, to cure defects in the machinery of the trust or to supervise and direct the administration of a charitable trust or the application of its assets. In *In re J W Laing* no order was made directing the trustee to perform any particular act. It was an administrative scheme case because the beneficiaries could not properly make use of the considerable funds of the trust if they were all distributed within the period of ten years as directed by the settlor.

116. As counsel (later Buckley LJ) argued in *Royal Society's Charitable Trusts*, the court exercises over trusts an equitable jurisdiction. Mr Morpuss accepts that the court can intervene in exceptional circumstances, and he submits that on the facts, the circumstances in *Letterstedt* were exceptional. There had been a very serious over-charge by trustees.

117. Mr Crow relies on *Attorney General v Bishop of Worcester* (1851) 9 Hare 328; 68 ER 530 and *In re Steed's Will Trusts* [1959] Ch 354. It is not a question

of what is expedient. Further authorities included *Attorney General v Harrow School* (1754) 2 Ves Sen 551; 28 ER 351, *Attorney General v Haberdashers' Company* (1791) 1 Ves Jun 295, 30 ER 351, *Attorney General v Governors of Foundling Hospital* (1793) 4 Bro Ch 165; 29 ER 833; 2 Ves Jnr 43, and *Attorney General v Governors & Co of Sherborne Grammar School* (1854) 18 Beav 256; 52 ER 101. He referred to two texts: *Chitty, Prerogatives of the Crown* (1820), *Storey's Equity Jurisprudence* (1839). As Slade J recognised in *Liverpool and District Hospital* case, the jurisdiction of the court with respect to charities could be ousted by statute. The applications in the property alienation cases were to approve matters which the trustees wanted to do.

118. Mr Pearce submits that there are particular cases where the non-intervention principle does not apply. Examples of such cases are where it is necessary or expedient for the court to interfere in the affairs of a charity (see for example *J W Laing*). But the courts have not exhaustively defined the circumstances.

My conclusion on this issue

119. This issue is about whether the court has jurisdiction, that is, as part of its supervisory jurisdiction over charities, to intervene to direct Dr Lehtimäki to exercise his fiduciary discretion in a particular way. For the reasons given in paras 121 to 173 below, I consider that the court can take jurisdiction through an exception to the non-intervention principle. Indeed, all the members of this Court agree that, if an exception to the non-intervention principle is needed, it can be found. Lord Briggs, however, joined by Lord Wilson and Lord Kitchin on this issue, holds in his concurring judgment that the same result can be reached more simply by holding that the position adopted by Dr Lehtimäki would constitute a threatened breach of fiduciary duty on his part ("the breach of duty route"). In the Chancellor's judgment, that position was one of "studied neutrality" (para 121), and posed "too great a risk for the court to allow the final decision to be taken by Dr Lehtimäki without guidance from the court" (para 153). With respect to my colleagues, I consider that the court cannot take jurisdiction over Dr Lehtimäki by that route: for my reasons, see paras 174 to 199 below. Accordingly, in this section of my judgment, I confine my attention to the non-intervention principle, which I consider to be the correct principle to apply.

120. The respondents' arguments on this issue are formidable. There is no doubt in my judgment that there is a well-established "non-intervention principle" which means that the role of the court is to ensure that the trustees of a charity exercise their discretion properly and that the court does not interfere in the trustees' exercise of a discretionary power unless they act improperly or unreasonably.

121. The leading authority on the non-intervention principle is now *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 where Lord Walker (with whom all the other members of this Court agreed) held that a breach of duty was necessary before the court could intervene with respect to matters that fell to trustees to do or decide:

> "73. In my view Lightman J was right to hold that for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene (apart from the special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist: see para 64 above). It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention."

122. Lord Walker also made some important observations on a well-known saying of Lord Truro LC, which encapsulates the principle:

> "88. Finally, on this part of the case, there is the submission that the trustees' duty to take account of relevant considerations is to be interpreted as a duty to act on advice only if it is correct - in effect, a duty to come to the right conclusion in every case. I have left this submission until the end because it is to my mind truly a last-ditch argument. It involves taking the principle of strict liability for ultra vires acts (paras 81-84 above) out of context and applying it in a different area, so as to require trustees to show infallibility of judgment. Such a requirement is quite unrealistic. It would tip the balance much too far in making beneficiaries a special favoured class, at the expense of both legal certainty and fairness. It is contrary to the well-known saying of Lord Truro LC in *In re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448:

> ‘that in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases.’
>
> The trustees’ duty does not extend to being right (‘the accuracy of the conclusion arrived at’) on every occasion. The ‘particular cases’ that Lord Truro LC had in mind may have included cases concerned with the maintenance of minor beneficiaries. They may also have included cases (such as *Kerr v British Leyland (Staff) Trustees Ltd* [2001] WTLR 1071) in which the trustees have to make a particular factual judgment, rather than exercise a wide discretion.”

123. It is to be noted that Lord Truro LC leaves room for exceptional cases in his final words. Lord Pannick cited several examples of this and further examples were cited by Mr Pearce, including examples from the judgment of Lord Walker: for example, paras 64, 74 and 75. In those circumstances I do not read Lord Walker as excluding the possibility of intervention in cases other than breach of duty (or scheme) if the circumstances attain a sufficient level of exceptionality and seriousness. In my judgment, these exceptional cases have special resonance in the law of charities, and it is unnecessary for me to cite all the examples we were given. Before leaving Lord Truro LC, I note that his formulation does not contain any equivalent of the “manifestly unfit” test used in relation to nominations. There is on his formulation no test of perversity, at most a requirement for fairness and fair consideration of the matter.

124. In this connection, Lord Pannick places particular reliance on another well-known case, *Letterstedt v Broers* 9 App Cas 371, where the Judicial Committee of the Privy Council removed the existing trustees of a trust in the course of litigation against them by the beneficiaries even though no allegation of misconduct on the part of the trustees had yet been established. This was clearly seen as a very delicate matter and the Board invoked the broad general principle that the duty of the court was to execute trusts, being guided principally by the welfare of the beneficiaries. The Board considered that it was probably not possible to lay down any more definite rule than that. The Board considered

on the complex facts of that case that the continuance of the trustees would prevent the trust from being properly executed. The useful point which I derive from this case is the reminder that it is the duty of the court to see that a trust is executed. I start from the basis, which is not challenged, that it has been decided that it is in the best interests of the charity to make the Grant, and that seen from that perspective if Dr Lehtimäki were to vote against the section 217 resolution, the achievement of what is the best interests of the charity would be impeded.

125. Lord Pannick also relies on *In re Ashton Charity* (1856) 22 Beav 288, 52 ER 1119, and property alienation cases. In *In re Ashton Charity*, Sir John Romilly MR held, at p 289, that:

> "upon an information, the Court of Chancery has a general jurisdiction, as incident to the administration of a charity estate, to alien charity property, where it clearly sees it is for its benefit and advantage."

126. These cases concern the court's power to authorise the alienation of interests in property held on charitable trusts and this topic is a very specific exercise of the role of the court acting under the delegated power to act as *parens patriae*. However, it also reflects the broad principle that the court's duty is to see that charitable trusts are performed.

127. The *J W Laing* [1984] Ch 143 case is instructive. In that case, Peter Gibson J considered an application by the trustees of a charity for a scheme enabling the trustees for the time being to be discharged from an obligation to distribute capital within ten years of the settlor's death. Deciding that section 13 of the Charities Act 1960 was inapplicable, he approved the scheme in exercise of the inherent jurisdiction of the court. In doing so he noted that the court (at p 153E-F):

> "… can, and should, take into account all the circumstances of the charity, including how the charity has been distributing its money, in considering whether it is expedient to regulate the administration of the charity by removing the requirement as to distribution within ten years of the settlor's death."

128. Another important example is *Hampden v Earl of Buckinghamshire* [1893] 2 Ch 531 (cited by Mr Morpuss) which as Mr Pearce explains shows the flexibility of the court's response to applications for its intervention. In that case,

the Court of Appeal intervened to prevent a trustee about to act in a manner which was within his powers but detrimental to other beneficiaries applying the following principle:

> "But, … to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the court can see it although he cannot, it is in my opinion the duty of the court to interfere." (at p 544 per Lindley LJ)

129. P D Finn in *Fiduciary Obligations* (1977), at para 86, provides an interesting analysis of this case as one in which the court recognised that, even where a trustee acts in good faith in the manner in which he considers to be the best interests of his beneficiaries, his actions may be reviewed by the court by reference to their consequences. Mr Morpuss submits that either this case was wrongly decided or the Court of Appeal did consider that there had been a breach of trust because the trustee failed to consider all the relevant matters. In my judgment, it is clear from the passage cited that Lindley LJ was proceeding on the basis that there was no breach of trust, and that the Court of Appeal took the view that it should intervene because of the unjust consequences to the other beneficiaries. This case is consistent therefore with the presence of an exceptional jurisdiction which goes beyond breach of duty.

