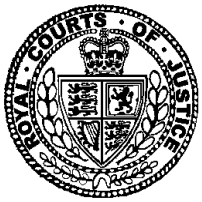

Neutral Citation Number: [2017] EWHC 1379 (Ch)

Case No: HC-2016-001810

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 09/06/2017

Before:

Sir Geoffrey Vos, Chancellor of the High Court

B E T W E E N

THE CHILDREN'S INVESTMENT FUND FOUNDATION (UK)

Claimant

and

(1) H.M. ATTORNEY GENERAL
(2) SIR CHRISTOPHER HOHN
(3) JAMIE COOPER
(4) MARKO LEHTIMAKI

Defendants

- -

Mr William Henderson (instructed by Linklaters LLP) appeared for The Children's Investment Fund Foundation (UK)

Mr Mark Mullen (instructed by the Government Legal Department) appeared for the Attorney-General

Mr Jonathan Crow QC (instructed by Withers LLP) appeared for Sir Christopher Hohn

Mr Simon Taube QC (instructed by Bates Wells & Braithwaite London LLP) appeared for Ms Jamie Cooper

Mr Guy Morpuss QC (instructed by Macfarlanes LLP) appeared for Dr Marko Lehtimaki

Mr Richard Vallat (instructed by the Solicitor for Her Majesty's Revenue & Customs) for Her Majesty's Revenue & Customs

Hearing dates: 8th to 11th May 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. The claimant is a substantial English registered charity called The Children's Investment Fund Foundation (UK) ("CIFF"). CIFF is a company limited by guarantee without a share capital, which was incorporated in 2002. Its claim form in this case is complex but, in essence, CIFF seeks the court's approval to make a grant of US$360 million (the "Grant") to another English registered charity, Big Win Philanthropy, also a company limited by guarantee without a share capital ("BWP"). The Charity Commission for England & Wales (the "Commission") has authorised these proceedings by an order dated 7th June 2016 made under section 115 of the Charities Act 2011.

2. CIFF obtained the bulk of its funds from companies operated by a philanthropist and banker, Sir Christopher Hohn, the second Defendant ("Sir Christopher"). It now has assets of more than US$4 billion. CIFF was co-founded by Sir Christopher and his ex-wife, the third Defendant, Ms Jamie Cooper ("Ms Cooper"), who each contributed to its success.

3. BWP is a new charitable foundation incorporated by Ms Cooper in June 2015. BWP has already been funded as to US$40 million by a payment made by TCI Fund Management Limited ("TCIFML") on 20th December 2016, pursuant to a Deed of Covenant made by Sir Christopher on 25th July 2015. Ms Cooper has also executed a Deed of Covenant dated 9th July 2015 under which she has covenanted to give or procure a gift of US$40 million to BWP on conditions including one that requires the Grant to be approved by the Commission or the court.

4. The establishment of BWP and the intention to make the Grant to BWP has arisen, in non-technical terms, as a result of the unfortunate break-up of both the marriage and the good relationship between Sir Christopher and Ms Cooper in late 2011. The matrimonial proceedings between them resulted in a payment of some US$530 million being made by Sir Christopher to Ms Cooper pursuant to a judgment of Mrs Justice Roberts delivered on 12th December 2014. The couple were divorced on 3rd April 2013.

5. Thereafter a series of Agreements were made in April 2015 (the "April agreements"). CIFF agreed to make the Grant to BWP provided that approval was obtained from either the Commission or the court. In addition, in broad terms at the same time, the two US$40 million payments were agreed, Ms Cooper irrevocably agreed to resign as a member and a trustee of CIFF once the Grant's approval application had been determined, and Sir Christopher agreed to use all reasonable endeavours to secure approval of the Grant. Specifically, Sir Christopher agreed to support the application for approval by writing a letter of support, but was not to be required to take any other supportive steps.

6. In July 2015, the April agreements were effectively implemented by a further series of documents (the "July agreements"). The deeds of covenant relating to the two sums of US$40 million were executed. Ms Cooper executed a Deed of Resignation dated 9th July 2015 by which she resigned irrevocably as a member and trustee of CIFF. That resignation will, as matters have turned out, be effective when the court approves

or refuses to approve the Grant. On 25th July 2015, CIFF wrote a letter countersigned by Ms Cooper, agreeing to make the Grant conditional on either Commission or court approval and the two covenants to which I have referred.

