

NOTE OF REASONS FOR DECISION

INTRODUCTION

1. This is an appeal raised by Doug McLaren ("the Appellant") against a decision of the Office of The Scottish Charity Regulator ("the Respondent") to suspend the Appellant from being a Charity Trustee originally issued on 21st December 2012 and thereafter reviewed and confirmed by the Respondent on 31 January 2013.
2. The decision was issued following an investigation into allegations raised regarding the Appellant's conduct while acting as a Charity Trustee of Tayside Foundation for the Conservation of Resources (Scottish Charity number SC023578) referred to in this note as "the Charity".
3. Section 31(4) of the Charities and Trustees Investment (Scotland) Act 2005 ("the Act") permits the Respondent following inquiries under section 28 of the Act to suspend for up to 6 months any person concerned in the management or control of a charity who appears to OSCR to-
 - a) have been responsible for or privy to misconduct,
 - b) have contributed to, or facilitated, misconduct, or
 - c) be unable or unfit to perform that person's functions in relation to the property of the charity or body.
4. It appeared to the Respondent that the Appellant, being concerned in the management and control of the Charity, contributed to, or facilitated, misconduct in the administration of the Charity.
5. On review the Respondent's reviewer upheld the original decision and the Appellant lodged an appeal to this Panel.
6. The Panel met on three days to hear the appeal. Mr McLaren was not represented on the first day of the Hearing but did have a supporter on

the second and third days. The Respondent was represented by its Senior Legal Adviser Ms Moira Cathcart.

7. Evidence was heard from Doug McLaren (the Appellant), Rizwan Aboobaker (the Landlord of the Lochee Shop), John Reid (a consultant who assisted the Charity from time to time regarding recycling opportunities), Jane Moore (the Charity's accountant and Independent Examiner), Derek White (a volunteer at the Charity), Joseph Lannan (an employee of the Charity), Mary Core (one of the Charity's trustees), Sharon Walker (an investigator at OSCR) , Shiona Baird (the Chair of the Charity) and Martin Tyson (Head of Regulation at OSCR).
8. At the outset of the Hearing the Chair made it clear that the proceedings before the Panel related only to the decision appealed against and not to any other ancillary points which were contained in the Appellant's note of Appeal. The Panel in reaching its decision has discounted any evidence presented which was largely irrelevant to the Respondent's decision and the matters contained in this Note relate only to the decision appealed against.
9. The Panel heard background evidence regarding the Appellant's reasons for acting in the way that he did. That background, was useful to the Panel, but whatever the background the Board's decisions remain.
10. The pertinent matter before the Panel is whether the Appellant acted in accordance with the decisions of the Charity or within his otherwise delegated powers and all of that in accordance with his duties as a Charity Trustee.
11. The background to the Respondent's decision fell into these main headings:

- a. In March 2012 the sum of £20,000 was paid to the Landlord of a shop in Lochee without the authority of the Charity's Board.
- b. The Lease entered into for the shop at Lochee was also entered into without the authority of the Charity's Board and in contravention of a decision taken by the Board.
- c. The Appellant entered into an onerous and substantial contract with D C Thomson for the clearance of a factory without the authority of the Charity's Board.
- d. The Appellant had a significant role in all three of these actions and was acting outwith his powers as a Charity Trustee and as a result the Respondent took action in terms of s31(4) of The Charities and Trustees Investments Scotland Act 2005

(4) OSCR may, by notice, suspend any person concerned in the management or control of the charity or body who appears to it to—

(a) have been responsible for or privy to the misconduct,

(b) have contributed to, or facilitated, the misconduct, or

(c) be unable or unfit to perform that person's functions in relation to the property of the charity or body.

- f. The Appellant had failed to continue to implement recommendations made by the Respondent in April 2007 in respect of improving the Charity's financial record keeping, the timely submission of accounts to OSCR and Companies House and to ensure that the charity complies with Health and Safety obligations.
 - e. The Respondent was of the view that its actions in suspending the Appellant were proportionate and that the statutory test was met.
12. The Appellant on the other hand did not agree that the Respondent's actions were proportionate or targeted.