130. There is little authority to support intervention by the court in circumstances such as the present, but as I see it that is because in the reported cases charities do not often have two governing organs with differing views: here the board of the company, ie the trustees, and the company in general meeting, ie the members. The trustees have surrendered their discretion to the court and the court has made a decision that a particular transaction which the board supports is in the best interests of the charity and should be put into effect. The second organ wishes to make its own decision independently of the board. It only has a right to vote on one element of the transaction by virtue of section 217 of the 2006 Act. Under the terms of the second organ's agreement with CIFF the necessary power is otherwise vested in the first organ. It would be reasonable for a member of a commercial company to treat his voting power as a veto on the transaction and to use it as a bargaining counter, but CIFF is not a commercial company but a charitable company and Dr Lehtimäki is a fiduciary and bound to act in this matter for the single-minded purpose of promoting the charitable objects.

131. The nearest case to the present may be that of *Attorney General v Governors of Christ's Hospital* [1896] 1 Ch 879, which the respondents rely on, but which properly understood is against them. In that case, the court was asked to give a direction, but it required the consent of a second person *by the terms of the Royal Charter constituting the charity*. It is quite clear that the objection which Chitty J saw to the making of the order was the fact that the governors were given power to administer the charity (following a compromise of earlier disputes) by the Royal Charter of Edward VI for he held at p 888:

> "I hold that it is beyond the jurisdiction of the court to sanction the Attorney General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter, and is established by Act of Parliament. To whatever lengths the court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition."

132. There is no suggestion that Chitty J would not have made the order in that case but for the Royal Charter which prevented an order from being made without the consent of the governors.

133. Although the court had no jurisdiction in the *Christ's Hospital* case, it is significant that the jurisdiction of the court was not ousted where the charity obtained a charter subsequent to its founding (*Attorney General v Dedham School* (1857) 23 Beav 350; 53 ER 138) or if the charity established by a charter had been translated from land to money following the compulsory acquisition of its property (*Clephane v Lord Provost of Edinburgh* (1869) LR 1 Sc 417). In the cases where the court is not precluded by statute, the court can, if on the application of the trustees it has decided that a particular transaction is in the best interests of the charity, make a consequential direction against not simply the applicants but also any other organ of the charity, which would clearly include the members in the case of a charity. As the Chancellor put it in this case, "the members of CIFF do not stand outside the charity; they are part of the administration of the charity, and they cannot lay claim to any private interest" (para 145). So, the court as entitled to make a direction against the organ which made the application as it is against any other organ whose consent is required, though that other organ would have of course first to be given an opportunity to be heard, as Dr Lehtimäki was in this case.

134. In this case, the trustees had surrendered their discretion with respect to the Grant, but Dr Lehtimäki did not surrender his. There is a distinction between a surrender of discretion and an application to the court for approval of a transaction without such surrender. In the former case, it has been held that "the court starts with a clean sheet and has an unfettered discretion to decide what it considers should be done in the best interests of the trust": per Lightman J in *Royal Society for the Prevention of Cruelty to Animals v Attorney General* [2002] 1 WLR 448, para 31.

135. Coupled with the surrender of discretion by the trustees in this case is the further fact that the governance disputes had brought the work of the charity close to a halt and that situation has been resolved by an agreement between the trustees and CIFF which will effectively divide the endowment into shares and allow the parties to go their separate ways but both employing their considerable skills in pursuit of charitable purposes albeit through different charities in the future. In addition, as I have shown above, the courts have always leaned in favour of giving special treatment to charities.

136. The court has a well-established jurisdiction to intervene where the charity can no longer be carried on as the founder envisaged, perhaps because the endowment has increased so substantially over the years that it is excessive for achieving the founder's original purposes, and it is satisfied that the charitable purposes can be beneficially carried out in some different way (see now sections 62 and 67 of the 2011 Act). (This is recorded by Chitty J in the course of his judgment in the *Christ's Hospital* case, although there was no failure of the charitable objects in that case, and see for example *Andrews v McGuffog* (1886) 11 App Cas 313.)

137. The fundamental point appearing from all these cases is that although the court must proceed with considerable caution, the categories of exceptional circumstances referred to by Lord Truro LC are not closed. In the particular circumstances of this case, I consider that the Chancellor was entitled to conclude that this was one of the cases in which the court can exceptionally intervene irrespective of any breach of duty, alleged or found, by any fiduciary. That is because an impasse is threatened in the performance of the trust if Dr Lehtimäki is unable to reach the same conclusion as the Chancellor has done. If he does that, the Grant cannot be made even though the arrangements which have led to the proposal for that Grant provided the means for settling an existential threat to the operation of the charity caused by deeply felt dissension between its two founders.

138. As Lord Wilson pointed out at the hearing, there is power in article 1.5 of the articles of association of CIFF for the trustees to remove members but the

process is cumbersome and may not lead to a clear result. It only applies when the continued membership of the member is harmful to the charity and provision is made for the member to make written representations. So, I do not consider that it provides an adequate alternative to the Chancellor's order.

139. That means that I must next consider a point which Mr Morpuss raises about an important provision of the 2011 Act, which seems to follow on from the non-intervention principle. Section 20(2) applies to the Charity Commission. Section 20 (as amended by section 20(3) of the Charities (Protection and Social Investment) Act 2016) provides:

> "20. Incidental powers
>
> (1) The Commission may do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties.
>
> (2) But nothing in this Act authorises the Commission -
>
> (a) to exercise functions corresponding to those of a charity trustee in relation to a charity, or
>
> (b) otherwise to be directly involved in the administration of a charity.
>
> (3) Subsection (2) does not affect the operation of section 84, 84A, 84B or 85 (power of Commission to direct specified action to be taken or to direct application of charity property)."

140. Mr Morpuss contends that the Chancellor's direction, if made by the Charity Commission, would fall within section 20(2). He goes on to submit that the court cannot have any wider jurisdiction than the Charity Commission in this regard and so the court cannot make an order compelling a member to vote in a particular way.

141. I do not consider that the first part of this proposition is sound. A member is not a "charity trustee" as defined in the 2011 Act. Section 177 of the 2011 Act states that, unless the context otherwise requires (which has not been suggested), the expression "charity trustees" means "the persons having the general control and management of the administration of the charity". The members of CIFF do not have general control of the activities of CIFF for the reasons discussed in para 14 above, and so subsection (2)(a) is not engaged by the Chancellor's direction. In the light of my other conclusions, I need not consider the question whether the direction to Dr Lehtimäki that he is to vote on the section 217 resolution in favour of it requires the performance of an act within the administration of a charity.

142. I reject the submission that the same restrictions as are imposed on the Charity Commission by section 20(2) apply to the court's inherent jurisdiction. What Mr Morpuss contends is that the court cannot have any wider jurisdiction than the Charity Commission in this regard and so the court cannot make an order compelling a member to vote in a particular way. In my judgment, the court's inherent jurisdiction is not tailored to that of the Charity Commission. The jurisdiction of the court with respect to charities is of ancient origin and there is no provision in the 2011 Act which attempts to codify it. It would, as Lord Pannick points out, require an express provision to remove or reduce the scope of the court's inherent jurisdiction: see *In re S (an infant)* [1965] 1 WLR 483. There is no such express provision in either the 2011 Act or the 2006 Act which modifies the inherent jurisdiction engaged in this case.

143. The final point is whether the court can exercise this jurisdiction by giving a direction and without making a scheme. It is said by the first and fourth respondents that to give the relief sought the court is restricted to making a scheme. Both Mr Morpuss and Mr Crow make the point that Ms Cooper has been unable to find a previous case in which the court, in reliance on its jurisdiction over trusts, has ordered a fiduciary to cast his vote at a company meeting as the Chancellor did in this case.

144. As the circumstances of every case are likely to be unique it is not at all surprising that the appellant has not been able to rise to this particular challenge. The facts and circumstances of this case are most unusual. Moreover, *ubi jus ibi remedium* is one of the maxims of equity and certainly examples can be found where the courts have made directions as consequential relief in charity cases: see, for example, *Attorney General v Black* (1805) 11 Ves Jr 191; 32 ER 1061, where Lord Eldon, having decided that the election of a master of a free school had not been carried out in accordance with the terms of the trusts, continued the appointment of acting master until proper elections could be held, which was obviously a necessary and expedient intervention by the court. But there are more modern authorities on this point.