7. There followed a lengthy and detailed correspondence between the members of CIFF, the trustees of CIFF, the Commission and their lawyers. Moreover, several distinguished counsel were instructed by the parties, whose opinions have been placed before me, alongside detailed evidence from the protagonists. I shall need to deal with some of this documentation, but it is useful first to consider the issues that have ultimately been thrown up by these proceedings. I provided the parties with a list of issues before the hearing began because the parties' skeleton arguments did not seem to be in complete agreement as to what the issues were that required determination. At the hearing, however, there was little disagreement that this list covered the main areas of dispute.

8. Before setting out those issues, however, I should mention an unexpected event that occurred on the second day of the hearing. It then became apparent to me that the central question in the case was likely to relate to the nature of the court's jurisdiction over the governance bodies of a charitable company limited by guarantee. That was because, if I determined, as submitted by Sir Christopher, that the payment of the Grant would be a "payment for loss of office to a director" of CIFF caught by sections 215 and 217 of the Companies Act 2006, the Grant would *prima facie* require to be sanctioned by a resolution of the members of CIFF before it could be paid. The question of whether any approval of the Grant by the court affected the need for that resolution was also a hotly contested one.

9. CIFF has only ever had a few members. They are now Sir Christopher, Ms Cooper and a Dr Marko Lehtimaki ("Dr Lehtimaki"), a university friend of Sir Christopher and Ms Cooper, who was a member between 2002 and 2009, and then again from 2012. In these circumstances, if a members' resolution of CIFF were needed to approve the Grant in the future, Dr Lehtimaki was likely to play an important role in such a resolution, bearing in mind the potential conflicts of interest of, and the agreements made by, the other members. For that and other reasons, it seemed to me that Dr Lehtimaki needed to be a party to these proceedings, and I joined him as the 4th Defendant to the claim on the third day of the hearing, 10th May 2017. Dr Lehtimaki appeared by counsel to resist his joinder, and I said that I would, and I shall, give my full reasons for having done so later in this judgment.

10. The identities of the trustees or directors of CIFF (the "trustees") are also important since they have fallen into essentially two groups, Sir Christopher and Ms Cooper on the one hand, and the independent trustees on the other hand. The independent trustees are now Mr Benjamin Goldsmith ("Mr Goldsmith"), Ms Masroor Siddiqui, and Dr Graeme Sweeney ("Dr Sweeney"). Former trustees include Dr Lehtimaki, Lord Mark Malloch-Brown ("Lord Malloch-Brown"), Mr Mark Dybul ("Mr Dybul"), Mr Gerry Elias ("Mr Elias"), Ms Joy Phumaphi, and Mr Rajan Pandhare ("Mr Pandhare"). The Governance Committee formed by the trustees comprises Mr Goldsmith and Dr Sweeney. Prior to 2nd March 2016, that committee comprised Lord Malloch-Brown, Dr Sweeney and Mr Elias.

The issues

11. Against that background, the main issues for the court's determination are as follows:-

i) Is this a case in which the trustees seek the court's approval to a momentous decision they have, in their discretion, decided to take, or a case in which they have surrendered their discretion to the court?

ii) Would the Grant confer a material benefit, whether directly or indirectly, on Ms Cooper within the proper meaning of clause 5.2 of CIFF's Memorandum of Association, so as to require the written approval of the Commission in advance?

iii) Would the Grant be a payment for loss of office within the meaning of section 215 of the Companies Act 2006 so as to require the approval of CIFF's members under section 217 of the Companies Act 2006, because it would be (a) consideration for or in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and either (b) a payment to a person connected with Ms Cooper, or (c) a payment to any person at the direction of, or for the benefit of, Ms Cooper or a person connected with her?

iv) If the Grant does require the approval of CIFF's members under section 217, are either or both of Sir Christopher and Ms Cooper (a) deprived of the right to vote because they owe fiduciary duties as members of CIFF and have a conflict of interest, (b) contractually deprived of the right to vote, and/or (c) contractually or otherwise obliged to vote in a particular way?

v) In any event, if the court approves the making of the Grant, does that abrogate the need for either (a) the Commission's written approval either under clause 5.2.5 of CIFF's Memorandum of Association and/or under section 201 of the Charities Act 2011, or (b) a members' resolution under section 217 of the Companies Act 2006?

vi) What factors should the court take into account in deciding whether to approve the making of the Grant, and in particular what weight should the court attach to the risk of tax being payable on the making of it?

vii) Should the court approve the making of the Grant?