- a. The Appellant argued that he had been given executive powers as an employee to carry out his duties and that these delegated powers extended to the actions the Respondent had complained of in 11 a to c above.
- b. The Respondent's decision had been predicated on a misunderstanding of the Charity's constitution (sic) [Memorandum and Articles of Association]. The Appellant contended that the Respondent had been duped by the Charity's Board.
- c. His presentation was that the Charity was not run by the Board rather it ran operationally as a business with a co-ordinator and staff. The Appellant was the co-ordinator.
- d. The Board meets nine or ten times per year, with the Board members seldom attending the charity other than at Board Meetings. The chair of the organisation is Shiona Baird who comes in more frequently. At one stage this may have been as often as 2 or 3 times per week.
- e. The Appellant accepted that he did not have a job description nor did the Charity have a scheme of delegation.
- f. The Appellant sought to argue that there was a difference between the actions of an employee – in this instance his role as co-ordinator - and that of a Board Member.
- g. In his view the Appellant considered that his actions were not those of a Charity Trustee – this was something which was the responsibility of the Board and any decision and action taken by him was while as an employee.

FINDINGS IN FACT

13. The Appellant paid £20,000 from the Charity's funds to the Landlord of the Shop in Lochee.

- 13.1 There is consistent evidence that the sum of £20,000 was paid to Mr Aboobaker. This was paid in a lump sum and was intended to relate to the rent for the period of 12 months in advance.
- 13.2 There is also a six month rent free period.
- 13.3 The negotiations regarding the payment to Mr Aboobaker were between Mr Aboobaker and the Appellant.
- 13.4 There was no record of the Board having authorised the payment out of its account.
- 13.5 The payment was made by and with the authority of the Appellant.
- 13.6 After it became clear to Mr Aboobaker that the payment had not been authorised by the Charity Mr Aboobaker did not refund the rental.
- 13.7 The Charity has not taken steps to recover the rental.
- 13.8 Part of the Appellant's duties was to look after the Charity's bookkeeping.
- 13.9 Mr McLaren in his evidence stated that he had been owed money by the Charity as a result of him not having taken his full salary over a number of years.
- 13.10 The arrangement had not been committed to a written agreement between Mr McLaren and the Board of the Charity.
- 13.11 Mr McLaren did not receive authority from any of the other Charity Trustees to allow him to take repayment of the sums owed.
- 13.12 Jane Moore the Charity's Independent Examiner confirmed that there had been an historic loan from Mr McLaren to the Charity from a time she was not involved with the Charity which amounted to £14,621 in the accounts of the Charity.
- 13.13 There had been two previous purchases made by Mr McLaren, of a forklift and a van at £1,800 and £2,000 respectively, which had not been agreed to by the Board.
- 13.14 Ms Moore's evidence was that she had advised the Board that the lease of the shop in Lochee was not prudent, there were questions

relating to income streams from that outlet and the drain on resources as well as viability.

14. The Appellant entered into a lease with Mr Aboobaker of the shop in Lochee without the authority of the Board.
- 14.1 All of the negotiations regarding the Lochee Shop took place between Mr Aboobaker and the Appellant. Mr Aboobaker, the Landlord, considered that the Appellant was acting for the Charity and was authorised to do so.
- 14.2 The Appellant did not have delegated powers from the Board to enter into a Lease of a Shop.
- 14.3 There was no scheme of delegation which applied to the Appellant or to any other board member or employee.
- 14.4 If the Appellant had certain powers delegated to him in relation to his co-ordinator's role these did not extend to taking any decision which would have overruled a board decision.
- 14.5 The Charity's Board at a meeting on 9 February 2012 decided not to proceed with the Lease of the Shop. The vote being 4 against proceeding with one (the Appellant) voting in favour.
- 14.6 While the Lease was not constituted to writing the intention had been that it would be a Full Repairing and Insuring Lease and that by paying one year's rent the Appellant sought to bind the Charity.
- 14.7 No lease was signed, no receipt for the rent obtained and no legal advice was sought by the Appellant in respect of the lease arrangement.
- 15 The Appellant entered into an onerous and substantial contract with D C Thomson for the clearance of a factory without the authority of the Charity's Board.