145. Mr Pearce disagrees with the submission of Mr Morpuss. He submits that the jurisdiction of the court in respect of charities enables the court, when it is necessary or expedient in the interests of the charity, to direct the holder of a fiduciary power exercisable in respect of the charity's property as to how to exercise that power. He also submits, but in my judgment the wording is not beyond argument, that the Chancellor found it necessary that the court should intervene because he held:

> "… the only remaining voting member of CIFF must be directed to approve it, otherwise the essential interests of charity which the court is there to protect would be put at risk." (para 155)

146. In my judgment, the starting point on this issue is that the court has the jurisdiction which it would normally exercise in respect of trusts and in addition the special jurisdiction which the court has in respect of charities. The latter is far wider than the former. It is ancient in origin and is the way in which the prerogative of the Crown as *parens patriae* is exercised in the case of charities.

147. Buckley LJ in the *Construction Industry Training Board* case considered that the court could exercise its jurisdiction in relation to charities without a scheme (see the passage cited at para 69 above). I reject Mr Crow's submission that this is limited to the discussion of breach of duty later in the same paragraph. Buckley LJ's holding is in general terms. Moreover, the matters in the relevant sentence of that passage from Buckley LJ's judgment are expressly stated to be only by way of example in any event.

148. The correct principle is that articulated by Lord Wilberforce in the context of private trusts in *In re Baden's Deed Trusts (No 1)* [1971] AC 424, 457:

> "the court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute. The books give many instances where this has been done ..."

149. In the present case, there cannot be any doubt but that the trustees were entitled to seek the directions of the court as to whether CIFF should make the Grant, and the court, once it had decided that the making of the Grant was in the charity's best interests, was entitled and bound to consider how those interests may be carried into effect. The matter simply did not require a scheme - it only required directions.

150. Lord Wilberforce's examples relate to private trusts, but many examples can be found in relation to charities. One of the first reported cases of a direction is *Attorney General v Haberdashers' Company* 1 Ves Jun 295, cited by Mr Crow, where Lord Thurlow LC made a direction for the respondent trustee to distribute certain funds. There was no allegation of any misconduct by the trustee. Later examples include *In re Randall* (1888) 38 Ch D 213, where a limited gift to charity had come to an end (citing *Walsh v Secretary of State for India* (1863) 10 HL Cas 367, concerning the destination following the Indian mutiny of a trust fund established by Lord Clive of India for the East India Company's militia). In the context of charities, the court is not in a case such as this seeking to execute the trust "in the manner best calculated to give effect to the settlor's or testator's intentions" (see per Lord Wilberforce above) but in the manner most likely to advance the charitable purposes for public benefit.

151. No party, other than Sir Christopher, suggested that there was any doubt about whether there could be a scheme in relation to CIFF even though the Law Commission of England and Wales in its report on *Technical Issues in Charity Law* (2017) (Law Com No 375) records a doubt about this, though it saw no reason to exclude charitable companies and other corporate charities from the scheme-making power of the court and the Charity Commission: see para 4.22. A charitable company is only in a position analogous to that of a trustee, but it is now well-established that the court's jurisdiction with respect to charities extends to institutions which are not trusts in the strict, technical sense of the word (see the comments of Slade J in the *Liverpool and District* case [1981] Ch 193, 214; see also the *Construction Industry Training Board* case [1973] Ch 173). (It is to be noted that the scheme in the *Liverpool and District* case would not have involved any change to the company's constitution as the company was in liquidation and its assets were held on the statutory trusts for distribution). That is sufficient for the purposes of this case.

152. Accordingly, in my judgment, while the court may commonly make a scheme, particularly where the application of assets cy-près is required, in an appropriate case it may also give effect to the charitable purposes by giving a direction. There would seem to have been little point in a scheme in this case, and there is no evidence that the Charity Commission thought that there should be a scheme.

Issue 3: Does section 217 of the Companies Act 2006 allow the Court to direct a member to exercise his discretion in a particular way when Parliament has provided for members to pass the resolution?

The range of the arguments on this issue

153. Lord Pannick submits that, although the court should be slow to exercise its power to intervene, section 217 of the 2006 Act does not prevent the court from exercising its inherent jurisdiction to direct the member as to how exercise his discretion under section 217.

154. As for the first and fourth respondents, Mr Crow took the burden of their arguments on this issue. He submits that Dr Lehtimäki would be using different skill sets from those of the court and implied there was therefore a good reason why Dr Lehtimäki should be able to exercise his vote independently. Mr Crow made the forensic point that no-one had produced any case in which the court had directed a member how to vote when there was no evidence that he had acted in breach of duty. The court had power to put in place machinery for the charity, but not to manage its activities. The prohibition on the Charity Commission from managing a charity in section 20 of the 2011 Act (discussed above) reflected the policy of the courts.

155. Mr Crow submits that, in the absence of a breach of duty, the court does not usurp the judgmental discretion of the decision-maker. By analogy with public law (and charities operated within the realm of public law - see *Stanway* above, para 91), the court should defer to the decision of the decision-maker chosen by Parliament. An inherent jurisdiction is not an unlimited jurisdiction. The court intervenes to approve matters which the fiduciaries wished to do: see, for example, *In re Ashton Charity*. In any event, policy supports the non-intervention principle because (1) members are better informed than the court, (2) it is important not to discourage donors who were potential members, (3) there is likely to be an increase in charity litigation if there is more intervention, (4) the court should by analogy with public law defer to the decision of the decision-maker chosen by Parliament. Therefore, the court could not override the members' powers under section 217.

156. Mr Pearce submits that the direction given by the Chancellor to Dr Lehtimäki was a proper exercise of that discretion. Mr Pearce submits that the power of the court extends to giving directions (see per Lord Wilberforce in *Baden (No 1)* [1971] AC 424) even though Fox LJ in *Kerr v British Leyland (Staff) Trustees Ltd* [2001] WTLR 1071 thought that the trustee could not be directed.

My conclusions on the third issue

157. I have concluded that the court could intervene where this is necessary or expedient to see that the charitable trusts are performed and can do so by way of a direction as opposed to a scheme. I deal here only with the issue that turns on section 217. There are a number of principles in play here:

(1) The court's inherent jurisdiction with respect to charities and the principle that Parliament must make it clear if it is restricting the jurisdiction of the court.

(2) The principle that the regulation of charities takes place in the field of public law and that in public law the court does not substitute its decision for that of the decision-maker selected by Parliament, which in the case of section 217 is the members of CIFF.

(3) The principle that to be valid steps taken by registered companies in pursuance of statutory powers must follow those provisions of the Companies Acts applicable to them. In default the action taken without following the provisions of the 2006 Act will be of no effect.

158. Lord Pannick relies on the first and third principles, while Mr Morpuss and Mr Crow rely on the second.

159. Starting with the position of the non-charitable company, the purpose of section 217 is not to veto transactions in which a director or her connected person has an interest but to ensure that there is adequate disclosure and approval by the company in general meeting. This is apparent from the drafting of the section. The original prohibition, as originally enacted, applied only to directors but the Law Commission of England and Wales and the Law Commission of Scotland recommended that it should be extended to payments to connected persons in their report, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties* (1999) (Law Com No 261; Scot Law Com No 173, paras 7.31 to 7.37). The Government decided to propose the necessary changes in the 2006 Act on the basis of the Law Commission's report.

160. Moreover, the legislature has not sought to interfere with or restrict the special voting rights a company may confer on any member, and so the articles could provide that only one member should effectively be able to vote on a resolution. The House of Lords considered in *Bushell v Faith* [1970] AC 1099 that the mandatory rule in section 184 of the Companies Act 1948 (now section

168 of the 2006 Act), whose purpose was to prevent companies from making removal of a director subject to an extraordinary resolution, did not prevent special voting rights being attached to a particular share on any ordinary resolution for the removal of a director. In that case, the House of Lords by a majority held that the article attaching special voting rights was valid despite the provisions of section 184(1), since Parliament was only seeking to make an ordinary resolution sufficient to remove a director and had not sought to fetter a company's right to issue a share with such rights or restrictions as it thought fit.

161. Lord Donovan held at pp 1110-1111:

> "When, therefore, it is said that a decision in favour of the respondent in this case would defeat the purpose of the section and make a mockery of it, it is being assumed that Parliament *intended* to cover every possible case and block up every loophole. I see no warrant for any such assumption. A very large part of the relevant field is in fact covered and covered effectively. And there may be good reasons why Parliament should leave some companies with freedom of maneuver in this particular matter. There are many small companies which are conducted in practice as though they were little more than partnerships, particularly family companies running a family business; and it is, unfortunately, sometimes necessary to provide some safeguard against family quarrels having their repercussions in the boardroom. I am not, of course, saying that this is such a case: I merely seek to repel the argument that unless the section is construed in the way the appellant wants, it has become 'inept' and 'frustrated'."