The essential statutory provisions

12. As can be seen from the issues identified above, it is necessary first to set out the essential statutory background to this application. The relevant provisions are found in the Companies Act 2006 and the Charities Act 2011.

13. Section 215 of the Companies Act 2006 provides as follows under the heading "Payments for loss of office":-

> (1) In this Chapter 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, or
>
> …
>
> (3) For the purposes of sections 217 to 221 (payments requiring members' approval)—
>
> (a) payment to a person connected with a director, or
>
> (b) payment to any person at the direction of, or for the benefit of, a director or a person connected with him,
>
> is treated as payment to the director."

14. A "person connected with a director" is defined in section 252(2)(b) of the Companies Act 2006 to include a body corporate with which the director is connected. A director is defined as being "connected with" a body corporate under section 254(2)(b) if the director controls more than 20% of the voting rights in that body.

15. Section 217 of the Companies Act 2006 provides as follows under the heading "Payment by company: requirement of members' approval":-

> (1) 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.
>
> …
>
> (3) A resolution approving a payment to which this section applies must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought—
>
> (a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;
>
> (b) in the case of a resolution at a meeting, by being made available for inspection by the members both—
>
> (i) at the company's registered office for not less than 15 days ending with the date of the meeting, and
>
> (ii) at the meeting itself."

16. Section 1 of the Charities Act 2011 provides as follows:-

> "(1) For the purposes of the law of England and Wales, "charity" means an institution which—
>
> (a) is established for charitable purposes only, and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities …

17. Section 69 of the Charities Act 2011 provides as follows under the heading "Commission's concurrent jurisdiction with High Court for certain purposes":-

> "(1) The Commission may by order exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for the following purposes—
>
> (a) establishing a scheme for the administration of a charity;
>
> (b) appointing, discharging or removing a charity trustee or trustee for a charity, or removing an officer or employee;
>
> (c) vesting or transferring property, or requiring or entitling any person to call for or make any transfer of property or any payment.
>
> (2) Subsection (1) is subject to the provisions of this Act.
>
> (3) If the court directs a scheme for the administration of a charity to be established—
>
> (a) the court may by order refer the matter to the Commission for it to prepare or settle a scheme in accordance with such directions (if any) as the court sees fit to give, and
>
> (b) any such order may provide for the scheme to be put into effect by order of the Commission as if prepared under subsection (1) and without any further order of the court."

18. Section 70 of the Charities Act 2011 provides as follows under the heading "Restrictions on Commission's concurrent jurisdiction":-

> "(2) Subject to the following subsections, the Commission must not exercise its jurisdiction under section 69 as respects any charity except—
>
> (a) on the application of the charity,
>
> (b) on an order of the court under section 69(3), or
>
> (c) on the application of the Attorney General. …
>
> (8) The Commission must not exercise its jurisdiction under section 69 in any case (not referred to it by order of the court) which—

(a) because of its contentious character, or any special question of law or of fact which it may involve, or

(b) for other reasons,

the Commission may consider more fit to be adjudicated on by the court."

19. Section 105 of the Charities Act 2011 provides as follows under the heading "Power to authorise dealings with charity property":-

(1) Subject to the provisions of this section, where it appears to the Commission that any action proposed or contemplated in the administration of a charity is expedient in the interests of the charity, the Commission may by order sanction that action, whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity.

(2) Anything done under the authority of an order under this section is to be treated as properly done in the exercise of those powers.

(3) An order under this section—

(a) may be made so as to authorise a particular transaction, compromise or the like, or a particular application of property, or so as to give a more general authority, …

(5) Where anything is done in pursuance of an authority given by an order under this section, any directions given in connection with that authority—

(a) are binding on the charity trustees [defined in 177] for the time being as if contained in the trusts of the charity, …

(7) An order under this section may authorise any act even though—

(a) it is prohibited by the Ecclesiastical Leases Act 1836, or

(b) the trusts of the charity provide for the act to be done by or under the authority of the court.

(8) But an order under this section may not—

(a) authorise the doing of any act expressly prohibited by any Act other than the Ecclesiastical Leases Act 1836, or by the trusts of the charity, or

(b) extend or alter the purposes of the charity.

(9) In the case of a charitable company, an order under this section may authorise an act even though it involves the breach of a duty imposed on a director of the company under Chapter 2 of Part 10 of the Companies Act 2006 (general duties of directors)".