- 15.1 The Appellant ceased to be the Co-ordinator on 24 April 2012. He did however remain a Director at that time. He had no operational responsibilities after that date.
- 15.2 On 19 June 2012 the Appellant who had no operational responsibility issued a letter in the Charity's letterhead to D C Thomson which on the face of it is a quotation or tender to carry out a clearance of items in a timescale from 25th June until 6th July 2012 all at a price of £10,000 ex VAT.
- 15.3 The Panel is of the view that from the evidence presented the Appellant intended to enter into a binding contract on behalf of the Charity.
- 15.4 The Chair of the Charity called a board meeting to discuss the D C Thomson contract but that meeting had to be cancelled. The Chair of the Charity did speak to the Appellant shortly after to say that the contract "was not on" without Board approval. She was however persuaded to await the outcome of the tender but was not happy.
- 15.5 The Appellant at the time he submitted the tender did not have either the express or implied authority of the Charity's Board to do so.
16. The Appellant as co-ordinator had the responsibility of the bookkeeping and accounting function of the Charity.
- 16.1 In April 2007 after an investigation the Respondent directed the Charity to take certain steps to improve the accounting function and to take certain steps with regard to Health and Safety matters at the Emporium – the premises occupied by the Charity.
- 16.2 There was a student event held at the Emporium in February 2012. The premises did not have a Public Entertainment Licence or an Occasional Liquor Licence albeit that tickets were sold for the event and part of the ticket price included the service of alcohol.

- 16.3 There was evidence to the effect that there were various Health and Safety issues at the Emporium and these were escalated during the student event given the numbers attending in premises which were effectively a warehouse with goods for sale.
- 16.4 There was no risk assessment in relation to the event.
- 16.5 While the Charity's Health and Safety Policy stated Shiona Baird was responsible for Health and Safety nevertheless despite her misgivings about the event the Appellant proceeded with the event making his own arrangements regarding stewarding and evacuation in case of an emergency.
- 16.6 The Appellant was the person who took control of the student event.

Findings in Law

17. The Appellant is a Charity Trustee

The Act defines "charity trustees" as persons having the general control and management of the administration of a charity. The Appellant was at all times whether as Board Member or as Co-ordinator acting in the general control of The Charity – this makes him a Charity Trustee for the purposes of the Act.

18. As a Charity Trustee the Appellant has certain statutory duties in terms of the Act and in particular in s 66

(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—

(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,

(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and

(c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—

(i) put the interests of the charity before those of the other person, or

(ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

16. The Appellant's conflict of Interest

In relation to the repayment of funds to him as a Charity Trustee then the Appellant had a conflict of interest. If he had required repayment of the funds owing then he should have sought repayment from the Board or at the very least made a request to the Charity's Independent Examiner given that she was in regular touch with the Charity. It was not correct for the Appellant simply to remove the funds from the Charity bank account over which he had operational control or to request a fellow employee to do so. The Appellant's actions are contrary to his duties in s 66.

19. The Appellant lacked authority for his actions.

19.1 In entering onto the Lease the Appellant was not acting in accordance with s66 (1)(b). Given the circumstances surrounding the Lease, even if the Lease had been authorised the Appellant would not have been acting in accordance with this provision by paying £20,000 for a Lease of a Shop where no written agreement had been entered into and without seeking proper legal and other professional advice in relation to a Full Repairing and Insuring Lease.

19.2 The Appellant was acting outwith his powers as a Coordinator and separately as a Board Member where the Board had decided not to proceed with the Lease of the Shop. No meeting was convened to reverse that decision and until it was reversed the Appellant did not have authority to enter into the Lease or to make a payment.

19.3 The exchange of correspondence with DC Thomson did amount to an offer to contract. The Panel is in no doubt that after he had been dismissed as an employee, albeit continuing as a Director and Charity Trustee, the Appellant did not have the authority to enter into a tender or contract with DC Thomson. He accordingly acted outwith his powers and contrary to his responsibilities as a Charity Trustee. Even if he thought it was the best commercial decision for the Charity he was not able to exceed the powers delegated to him and should have sought board approval without which he could not proceed.