162. So, the protection given by Parliament is subject to being rendered less effective by the company exercising other powers, such as the right to attach special rights to shares. There cannot therefore be any policy objection from the perspective of company law why the law of charities should not enable a court to direct a member how to vote on a section 217 resolution.

163. Furthermore, there are other provisions in the 2006 Act which confer broad powers on the court to make directions: see, for example, section 994 of the 2006 Act (relief against unfair prejudice). While the court could not dispense with the requirement for a resolution as described in section 217 this power could be used in an appropriate case to require a member to vote in favour of a resolution.

164. In the case of a charitable company, the member is a fiduciary for certain purposes which would include the making of a grant, like the Grant in this case. The question how he votes is usually an exercise of his discretion in which the court cannot interfere (see generally Issue 2, above).

165. However, if the directors (here the trustees) have surrendered their discretion to the court, then the court will exercise their power to agree to a transaction which involves a payment in connection with a trustee's loss of office. The court is called upon to approve the exercise of that discretion. The Chancellor did so unconditionally (save as to the Charity Commission's approval), and in particular his decision was not dependent on Dr Lehtimäki taking the same view and agreeing to pass the section 217 resolution. In those circumstances the field for the operation of public law in this case is exhausted. The section 217 resolution becomes a matter of the internal management of the company. So, in my judgment, it is open to the court to make an order which compels the member entitled to vote on the section 217 resolution to vote in a particular way.

166. This outcome is consistent with the role of a member in a registered company where the power to manage the company's activities is delegated to the board unless and to the extent that the 2006 Act or the company's constitution provide otherwise. Section 217 of the 2006 Act only gives members the right to vote on the Grant because it is also a payment in connection with loss of office: a member would normally have no say on the making of grants by a grant-making charitable company and in any event has no role in initiating or negotiating the proposal.

167. There is no interference with the statutory scheme in the 2006 Act because there still must be a resolution for the purposes of section 217. In the same way, a resolution has to be passed even where a member is effectively disenfranchised because another member has weighted voting rights. That is so even though, unless the member is a fiduciary who is not authorised to vote on a resolution, he is the director who, or whose connected person, will benefit under the resolution.

168. Likewise, there is no interference with the statutory scheme in the 2011 Act. The court does not dispense with the separate requirement in section 201 of that Act for the prior written consent of the Charity Commission.

169. If the conclusion of the Court of Appeal were right, it would mean that if, in this case, Dr Lehtimäki had come to the view that, despite the conclusion of the Chancellor, the Grant was not in the interests of the charity, the court would

have no power in an appropriate case to give a direction to Dr Lehtimäki to vote in favour of the section 217 resolution or to see that the charitable purposes were performed.

170. Mr Morpuss submits that section 201 recognises that the Charity Commission cannot by a scheme under the 2011 Act "short-circuit" the requirement for a resolution of the members of a charitable company. The Law Commission of England and Wales likewise noted that there was uncertainty on this point in relation to a company's power to alter its constitution (which requires a special resolution) in its recent report, *Technical Issues in Charity Law* (2017) (Law Com No 375), which is currently awaiting government response. The 2011 Act and the 2006 Act are both primary legislation and thus my provisional view (as this point has not been fully argued) is that, under the law currently in force and in the absence of an order by a court having power to make the necessary change itself, a charitable company must follow the procedures in the 2006 Act if it proposes to alter its constitution or take any other step for which a procedure is prescribed by the 2006 Act, and that Mr Morpuss' submission about section 201 would appear to be correct.

171. The frustration felt by Dr Lehtimäki at not being called upon to exercise his own, highly skilled judgment is understandable, but the Chancellor was in a position to consider the merits of the Grant very carefully in the light of the evidence filed. Of course, the law applies in the same way whether a fiduciary has Dr Lehtimäki's knowledge and skills or not. The court finds itself in the position that it is totally uncertain as to what the final conclusions of Dr Lehtimäki's deliberations might be, and he has not sought an opportunity to come to a view before the court makes any order.

172. As CIFF was seeking the directions of the court, it must, in the absence of some evidence to the contrary (and there is none), be assumed that all relevant information known to it was placed before the court.

173. Moreover, as a member, Dr Lehtimäki is subject to the terms of the articles which entrust the management of CIFF to the trustees and they have resolved to surrender their discretion to the court. The court must look at all the circumstances and the full context of the potential exercise of discretion. In that regard, the question is not only what Parliament intended in enacting section 217 of the 2006 Act but also what the settlors intended in establishing a charity which gave members only a subsidiary role. Looking for the intention of the settlors as expressed in the structure which they established, it seems to me unlikely that they intended in a case such as the present that members should prevent the charitable purposes from being performed and their beneficiaries safeguarded as

a result of reaching a different view from the court, exercising the discretion of the trustees, on the question of the Grant.

WOULD THE COURT HAVE JURISDICTION TO DIRECT DR LEHTIMÄKI TO VOTE IN FAVOUR OF THE SECTION 217 RESOLUTION ON THE BREACH OF FIDUCIARY DUTY ROUTE?

Lord Briggs' concurring judgment on the breach of duty route

174. I have had the benefit of reading Lord Briggs' judgment. Lord Briggs' conclusion on Issue 2 is that reliance on an exception to the non-intervention principle is unnecessary and that the court can simply direct Dr Lehtimäki to vote in favour of the section 217 resolution because the court has determined, on exercise of the trustees' discretion surrendered to it, that it is in the best interests of the charity for the Grant to be made. Lord Wilson and Lord Kitchin agree with Lord Briggs. I respectfully disagree.

175. In the judgment of Lord Briggs, the determination by the court that the Grant should be approved on the trustees' surrender of their discretion to the court binds Dr Lehtimäki as a member of CIFF because he has been joined as a party to the proceedings (para 208). Although the ordinary duty of a fiduciary is to "exercise the powers that he has in that capacity in the way that he decides, in good faith, would be most likely to further the purposes of CIFF", that power has "to give way" (para 218), and, once the court has given its approval, "there can be no reasonable basis for a fiduciary acting contrary to that decision" (para 232). "The duty of the fiduciary is then to use his powers so as to give effect to the court's decision …" (para 218). In Lord Briggs' judgment, there is "no longer any legitimate debate" on the question that the court has decided (para 218). Lord Briggs considers that the member's only option if he cannot vote for the section 217 resolution is to resign (para 218). Moreover, while Parliament has imposed constraints on the trustees' exercise of their powers in section 217 of the 2006 Act and section 201 of the 2011 Act, those constraints do not serve the same purpose where the court makes that decision in place of the trustees (paras 209 and 210), and so the members can be directed how to vote by the court. Dr Lehtimäki ceases to be "entitled under section 217 to overrule the trustee directors" (para 221). In contrast, my conclusion is that a direction should be made by way of an exception to the non-intervention principle based on the exceptional circumstances of this case.

The views of the Chancellor and of the Court of Appeal

176. Lord Briggs founds his conclusion on the judgment of the Chancellor. As I have explained above, the Chancellor accepted that another fiduciary acting reasonably could reach a different conclusion from his own (para 135: "I am not saying that no reasonable trustee or fiduciary could disagree with my view ...") but then went on to hold that, once the court has made its decision, the member no longer had a free vote and would be acting in breach of duty if he acted contrary to the court's decision. Thus, he held:

> "Here, both the Commission and the trustees of CIFF have decided that their discretion to approve the Grant should be exercised by the court. That discretion has now been exercised. The discretion so exercised binds the charity and the charitable company, CIFF. Its management is only divided between trustees and members for specific purposes. Here the trustees of CIFF bound CIFF in relinquishing their discretion to the court, and the court order will bind CIFF in deciding that the Grant should be made. That means that, whilst the members must pass a resolution under section 217 to approve the Grant, it is not in this case open to any member of CIFF to vote against that resolution, once the court and the Commission have approved the Grant. The member does not have a free vote in this case because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction over the administration of charities. When the court has decided what is expressly in the best interests of a charity, a member would not be acting in the best interests of that charity if he gainsaid that decision." (para 154)

177. The Court of Appeal disagreed with the Chancellor. Moreover, their view, with which I agree, was that there was no basis for any suggestion that when Dr Lehtimäki makes his decision he will not do so in the proper performance of his fiduciary duties (para 69).