20. Section 201 of the Charities Act 2011 provides under the heading "Consent of Commission required for approval etc. by members of charitable companies" as follows:-

> "(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), and
> >
> > …
>
> (2) The provisions of the 2006 Act are—
>
> > …
> >
> > (f) section 217 (payments to directors for loss of office); …"

The essential terms of the relevant documentation

21. Next, I need to set out the essential terms of the relevant documentation.

CIFF's Memorandum and Articles of Association

22. Article 3 of CIFF's Memorandum of Association (the "Memorandum") states CIFF's objects as "the general purposes of such charitable bodies or for such other purposes for the benefit of the community as shall be exclusively charitable as the Trustees may from time to time determine".

23. Article 4 of the Memorandum gave CIFF the powers to co-operate with other bodies (clause 4.4), to support, administer or set up other charities (clause 4.5), to make grants or loans of money (clause 4.13), and to do anything else within the law which promotes or helps to promote the objects of CIFF (clause 4.27).

24. Article 5 of the Memorandum deals with benefits to members and trustees as follows:-

> "5.2 A Trustee must not receive any payment of money or other material benefit (whether directly or indirectly) from [CIFF] except:
>
> > 5.2.1 as mentioned in clauses 4.20, 5.1.2, 5.1.3, or 5.3 [none of which is relevant to this case].
> >
> > 5.2.2 reimbursement of reasonable out-of-pocket expenses (including hotel and travel costs) actually incurred in running [CIFF]

> 5.2.3 an indemnity in respect of any liabilities properly incurred in running [CIFF] (including the costs of a successful defence to criminal proceedings)
>
> 5.2.4 payment to any company in which a Trustee has no more than a 1% shareholding
>
> 5.2.5 in exceptional cases, other payments or benefits (but only with the written approval of the Commission in advance)."

25. Article 9.1 of CIFF's Memorandum provides that words and expressions defined in the Articles of Association (the "Articles") have the same meanings in the Memorandum. The term "material benefit" used in clause 5.2 of the Memorandum is defined in clause 10.1 of the Articles as meaning "a benefit which may not be financial but has a monetary value".

26. Article 2 of the Articles provides for general meetings of CIFF, making clear that the members will, at an AGM, elect persons to be trustees and appoint auditors for CIFF and "discuss and determine any issues of policy or deal with any other business put before them". Article 3 provides, however, that the trustees "as charity trustees have control of [CIFF] and its property and funds".

The "CIFF letter" dated 14th April 2015 from Lord Malloch-Brown on behalf of CIFF to Sir Christopher and Ms Cooper

27. The CIFF letter attached a letter headed "Letter of Intent" also dated 14th April 2015 from Sir Christopher and Ms Cooper to the trustees of CIFF. Both were included amongst the April agreements. The Letter of Intent included the following:-

> "We write in our capacity as Members and Trustees of [CIFF].
>
> … we are delighted to report that this process has been concluded successfully and all outstanding matters and all conflicts have now been settled.
>
> In a letter from [Ms Cooper's] solicitors to the trustees' solicitors dated 13 February 2015, [Ms Cooper] requested a grant from [CIFF] in an amount of $500m for the purposes of enabling her to establish a new UK charitable foundation (the "New Foundation"). In a letter from [the trustees' solicitors] to us dated 11 March 2015, the trustees responded to [Ms Cooper's] request by proposing a grant in the amount of $360m (the "Proposed Grant") to the New Foundation … [Ms Cooper] now accepts that $360m is the appropriate amount for the Proposed Grant from [CIFF] and [Sir Christopher] has agreed to support the application before the [trustees of CIFF], and in the [trustees'] application to the [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 Christopher] beyond confirming the same in writing in the form of Appendix 1 when required to do so …
>
> Because both of [Ms Cooper] and [Sir Christopher], as trustees of [CIFF], have a conflict of interest, neither will vote on the Proposed Grant.

> After the [trustees'] approval of the Proposed Grant … and its submission to the [Commission], [Ms Cooper] will forthwith recuse herself from all involvement with [CIFF], whether as a member, trustee or otherwise, save to pursue payment of the Proposed Grant through the [Commission], relevant tribunal or court, which recusal will remain in place pending her resignation as a trustee and member if [CIFF]. … [Sir Christopher] will take no steps, directly or indirectly, through a third party or otherwise, to indicate that he is in opposition to the Proposed Grant. [Ms Cooper] will resign as a trustee and member of [CIFF] with immediate and permanent effect on the determination in respect of the Proposed Grant by the [Commission]/tribunal/court as the case may be, and for the avoidance of doubt, this will occur whether the Proposed Grant has been approved by such body or not."