19.4 In each instance the Appellant did not comply with the standards and requirements of s66 of the Act.

20 The Respondent has been proportionate in its actions.

20.1 The approach of the Respondent to this issue and the decision reached by the Respondent were proportionate. The Appellant had sought to show that if the Charity was in a poor state of financial affairs then OSCR was being disproportionate in singling him out.

20.2 The evidence was clear in that it was the Appellant who had entered into the Lease of the Lochee Shop contrary to the decision of the Board.

20.3 It was the Appellant who had made the payment of the rent without the permission of the Board and then sought to say that it was his own money – a loan which he may have been entitled to have repaid. Yet he took the repayment without the authority of the Board in a matter in which he had a conflict of interest.

20.4 The Appellant entered into a contract regarding the clearance etc. of the DC Thomson warehouse contrary to the wishes of the Board.

20.5 The other Trustees of the Charity were not a party to these transactions which were carried out by the Appellant.

20.6 There are other matters at the Charity which have been of concern to the Respondent but these are being addressed separately by the Respondent and the Charity; the other Charity Trustees are co-operating with the Respondent in resolving these matters. The existence of these concerns

and the actions taken to address them do not make the action taken against the Appellant disproportionate. In each of the three main grounds for the Respondent's decision it was the Appellant who was at fault and accordingly the Respondent was proportionate and targeted in seeking to act against the Appellant.

- 20.7 In setting out the reasons for its decision, the Respondent stated that the Appellant was also in breach of his duties as a charity trustee because of his failure to continue to implement recommendations made to the Charity by the Respondent in 2007 concerning financial record keeping, reporting, and compliance with other relevant legislation, in particular that regarding Health and Safety.
- 20.8 The Appellant argued that such implementation was a collective responsibility of the Board, and that he should not have been singled out in this way.
- 20.9 The Panel found that while the Appellant, as Co-ordinator, had primary responsibility for implementation, this was a collective responsibility of the Board for which the Board, and not just the Appellant, was accountable. This does not however mean that the actions and decision of the Respondent were disproportionate given that it had the co-operation of the other Charity Trustees in putting matters right.
- 20.10 Moreover, the Appellant was at fault in relation to the student event and there were serious Health and Safety as well as other licensing and regulatory issues which arose and he failed to take properly into account the serious concerns raised by the Chair at the time, ploughing on regardless.
- 20.11 In the other matters raised in the reasons for the Respondent's decision, it was the Appellant alone who was at fault.

21. Conclusion

- 21.1 It is the responsibility of all Charity Trustees to act within the powers delegated to each of them. Each is responsible for his or her own

decisions whether taken alone or corporately as a board or committee. These decisions and actions must always be taken within the powers contained in the charity's founding deed and then delegated to the individual or committee. In turn such decisions and actions are required to meet the test which is set out in s 66 of the Act and other proper principles of good management.

21.2 Checks and balances need to be in place to ensure that the objects and finances of the charity are protected and proper accountability is also required to avoid any one Charity Trustee acting without the consent or authority of the others.

21.3 When a board has made a decision not to proceed with a particular course of action it is not consistent with these principles that any one individual or group of individuals chooses to ignore the decision of the board – the correct course of action (subject to any standing orders) is to re-convene a board meeting to re-open the discussion. Until that board is reconvened its decision should stand.

21.4 In this instance the Appellant chose to continue down a route knowing that it was unauthorised. There had been a disagreement among the Charity Trustees but the Appellant thought his unilateral actions to be the best for the organisation of which he was the founder and to whose success he is fully committed.

21.5 The Appellant chose not to follow the rules and therefore put the Charity at risk, this was correctly addressed by the Respondent in its decision and at review.

22. Decision

The Panel unanimously confirms the decision appealed to it and refuses the Appeal.

23. Expenses

The Respondent did not make a motion for expenses and the Panel has chosen not to make an order for expenses of its own cause.