Submissions on the breach of duty route

178. The only party to this appeal to advocate the breach of duty route before this Court was Ms Cooper, and then only fleetingly. Mr Morpuss' brief rejection of this route was to my mind convincing. The approval given by the court in this case is only on the surrender by the trustees (with the Charity Commission's

approval) of their discretion. On Mr Morpuss' submission, the court did not have jurisdiction as against the member simply because it had jurisdiction as against the trustees. He went on to describe that proposition as bootstrapping.

Basis of jurisdiction must logically precede the conclusion of breach of duty

179. I emphasise that word "jurisdiction", which means, as already explained, the court's supervisory jurisdiction over charities. The Chancellor had no jurisdiction to make an order against Dr Lehtimäki unless he was threatening to act in breach of his duty. But Dr Lehtimäki was not threatening to act in breach of this duty. The Court of Appeal so found.

180. The fiduciary's duty is subjective, namely to do that which he considers to be in the best interests of the objects of the charity. The importance of a subjective duty is that it is the fiduciary, and not the court, which decides which option to take. The question, properly formulated, for a member is not as stated in para 222 of Lord Briggs' judgment: is the Grant in the best interests of CIFF?, but: do I in good faith consider that the transaction is in the best interests of CIFF (or, more accurately, the charitable objects)?

181. The order of the Chancellor to approve the Grant was an exercise of the discretion which had been surrendered to him by the trustees. The Chancellor made Dr Lehtimäki a party to the proceedings but that does not alter the nature of the application or enlarge the court's jurisdiction (cf para 227 of Lord Briggs' judgment). Dr Lehtimäki chose not to surrender his discretion to the court and the trustees had no power to surrender his discretion for him. On that the position in this court remains the same as it was before the Chancellor. When the court exercises a discretion surrendered to it, it acts in the place of the trustees and the surrender confers no power on the court which the trustees themselves did not have: see *Lewin on Trusts*, 20th ed (2020), para 39-099.

182. So the jurisdiction has to be found in some other way. Lord Briggs explains that when the Grant is approved Dr Lehtimäki's duty is transformed from one under which he is bound to act in what he considers to be the best interests of the charity to one under which he has no discretion but to vote to approve the Grant. The Chancellor made a mandatory order against him to that effect. But the order approving the Grant could not alter his powers in that way. If the required transformation can be achieved at all, despite the fact that Dr Lehtimäki was intending to exercise his powers in a proper manner, it could not be done by an order exercising the trustees' discretion: see *Lewin on Trusts*, above. It could only be done by making a separate substantive order to that effect

against Dr Lehtimäki changing his subjective duty into one to vote to give effect to the court's decision.

183. Furthermore, the point is not one of form. Jurisdiction must be established in substance before the direction is given, it is not enough for the court to found jurisdiction on a breach of duty which does not arise unless the court has jurisdiction to make the order. To do otherwise is, with respect, circular. Therefore, as I analyse it, the breach of duty route cannot be followed because there is no jurisdiction. The court must first establish jurisdiction by finding, if it properly can, an exception to the non-intervention principle. That may explain why counsel made detailed submissions on this principle to almost the complete exclusion of the breach of duty route.

The court's approval may be frustrated by the action of non-fiduciaries

184. The exceptions to the non-intervention principle only enable the court to make orders against fiduciaries. It does not enable the court to bind any non-fiduciary such as a donor, benefactor or founder of a charity who has reserved the right to give consent to any transaction, save to the extent that they are themselves fiduciaries. If their consent is required, but is withheld, the effect is likely to be that the transaction which the court approved on the trustees' application cannot be implemented. So too with the Charity Commission. The Chancellor made it clear that the Charity Commission, which is not a party to these proceedings and has not made submissions, should be free to decide whether to give its approval:

> "150. In these circumstances, therefore, it is relatively clear that the Commission has deferred to the court in relation to the decision as to whether the making of the Grant is 'expedient in the best interests of CIFF' and should, therefore, be sanctioned, but has decided to wait and see what the court decides before giving its prior approval to a section 217 resolution. When it took these decisions, however, the Commission did not know what the court now knows as to the legal position of the members of CIFF (as now determined) and as to Dr Lehtimäki's position as described to the court. None the less, I take the view that the Commission's approach should be respected, and that it should be given its statutory opportunity in the light of this judgment to consider whether to approve the making of a members' resolution under section 217 of the Companies Act."

185. The Chancellor's direction against Dr Lehtimäki was expressly made conditional on the Charity Commission giving its consent under section 201 of the 2011 Act (as well as under the constitution of CIFF), and there has been no appeal against that part of the Chancellor's decision. In my judgment, the Charity Commission as a public body cannot be bound to reach its decision on what is expedient in the interests of the charity by virtue of the decision which the court has made on the trustees' application. The Charity Commission must make its own decision on the materials available to it though no doubt it would take into account the court's decision. However unlikely, it is open to it to come to a different conclusion, and if it does, the Grant will not proceed.

Avoiding a blanket approach to breach of duty

186. The breach of duty route involves a blanket approach: all other fiduciaries for the charity in question must vote to give effect to the transaction which the court has approved. Once it is appreciated that the Charity Commission and the holder of any non-fiduciary power to give consent is not bound by the order made on the trustees' surrender of their discretion to the court, a more nuanced view of the position can be taken and the conclusion reached that there is no absolute need for a member of a charitable company to have his discretion taken away from him. Even if he is bound to act reasonably, there can, as is demonstrated by the judgment of the Chancellor in this case, be a reasonable difference of judgment on the exercise of a discretion.

The importance of the subjective test for breach of fiduciary duty

187. The subjective nature of the fiduciary's duty is very important to the operation of charity law. The court does not interfere in a dispute as to how a charity is to be administered: see paras 120-122 above. The non-intervention principle reflects the judicial policy of not interfering with the acts or decisions of trustees in the absence of evidence of a breach of duty. As explained, any departure from the non-intervention principle calls for caution.

188. Furthermore, Lord Briggs' approach is out of line with the benevolent approach which the law adopts in relation to charitable trusts (see paras 53 to 55 above) and also in relation to charitable trustees. Thus, for example (and remembering that I have not concluded that there is any threatened or actual breach of duty by Dr Lehtimäki: see further para 195 below), the law looks benevolently on charity trustees even where there is evidence of actual or potential breach of duty: see, for example, the judgment of Lord Eldon in *Attorney General v Exeter Corpn* (1826) 2 Russ 45, 54 (approved by the House of Lords in in *Andrews v McGuffog* 11 App Cas 313, 324) as follows:

> "With respect to the general principle on which the court deals with trustees of a charity, though it holds a strict hand over them, when there is wilful misapplication, it will not press severely upon them, where it sees nothing but mistake. It often happens, from the nature of the instruments creating the trust, that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest, and unconnected with any corrupt purpose, the court, while it directs for the future, refuses to visit with punishment what has been done in time past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities."

189. There are practical reasons for the court's benevolent approach, and the reasons are equally valid in support of the subjective nature of the fiduciary's duty. Lord Eldon explains that the reason for the court's benevolence is to encourage people to become trustees of charities. Another reason would also be that it may give donors to charities confidence that their generous, and in this case, massive, donations for public benefit will be managed and applied as the officers and, in the case of a membership charity like CIFF, its members think fit in accordance with the law and the constitution of the charity, and not by the court. The court may not have the same detailed experience and knowledge of the charity as the officers and members have. The Court of Appeal expressed similar views to those in this paragraph in para 63 of its judgment when agreeing with a submission by Mr Robert Ham QC, then appearing for Sir Christopher.

Importance of my more nuanced approach in membership charities

190. Another important reason for the court's restraint in the case of membership charities is that people become members so that they can have a say in how the charity is run. The function of the membership charity is inherently participatory for those who desire to do more than give and also want to play a part in the direction of the charity.

191. The effect of the breach of duty route is that once the court has decided on the trustees' application that a particular step is in the best interests of a charity, its members will have no further say. As already indicated, this is contrary to the ethos of a membership charity. The court may not be aware of their reasons on a particular proposal of the charity trustees, especially if the members are drawn from a wide section of the public. Society draws enormous strength and benefit from charities of this kind, and that factor should in my judgment incline the court to hold that jurisdiction can only be founded in this

case if there is an applicable exception to the non-intervention principle. That principle should in my judgment prevail over any disagreement with or disapproval of Dr Lehtimäki's conduct in this matter.

192. The trustees surrendered their own discretion to the court, not that of Dr Lehtimäki. The Chancellor was therefore not exercising any corporate power conferred on the members or any other person. In my judgment the court should be very circumspect in overriding protections written into the articles or conferred on members by the Companies Acts. Appropriate restraint is reflected in the non-intervention principle.