28. The Letter of Intent then referred to the intended contributions of US$40 million to the "New Foundation" (later BWP) to be made by Sir Christopher and Ms Cooper.

29. The CIFF Letter included the following provisions:

> "We attach:
>
> (i) a letter dated 14 April 2015 from the Members other than [Dr Lehtimaki] to ourselves (the "Letter"); and
>
> (ii) a Members' Agreement dated 14 April 2015 among the Members (the "Members' Agreement").
>
> This letter sets out our agreements in relation to the matters set out in these documents (the "Agreed Matters").
>
> 1. **The Proposed Grant:** In consideration of the undertakings on the part of the Members set out in this letter, and subject to the objects, governance and the business plan relating to the New Foundation being reasonably satisfactory to us and the fulfilment of the condition set out in paragraph 2 below, we agree to make the Proposed Grant (as defined in the Letter).
>
> 2. **Condition:** Our agreement set out in paragraph 1 above is conditional upon, in respect of the Proposed Grant and the other Agreed Matters either:
>
> (i) the Charity Commission (the "CC") giving its approval or endorsement;
> (ii) the CC raising no objection; or
> (iii) in the absence of (i) or (ii), the CC or court giving authority to make an application to court for the approval of the relevant matters and the court giving such approval.
>
> 3. **Support for the satisfaction of the condition:** The Members and we shall use all reasonable endeavours to secure the fulfilment of the condition set out in paragraph 2 above, specifically as follows:

(i) We shall, as soon as is reasonably practicable following the submission to us of both proposals for the New Foundation reasonably satisfactory to us and a draft of the proposed new Articles of Association contemplated by paragraph 5(i) below in a form reasonably satisfactory for submission to the CC, apply to the CC for the approval or endorsement referred to in paragraph 2(i) above;

(ii) Each of Sir Christopher Hohn and Jamie Cooper shall, as soon as is reasonably practicable thereafter, indicate categorically to the CC or tribunal or a court of competent jurisdiction that he or she fully supports as outlined in the Letter the making of the Proposed Grant and the implementation of the other Agreed Matters;

(iii) In the circumstances contemplated by paragraph 2(iii) above, we shall apply to the court within a reasonable period for the required approval.

For the avoidance of doubt, neither we nor the Members shall be obliged to appeal or support an appeal from any judgment of a court.

4. The Members' undertakings: Each of the Members undertakes to us to fulfil all of his or her commitments under the Letter and the Members' Agreement, and to use all reasonable endeavours to carry into effect all things that the Members' Agreement in respect of one or more (notwithstanding, in each case, any termination of the Members' Agreement in respect of one or more of the other Members pursuant to clause 2.16 of such agreement), within the time period set out therein (or as soon as is reasonably practicable thereafter) or, if no period is set out, within a reasonable time period.

5. Governance: For the avoidance of doubt, it is agreed that:

(i) the Articles of Association shall be amended to implement the constitutional matters referred to in the Members' Agreement but we are not seeking any further amendments thereto; and

(ii) unless we determine otherwise, the Implementation of all of the matters dealt with in this letter and all matters connected with them or otherwise connected with this letter shall be handled on our behalf by a committee of our Board comprising [Lord Malloch-Brown], [Mr Elias] and [Dr Sweeney], who shall be authorised to exercise all of the relevant powers of the Board.

6. Supplementary matters: This letter shall be governed by and construed in accordance with the laws of England & Wales and each of the parties submits to the exclusive jurisdiction of the English courts in relation to any matter arising out of or connected with the agreement set out in this letter."

The Members' Agreement dated 14th April 2015 entered into between Ms Cooper, Sir Christopher and Dr Lehtimaki

30. The Members' Agreement dealt with the future governance of CIFF. Clause 2.12 provided that where any member had recused himself from voting, that member was to grant an irrevocable power of attorney to the company secretary instructing him to vote in accordance with the majority of the remaining members.

The Grant Agreement between CIFF and BWP dated 25th July 2015

31. The independent trustees of CIFF (i.e. those excluding Sir Christopher and Ms Cooper) approved the Grant on 25th July 2015 and entered into the Grant Agreement. The detailed terms are not important, save that it provides that the Grant shall be applied for the establishment of an endowment to generate income for application towards "Specified Purposes" defined as "the improvement of the lives of children, young people and families in need in developing countries or countries in crisis". Under clause 4 of the Grant Agreement, the Grant is to be paid in 20 equal quarterly instalments of US$18 million each.

BWP's Articles of Association

32. Ms Cooper was the founder and sole subscriber to BWP, and is now the sole member and BWP's President. She chairs its board of directors and trustees. The other trustees are Mr Suprotik Basu, Mr Malik Dechambenoit, Mr Nikos Makris and Dr Dybul. They all, in different ways, have significant international financial or charitable experience. Article 2 of BWP's Articles of Association provides that its objects should be "for the public benefit" to prevent and relieve poverty, relieve suffering sickness and distress, advance education, and promote any other charitable purpose.

33. Article 4 of BWP's Articles of Association provides that the income and property of BWP shall be applied solely towards the promotion of its objects, and that no part of its income and property may be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to any member. Article 4.4 also restricts benefits received by trustees of BWP.

The evidence

34. I do not intend to lengthen this already lengthy judgment by reciting the detail of the voluminous evidence that was placed before the court. Witness statements were filed for CIFF by Ms Penelope Chapman of Bircham Dyson Bell, solicitors acting alongside Linklaters LLP for CIFF, and by Lord Malloch-Brown (though in the course of the hearing he filed another statement this time apparently for Ms Cooper). Sir Christopher filed two statements on his own behalf. Mr Dybul and Ms Cooper filed statements on Ms Cooper's behalf.

35. It is, however, worth spending a moment identifying the detail of the evidence provided for the court by Dr Lehtimaki. In the first instance, Dr Lehtimaki provided a statement dated 11th July 2016 saying that "he had been asked by the [trustees] to indicate my position in relation to members' approval of the Grant". He said also that he had been asked to sign a letter approving the Grant in April 2015 but had declined.

He continued by saying that, pending determinations by the Court of these proceedings and by the Commission, he was "neutral as to whether or not the Grant should be approved". Dr Lehtimaki concluded that statement as follows: "I am concerned to ensure that the Grant receives all necessary approvals from the Court, and in due course from the Commission, and is finally put before the members for their consideration when they are fully and properly informed. If all these approvals are not obtained, I am concerned legal challenges may be brought in the future over the validity of the Grant, all of which could harm [CIFF], its work and its reputation".

36. On 3rd May 2017, Dr Lehtimaki's solicitors wrote to the court enclosing a letter of the same date from him to me. The solicitors indicated that Dr Lehtimaki was the "sole independent member of CIFF and has grave concerns over the position advanced by the parties to the Claim … the Trustees of CIFF now appear to argue that the members should not be allowed a vote under s. 217 of Companies Act 2006 to approve the [Grant]. Dr Lehtimaki wishes to voice his opposition to the Trustees' proposal to remove his vote in the strongest terms …". Dr Lehtimaki's accompanying letter emphasised his independence and explained that he declined the invitation to become a defendant to these proceedings because he understood he would be able to cast his vote after the court had reached its determination, he wanted to remain neutral, and because of the potential legal costs. He expressed concern that the trustees were arguing that section 217 did not apply to the making of the Grant, and suggested that their arguments were faulty and created a governance problem. Dr Lehtimaki said that the members' rights had to be protected, but that he remained open minded as to whether the Grant should be made. He concluded as follows:-

> "For the time when members' approval is required, I have taken steps by reserving the services of a charity consultancy to help evaluate the effectiveness of the Grant, as well as arranged for a provision for further legal advice in case needed. I also have a Deed of Release from CIFF, Sir Christopher and Ms Cooper, which in summary states that I cannot be challenged as to any decision I cast regarding the Grant. This would allow me to remain fully impartial, and hopefully also ensure that the members' vote provides complete finality for CIFF".

37. Thus, it appeared from Dr Lehtimaki's expressed position immediately prior to the hearing that he wished to arrogate to himself the final decision on whether the Grant should be made, whatever the court or the Commission might decide. On that basis, he declined to become a party to the proceedings.

38. These documents emanating from Dr Lehtimaki form the background to my decision to consider whether to join him as a defendant, which I eventually ordered. My concern, in a nutshell, was that the court might decide that section 217 of the Companies Act 2006 required a members' resolution, and that it would then need to consider what powers it might have to ensure that its decision prevailed, and was not overridden by an unaccountable membership.