Deadlocked trustees are not an analogous situation

193. Lord Briggs seeks to draw an analogy with cases where the court makes directions to resolve disputes among a deadlocked body of trustees but in my respectful view that analogy misses the point. In those cases, the court has only a single body of fiduciaries before it. In this case, there are two: (i) the trustees and (ii) the members of CIFF. As a matter of corporate law, the trustees do not control the members' powers (see para 14 above). In any event, the cases on deadlock form an exception to the non-intervention principle (see per Lord Walker in *Pitt v Holt* [2013] 2 AC 108, para 73, cited at para 121 above).

A material change of circumstances would undermine the basis on which the direction has been made

194. Lord Briggs accepts that there could be a change of circumstances and the possibility that the order of the court (para 230 below) would have to be reviewed but he does not explore the consequences of that acceptance. An important consequence is that it may turn out that in the event there is no breach of duty by the time the member comes to vote. A change of circumstances could occur at any time before the date on which Dr Lehtimäki has to vote on the section 217 resolution, which is the material time for assessing the existence of a breach of his duty.

195. Once it is accepted that his decision is one to be taken at the date of the vote (which may not take place for some time), it cannot be concluded that a fiduciary, who has assured the court that he will act bona fide in the best interests of the objects of the charity, is currently threatening to act in breach of his subjective duty at the date of the court's determination on the trustees' application or that there is no basis on which if there were no order he could not reasonably form the view that it was not in the best interests of the charity to vote

in favour of the section 217 resolution (cf per Lord Briggs at para 232 below). So to conclude would be to prejudge the issue. On conventional principles, there is no threatened breach of duty at the present time, and a quia timet injunction would not lie on the basis of the subjective duty.

Conclusions on the breach of duty route

196. The breach of duty route assumes that which must first be proved and diverts attention away from the source of the court's jurisdiction to make a direction against a member. Unless there is an applicable exception to the non-intervention principle, there is no jurisdiction. And it seems to me wrong for a court, in an understandable desire to ensure the effectiveness of its order, to characterise any dissension from it as automatically a breach of duty. Rather, it should satisfy itself that it is justified in concluding that there is an appropriate exception to the non-intervention principle. That is the principled way to ensure that a member cannot exercise a veto on the court's approval of the Grant.

197. Moreover, the conclusion that there is a threatened breach of duty can only be reached, as Lord Briggs accepts, by making what I see as a significant inroad into the subjective duty. Lord Briggs' response is that the test has to be objective in these circumstances. But the effect of that approach is to make a fundamental change in the member's duty. It also involves taking away the member's discretion: in the words of the Chancellor's judgment, at para 154, "the member does not have a free vote in this case", and so he is no longer free to exercise his voting rights as he thinks fit in the proper performance of his duties.

198. The making of a direction against Dr Lehtimäki on the basis that it would be a breach of duty for him to act other than as the court has decided in relation to the trustees may have consequences which stretch beyond the very exceptional nature of this particular case. In my judgment, the broader consequence in membership charities is to tip the balance of power in favour of the trustees and/or the court, and against the membership. The members who take a different view from the court will be compelled to return to the court to justify their approach. The onus should not be on them to do so. The core facts of this case are not necessarily "very unusual": it is not infrequent to find disagreements between the trustees and members of substantial and well-known membership charities. Accordingly, in my judgment, to hold that members are automatically bound by the court's decision in relation to the trustees is the wrong turn for charity law to take.

199. Respectfully, I consider that the non-intervention principle has to be observed even in this case. The court can only make a direction against Dr Lehtimäki if it is satisfied that there is an applicable exception to that principle. I am so satisfied for the reasons that I have given.

SUMMARY OF MY OVERALL CONCLUSIONS

200. On the first issue, I consider that a member of a charitable company owes fiduciary duties to the charitable purposes in relation to the passing of a resolution such as the 217 resolution, which, if passed, will make possible a disposition of assets which would otherwise have been applicable for those purposes. The fiduciary duties are tailored to fit within the corporate vehicle, and thus Dr Lehtimäki has no greater right to demand information from the trustees (the directors) than the terms of the company's constitution or the general law relating to companies allows a member. I also consider that the duties are narrower than those formulated by the Court of Appeal so that they do not apply in every instance where a member has power to act. Those circumstances must be worked out as and when they arise.

201. On the second issue, I conclude that the fundamental principle is the non-intervention principle under which the court does not seek to substitute its judgment for that of a fiduciary. Any departure from this principle must be approached with considerable caution by the court. Litigation which simply seeks to draw the court into matters which can be dealt with by the trustees under their powers is not to be encouraged, but litigants must in any event overcome the hurdles to bringing charity proceedings to which I have referred in para 50. However, in my judgment, the present case is a rare exception to that principle. The trustees of CIFF have surrendered their discretion to the court and the court's priority is to see that fiduciaries for the charity perform their duties in the way most likely to achieve its continued existence notwithstanding what has been held to be in effect an existential threat to the proper governance of the charity. I also consider that the court has jurisdiction to give a direction to Dr Lehtimäki to vote in favour of the section 217 resolution, and that there does not have to be a scheme.

202. On the third issue, I conclude that, CIFF's trustees having surrendered their discretion to the court, and the court having reached the unchallenged conclusion that it is in the best interests of the charity for the Grant to be made, the court can give a direction to a fiduciary as to the manner in which he votes on the section 217 resolution and that the 2006 Act does not by implication prevent the court from making such an order.

203. I therefore conclude that the Court of Appeal was in error in not making the direction. However, differing here from Lord Briggs, I would reject the breach of duty route, that is, the view that the court can found its jurisdiction to make this order against a member on the basis that for a member to threaten to vote other than in favour of the section 217 resolution would be a breach of duty by the member simply because the court has reached the conclusion that the Grant should be approved on the trustees' application (paras 174 to 199 above).

204. I would allow the appeal to the extent explained in this judgment.

LORD BRIGGS: (with whom Lord Wilson and Lord Kitchin agree)

205. I agree that this appeal should be allowed, and with the summary of the reasons for doing so given by Lady Arden in paras 200-202 (but not 203) of her judgment. I add a few words of my own first because there is in my view a simple although unusual reason why it was right for the Chancellor to direct Dr Lehtimäki how to cast his vote under section 217 which depends upon no deep consideration of the law of trusts and charities of the type which both the parties and my Lady have considered it necessary to undertake.

206. CIFF is a charitable company, falling under the court's special jurisdiction in relation to charities. Like a charitable trust CIFF is only a charity because its objects (ie its purposes) as laid down by its constitution are exclusively charitable. The furtherance of those purposes is entrusted primarily to its trustees. Although their functions are in most respects indistinguishable from those of company directors, like other charitable trustees they have the power to surrender to the court the exercise of their fiduciary discretion about a particular matter, a surrender which the court may or may not accept. If (as here) the court accepts that surrender, it will exercise that discretion in accordance with what it considers will best further the charitable purposes of the company, after hearing evidence and submissions from interested parties and from HM Attorney General representing the Crown as *parens patriae*.

207. If the surrender of the trustees' discretion relates to the approval or disapproval of a particular proposed transaction the court will have to come to a decision whether the company's entry into that transaction is, or is not, in furtherance of those charitable purposes. If the court concludes that it is, then it will follow that those purposes will not best be furthered by that transaction not going ahead. The court's decision on this question may be (and was in this case) a very difficult one, about which reasonable minds, activated by nothing less than the loyal performance of a fiduciary duty, may well differ.

208. But once the court's decision about the merits of the transaction is made then, subject to any appeal (or perhaps a significant change in circumstances before it is implemented), that difficult question has been finally resolved. It ceases to be a question for debate. It is binding on all those interested parties joined to the relevant proceedings, and the duty of the charity's fiduciaries (whether or not joined as parties) is to use their powers to the end that it is implemented, both generally and in accordance with any directions which the court may give for that purpose. It would in my view be a plain breach of fiduciary duty for a relevant fiduciary of the charity to do otherwise, a fortiori to exercise a fiduciary power so as in effect to veto the very transaction which the court has decided should proceed in furtherance of the charity's purposes.

209. Where a proposed transaction by a company involves a payment to one or more of its directors for loss of office, then section 217 of the Companies Act 2006 requires that the payment element of the transaction be approved by a members' resolution. Section 201 of the Charities Act 2011 requires that, in addition, the payment element be approved by the Charity Commission where the relevant company is a charity. Section 217 recognises the need for an ordinary company's main stakeholders to have a veto over the ability of its directors to make payments to themselves or to one of their number from the company's funds. Section 201 recognises that the Commission, as the representative of the public for this purpose, should have the same ultimate control over such payments out of the funds of a charity. Both these sections recognise the obvious risk that directors may be swayed by inappropriate motives in deciding upon such payments, even when the intended recipients abstain entirely from the decision-making process.