39. Once joined, Dr Lehtimaki filed further evidence which can be briefly summarised. In essence, he said that he remains undecided about how to vote. He said that he thinks as a Stanford and Harvard trained economist thinks and "now I owe the fiduciary duty". He then explained his decision-making process in detail, basically dividing the arguments into 2 direct factors namely: "the net effect on CIFF's

charitable work" and "solving the governance problem", and two secondary factors namely: "the overall impact on the UK charitable sector" and "the negative precedents of making the Grant". He then analysed the factors according to economic principles of weighting, cost-benefit analysis and a review against CIFF's general grant making process. Dr Lehtimaki took issue with some of the factual evidence adduced by CIFF, but summarised his conclusion in paragraphs 34-35 and 49-53 of his statement as follows:-

> "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 $360 million 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. …
>
> 49. I do consider Sir Christopher to be my very dear friend and I have never tried to hide it. Our friendship goes back many, many years and I have conversations with him on a daily basis. Naturally, our conversations at times covered these proceedings. However, this does not mean that I would allow this friendship to interfere with my duties. I take my fiduciary duties seriously and I wouldn't allow my judgment to be impaired by personal factors. As can be seen from the minutes of the board meeting of 17 May 2014, I will not shirk tough decisions that are in the best interests of CIFF's recipients, even if at the expense of Sir Christopher or Ms Cooper.
>
> 50. However, I am concerned that the narrative in this case may be moving away from the subject of charity and on to the subject of relationships. That is not appropriate. The focus should always be on the best interests of CIFF's beneficiaries. If this case is about some fairness between Sir Christopher and Ms Cooper, then I think this case is in the wrong courtroom. I will say for the last time: Sir Christopher's wishes, along with those Ms Cooper, the trustees of CIFF, myself and the UK charitable sector as a whole, are irrelevant to me.
>
> 51. The allegation that I am favouring someone seems to me to indicate something more troubling. The fact that this has been frequently mentioned indirectly in both in submissions and in discussions points towards the elephant in the room – that this is a continuation of the divorce case between Sir Christopher and Ms Cooper. That is not how it should be. However, given what has happened, I would not be surprised if further allegations against me are fabricated.

> 52. I would reiterate that the only people I have a fiduciary duty towards are the intended recipients of CIFF's charitable work. While my reasoning is abstract, I find it useful to visualize the person to whom I am answerable for when taking decisions. To me, this is the HIV positive young woman with her HIV negative child I met in Mutare Hospital in Manicaland, Zimbabwe (whose husband was beating her up because taking the necessary medicines was an embarrassment for his family). I am not a 'soft' person, but with that image in mind, choices become much easier.
>
> 53. Thus the only consideration to the Grant is whether it is a net benefit to the children in developing countries. If it is, then it should be paid. If it is not, then it should not be paid. It is that simple."

40. It is noteworthy also that on 25th July 2015 as part of the package of documents executed at that time, Dr Lehtimaki was provided with a deed of release executed by CIFF and by Sir Christopher and Ms Cooper (to which he referred in the evidence I have mentioned), releasing him from all and any claims in relation to the implementation of the April agreements and the proposed Grant.

41. Just prior to the start of the hearing, Sir Christopher emailed Dr Sweeney on 7th May 2017 saying that he was minded to donate this year to CIFF an amount equal to the incentive management fees of US$40 million payable by CIFF to TCIFML, having done the same in the previous year. He said he was also "minded to continue making other significant donations to CIFF". He concluded, however, with this: "if CIFF is in litigation with me for any reason or legal costs are sought from me I will make no further donations of any type to CIFF".

42. I have not set out any of the evidence that the parties have filed as to the merits or demerits of the proposed Grant, not because I have not found it helpful, but because I shall deal with these factors when I come to determine issues 6 and 7.

The court's jurisdiction over charities generally and charitable companies in particular

43. I have already set out the most relevant statutory provisions from the Charities Act 2011. Before dealing with the specific issues raised by the application, I think it is helpful to summarise the relevant authorities on the court's jurisdiction over charities and charitable companies. The issue that has arisen in this case relates to the exercise of that jurisdiction over members rather than trustees, but the two are inter-connected. The question arises because, if section 217 of the Companies Act 2006 applies to the making of the Grant, a members' resolution will *prima facie* be required before it can be made. It is important, therefore, to know the extent of the court's jurisdiction over members of a charitable company. The argument revealed a rather stark difference of approach.