210. Such constraints have no equivalent purpose where the decision that the charity should enter into a transaction involving payment to a director or trustee for loss of office is not merely approved, but actually decided on, by the court, after a surrender of the requisite discretion, and after those with contrary views are given a proper opportunity to make submissions and furnish evidence. The court will not be affected by fellow feeling of the type which might affect the directors or trustees. If the court gets the decision wrong, there is an appellate process in place to put it right. It is common ground that the Charity Commission may defer to the court under section 201 in such a case. It would be most unlikely if (as in the present case) the Charity Commission had authorised proceedings designed to enable the court rather than the trustees to make the decision that it would then decline to consent to a transaction which the court had approved, as being in furtherance of the purposes of the charity. But the same goes, or ought to go, for the members of a charitable company under section 217 if, as here, they are pure fiduciaries with no proprietary or other separate stake of their own in the company's assets. That is not to say that a section 217 resolution becomes unnecessary, but only that the members, if fiduciaries, can be directed by the

court to approve it, if they are minded to do otherwise. Nor would approval by the Charity Commission become unnecessary, but in the absence of something having gone badly wrong with the court proceedings, it is hard to conceive why it would be withheld.

211. Applied to the facts of the present case, the analysis is as follows. The management of CIFF was gravely threatened by the most unfortunate falling out between its generous and dedicated founders, Sir Christopher and Ms Cooper. What became the Grant (as Lady Arden describes) was thrashed out as a way of dealing with that threat in a way which would effect a form of demerger of CIFF's funds and activities into two charities, CIFF and Big Win Philanthropy ("BWP"), each with the same (though differently worded) objects as CIFF, the latter to be managed by Ms Cooper who would withdraw from CIFF, with its funds augmented by further substantial donations from both Sir Christopher and Ms Cooper.

212. CIFF was under the control of five trustees, including Sir Christopher and Ms Cooper. The latter two were, along with Dr Lehtimäki, the only members of CIFF. For perfectly understandable reasons the trustees considered it appropriate to surrender to the court their discretion whether to commit CIFF to the making of the Grant, and the Charity Commission deferred to the court by authorising the proceedings. But the Grant included what was, strictly, a payment for loss of office within section 217, and therefore required the approval of the members of CIFF. Again for understandable reasons, Sir Christopher and Ms Cooper declined to participate in voting as members. So the question whether to vote in favour of the making of the Grant fell upon the shoulders of Dr Lehtimäki.

213. The court heard submissions from all interested parties including CIFF itself, HM Attorney General and Dr Lehtimäki, who was joined as a party and lodged evidence. The Charity Commission understandably took no active part itself. The Chancellor decided that the making of the Grant was in the best interests of CIFF; ie that its charitable purposes would be better advanced by the making of the Grant than by its not being made. He found that a difficult decision, about which relevant fiduciaries, including in particular Dr Lehtimäki, could reasonably differ without thereby being in breach of duty. But there has been no challenge to that decision.

214. When informed that Dr Lehtimäki did not consider himself compelled by the court's decision as to the best interests of CIFF to approve the making of the Grant under section 217, he directed him to do so. Speaking of Dr Lehtimäki he said, at para 154:

> "The member does not have a free vote in this case because he is bound by the fiduciary duties I have described and is subject to the court's inherent jurisdiction over the administration of charities. When the court has decided what is expressly in the best interests of a charity, a member would not be acting in the best interests of that charity if he gainsaid that decision."

I agree.

215. I must say something very briefly about the two principal grounds on which that direction has been challenged, successfully, in the Court of Appeal. The first is the submission that Dr Lehtimäki is not, as a member of CIFF, a fiduciary at all, although it may be conceded that he was bound by the "proper purpose" rule, that is to exercise his section 217 power for the purpose for which it was given. On this issue I agree with the Chancellor, the Court of Appeal and with Lady Arden that Dr Lehtimäki is a fiduciary, in particular in relation to the exercise of his power as a member of CIFF to approve or disapprove the making of the Grant. There may be slight differences in emphasis and detail in their reasoning, particularly in relation to the question whether the members of mass membership charities like the National Trust are fiduciaries and, if not, why not. Like Lady Arden I would prefer to leave these issues to a case where they might affect the outcome. In the case of CIFF, its constitution confers no particular benefits on its members which would bring that question into play.

216. The second, and main, ground is what is loosely described as the "non-intervention principle", namely that the court will not generally interfere with the performance by fiduciaries of their duties unless they are acting, or threatening to act, in breach of duty, or have surrendered their discretion, and that the court's special jurisdiction over charities gives rise to no exception. It was the main ground upon which the Court of Appeal overturned the Chancellor's direction to Dr Lehtimäki as to how he should vote upon the necessary section 217 resolution. Lady Arden deals with this ground on the assumption that Dr Lehtimäki's stance involved neither a breach nor a threatened breach of his fiduciary duty. On that basis she concludes that the non-intervention principle, important though it undoubtedly is, cannot be without exception, either in the law of trusts or a fortiori in relation to charities and that this case is, on its very unusual facts, just such an exception. In particular she concludes, and I agree, that the court's jurisdiction to intervene in the affairs of charities extends beyond its trusts jurisdiction more widely than just in relation to schemes.

217. If it were necessary to proceed upon the basis that Dr Lehtimäki was neither committing nor threatening a breach of his fiduciary duty by declining to vote on the section 217 resolution in accordance with the court's decision that the making of the Grant furthered the charitable purposes of CIFF, then I would agree both with Lady Arden's conclusion and with her analysis. But I am unable to accept the premise. I shall assume in Dr Lehtimäki's favour that, as the Chancellor said, a conclusion by him that the making of the Grant was not in the best interests of CIFF, and a vote against it under section 217, would not *in the absence of the court's decision on the point* have involved any breach of fiduciary duty on his part. Thus if for example the trustees had resolved that the Grant should be made (on their perception that to do so would be in the furtherance of CIFF's charitable objects) without seeking the assistance of the court it would have been perfectly consistent with his fiduciary duty as a member to consider the matter afresh and, if he concluded otherwise, to prevent the making of the Grant by voting against it as the only unconflicted member. It is plainly within the intent of section 217 (which Parliament clearly intended should apply with full force to charitable companies) that the members may overrule the trustee directors in the event of a bona fide disagreement of that kind, where (as here) the transaction in question includes a relevant payment for loss of office.

218. But once the court has ruled upon the underlying common question whether the proposed transaction is in the best interests of the charity, in properly constituted proceedings in which both the company and the members are joined as parties, the position fundamentally changes. It may well be that particular fiduciary organs of the charity bona fide opposed and argued against the decision which the court reached and remained unconvinced by the court's reasoning. But there comes a point where the ordinary subjective duty of the fiduciary (as the Court of Appeal put it at para 48) to "exercise the powers that he has in that capacity in the way that *he* decides, in good faith, would be most likely to further the purposes of CIFF" has to give way, where the court has reached a different view from his own and made a final decision to that effect. This is because the concept that the fiduciary is entitled to form his own subjective judgment about a matter affecting (in this case) the company assumes that there are different conclusions about the matter which may reasonably be reached. But when the very question in issue has been finally decided by the court in proceedings in which the fiduciary has been joined as a party and been heard, then there is no longer any legitimate debate. The duty of the fiduciary is then to use his powers so as to give effect to the court's decision about the company's best interests, however much he may disagree with it. If he finds that he cannot in conscience do so, then he should resign.

219. There is a useful parallel in the situation which arises where trustees who have to act unanimously in deciding whether or how to exercise a fiduciary

power find themselves deadlocked and, exceptionally, the court needs to resolve that deadlock in order to enable the trust to be duly administered. The court may be called upon to do so by one or more of the trustees, without a surrender of discretion by all of them, or indeed on the application of any interested party, such as a beneficiary. The opposing sides among the trustees may each have perfectly reasonable and bona fide views about whether the exercise, or non-exercise, of the relevant power would best serve the interests of the beneficiaries. Where in such a case the court chooses to decide whether or how the power should be exercised, in the best interests of the beneficiaries, then it becomes the duty of all the trustees to act in accordance with the court's decision, regardless whether they agree with the court's view about the merits of the matter. If necessary the court may direct them to do so. For a useful summary of English and Commonwealth authorities on this aspect of the court's jurisdiction in the administration of trusts, see *Garnham v PC* [2012] JRC 050.

220. It is suggested in this case that the above analysis is inapplicable because all that the court was doing was standing in the shoes of the trustees in making for them their decision on the merits of the Grant, whereas Dr Lehtimäki as a member is a different organ of the company, unaffected by that decision, entitled to reach and act upon his own view of the merits and thereby to overrule the trustees. It is said that his joinder as a party, otherwise than at his request, does not detract from that entitlement. I respectfully disagree, for the following reasons.

221. First, the court was not merely resolving some internal disagreement among the trustees. It was at the trustees' unanimous request making the decision about the merits of the Grant for the company itself, exercising for that purpose its inherent jurisdiction in relation to the administration of the company as a charity, with the consent of the Charity Commission. CIFF was, in recognition of that, joined as a party, for the purpose of being bound by the outcome. As the organ charged with the overall direction and management of CIFF the trustees were beyond question the appropriate body within CIFF to put that question before the court on CIFF's behalf. While it is true that this is not a case of deadlock (because the members are, in respect of proposed payments for loss of office, entitled under section 217 to overrule the trustee directors), the court became seized of the issue as to the merits of the Grant by a legitimate alternative route.

222. Secondly, the underlying question whether the making of the Grant was in furtherance of CIFF's charitable purposes was the determinative question for both the trustees and for the members, although they were different fiduciary organs of the company. This is not a case (as it would usually be in the case of an ordinary commercial company with non-fiduciary members) where the two organs might legitimately have a different agenda from each other. There is no

sense in which it could be said that Dr Lehtimäki as a member might legitimately bring different objectives into his decision making, from those actuating the trustees. For both of them, the decisive question was the same: would the making of the Grant further the charitable purposes of CIFF? If it would, then they both had a duty to see that it happened.

223. Thirdly the court was astute to make CIFF's members, and Dr Lehtimäki in particular, parties to the proceedings, both to obtain their assistance in the making of a difficult decision, in the form of evidence and submissions, and to bind them into the outcome.

224. It is in my view nothing to the point that Parliament has by section 217 given the members of a company their own decisive say in relation to the making of payments for loss of office to directors, and confirmed it in relation to charitable companies in which the members will usually be fiduciaries. The members' decisive role is given to them as a control upon what would otherwise be the uncontrolled discretionary power of the directors (here the trustees). It was no part of Parliament's purpose to give fiduciary members of a charitable company the like control over the court's exercise of power over the company under its jurisdiction in relation to charities. That does not mean that section 217 was thereby disapplied, or for that matter the requirement for the approval of the transaction by the Charity Commission under section 201 of the 2011 Act, as the Chancellor recognised by the terms of his order.

225. Lady Arden was kind enough to read a draft of my judgment, which ended at para 224 above. She has, in paras 174 and following of her judgment set out at length why she disagrees with the breach of duty route. I must explain why I have not been persuaded by her analysis. I mean no disrespect by doing so briefly.

226. First however, I acknowledge the awkwardness of a point which asserts a threatened breach of duty when this was not in the forefront of the arguments which the court heard. But this is a really important point: can a fiduciary whose duty is to further the purposes of a charity stand aloof from a final decision of the court, made for the charity, on that very point, in proceedings in which he had been both joined and heard, so as to exercise a veto over what the court has decided would best further those purposes, or would it be a breach of duty to do so? I have not been persuaded by Lady Arden's reasons for not affirming the judge's conclusion that such conduct would be a breach.

227. Lady Arden says (at paras 178 and 181) that she prefers the submission of Mr Morpuss that the court had no jurisdiction over Dr Lehtimäki as a member

merely because it had accepted a surrender of the trustees' discretion. I agree. But having joined Dr Lehtimäki, the court's jurisdiction to require him to vote in favour of the Grant arose because his threat not to do so was a threatened breach of duty.

228. Lady Arden acknowledges, at para 178, that the breach of duty point was, albeit briefly, taken on Ms Cooper's behalf in her Grounds of Appeal. The Court asked Lord Pannick during his opening of the appeal whether he adhered to the argument that Dr Lehtimäki would be in breach of duty if he voted against the Grant after its approval by the Chancellor and he said, again briefly, that he did. So the point remained to be decided, even though little was thereafter said about it during the hearing.

229. More to the point, as I have sought to explain, the breach of duty point was precisely the basis upon which the Chancellor decided to direct Dr Lehtimäki to vote in favour of the Grant. True it is that the Court of Appeal disagreed with the Chancellor's reasoning, but that is why there is an appeal to this court. It must be open to this court on a second appeal to conclude that the first instance judge was right in his analysis, save perhaps where all parties to the appeal are for good (rather than tactical) reasons united in the view that he was wrong. There was no such unanimity in the present case.

230. I am unable to agree with Lady Arden's next point (at paras 184-186), which is that if (as the Chancellor recognised) the Charity Commission retained its power to approve or disapprove the transaction under section 201 of the 2011 Act, then there could be no valid distinction with Dr Lehtimäki's power as a member under section 217. First, the Charity Commission is not a fiduciary subject to the court's general jurisdiction in relation to breach of duty. It is a separate public body with its own statutory jurisdiction. Secondly the Charity Commission was not joined as a party to the proceedings, or heard on the merits of the Grant. The relationship between the court and the Charity Commission is quite different from that between the court and a fiduciary who is also a party to the proceedings, and its detail is beyond the scope of the issues in this appeal. Leaving aside change of circumstances, it seems very unlikely that the Charity Commission would prohibit the making of the Grant by a refusal under section 201, where the court had already finally decided that it would further the purposes of CIFF, and directed Dr Lehtimäki to vote in favour of it under section 217.

231. Lady Arden makes a number of points which may be loosely characterised as suggesting that the breach of duty route would have ramifications adverse to the willingness of members of the public to become engaged in the affairs of charity by becoming donors or members of charitable

companies. Thus she says that the decision that Dr Lehtimäki was threatening a breach of duty would undermine the subjective basis of fiduciary liability, that it would be contrary to the benevolent treatment of charity trustees by the court, that donors would react adversely to the court preferring its own views to those of members and trustees, and that it would discourage membership by shifting the balance of power from the membership to management and the court.

232. I accept that the principled basis upon which the Chancellor decided to direct Dr Lehtimäki to vote (with which I agree) does involve some limited departure from a purely subjective assessment of the question whether a fiduciary has committed, or is threatening to commit, a breach of duty. But the test for breach of fiduciary duty has never been purely subjective. The fiduciary's belief has to be both bona fide and reasonable, if he or she is to act upon it without risking breach of duty. In *Cowan v Scargill* [1985] Ch 270, 289, Sir Robert Megarry V-C said this, of the trustee's duty in relation to investment:

> "This requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness."

Where the court has finally decided what is in the charity's best interests there can be no reasonable basis for a fiduciary acting contrary to that decision and, here, actually vetoing the transaction which the court has decided best furthers the purposes of the charity.

233. Nor can such conduct, in the face of a final decision of the court after hearing full argument, be equated with the type of bona fide mistake referred to by Lord Eldon LC in *Attorney General v Exeter Corpn* 2 Russ 45. He contemplated that the court would readily give directions as to future conduct by the trustee, but be merciful in relation to punishment for the past. No-one is suggesting that Dr Lehtimäki should be punished. Nor should anyone be discouraged from becoming a fiduciary for a charity (as a trustee or a member) by the prospect that, in unusually difficult cases like the present, the court may give such directions, in the expectation that they will be complied with. The fact that the court is there to lend its assistance when the fiduciaries are divided, or cannot make up their minds, should be an encouragement to those uncertain whether to undertake what may occasionally be a challenging role.

234. I fully agree with Lady Arden that membership of corporate charities should be encouraged, and that members should also be encouraged to play their constitutional part in decision making about the charity. But there will, very

occasionally, be decisions of great difficulty, sometimes of great controversy, with which the court is there to assist, in its general supervisory role over charity. That this is just such a case is the foundation of Lady Arden's judgment as much as it is of mine. I do not think that this very unusual case will tend to shift the balance of power away from members towards management and the court. In the present case Dr Lehtimäki was, by his joinder, encouraged to put his own view of the merits of the Grant before the court, although it was the trustees who placed the matter before the court. In fact the originators of the proposal to make the Grant, Sir Christopher and Ms Cooper, were both members as well as trustees.

235. I would therefore allow the appeal, and restore the Order made by the Chancellor, essentially for the reasons which he gave.

LORD REED:

236. With some reluctance, as I found the judgment of the Court of Appeal more persuasive than have your Ladyship and your Lordships, but in deference to the unanimity of the other members of the court as to the outcome of this appeal, and bearing in mind that the facts of this case seem unlikely ever to be replicated, I concur in the order proposed.