44. In brief, Mr William Henderson, counsel for CIFF, submitted that if section 217 of the Companies Act 2006 applied, the court could only direct members of CIFF how to vote on a members' resolution (other than on the basis of any contractual requirements) if (a) they held their membership rights in a "sufficiently fiduciary capacity", and (b) absent bad faith, if no reasonable member could fail to exercise their rights as the court wished to direct. Mr Jonathan Crow QC, counsel for Sir Christopher, went a little further submitting that the members here were fiduciaries,

but that the court could substitute its own judgment for theirs only if invited to do so or if a breach of duty were threatened. If, therefore, the court concluded that a reasonable fiduciary might have decided either way, it could not direct the members how to vote.

45. Conversely Mr Mark Mullen, counsel for the Attorney General, and Mr Simon Taube QC, counsel for Ms Cooper, submitted that the court did have jurisdiction to direct the members how they should vote on a section 217 members' resolution. The Attorney General submitted that the members here did not stand outside the charity. They were part of the administration of the charity. They could not lay claim to any private interest. CIFF was a charity with public interests only. In these circumstances, sections 1 and 69 of the Charities Act 2011 were of key importance. The Commission had declined jurisdiction, mindful of section 70(8) of the Charities Act 2011, on the basis that the matter was contentious and raised special questions of law and fact that were more properly decided by the court. Moreover, the Commission had approved the making of the application to the court in paragraph 10.2.7 of the Claim Form seeking directions to the parties as to the passing of a resolution under section 217 of the Companies Act 2006 approving the payment of the Grant. Mr Mullen expressly submitted that the court did not need to find bad faith, because CIFF was coming to the court as a charitable company asking the court to make its decision for it. CIFF included its members, who were, as Mr Mullen put it "bound up in the administrative machinery of CIFF". Mr Taube broadly supported the Attorney General's submissions suggesting other mechanisms by which the court might dispense with a section 217 resolution or direct the members how to vote.

46. Before turning to the authorities, it is useful to state some general principles that will not, I hope, be controversial:-

    i) 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 at 75-6, *North West Transportation Ltd v. Beatty* (1887) 12 App Cas 589 at 593, *Allen v. Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656, and *Re Charterhouse Capital Limited* [2015] EWCA Civ 536, [2015] BCC 574 at paragraph 90.

    ii) A member of a commercial trading company does not, therefore, owe any fiduciary duties in respect of his voting rights.

    iii) Members of a charitable company limited by guarantee without a share capital do not generally have a personal proprietary interest in their shares, since they cannot benefit personally from their membership as a result of the restrictions contained in sections 197, 198 and 201 of the Charities Act 2011.

47. As can be seen from the arguments I have recorded above, the parties in this case have rather assumed in oral argument that a member of a charitable company limited by guarantee without a share capital may owe some kind of fiduciary duty to the

company itself, and may owe a duty to exercise his vote in the best interests of the company (cf. the duties of directors of companies under sections 170-176 of the Companies Act 2006). That question has, however, never been authoritatively determined. Mr Henderson's ultimate submission in his written skeleton was that the "balance of the arguments … [favoured] the conclusion that generally members of a charitable company do not owe the company fiduciary duties". He cited, but rejected, the Commission's view to a contrary effect in its online publication RS7 at pages 18 and 33-34, and relied by negative analogy on Part 11 of the Charities Act 2011 which introduced a new form of body corporate, namely a Charitable Incorporated Body, whose members were expressly given (otherwise unnecessary) fiduciary duties by section 220 of that Act.

48. The starting point is probably Lord Truro LC's famous *dictum* in *In re Beloved Wilkes's Charity* (1851) 3 Mac. & G. 440, (1851) 42 ER 330 where he said at page 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". Put in modern language, the court will only interfere with the exercise of a discretion by a fiduciary if that fiduciary has acted in bad faith or on the wrong basis (see Lord Walker's comparison with the concept of *ultra vires* in this context at paragraph 88 of his judgment in *Pitt v. Holt* [2013] UKSC 26, and Lightman J's approach to the trustees' discretion in *RSPCA v. Attorney-General* [2002] 1 WLR 448 at paragraph 36).

49. Mr Guy Morpuss, QC, counsel for Dr Lehtimaki, placed reliance on *Attorney-General v. Governors of Christ's Hospital* [1896] 1 Ch. 879, where the court had to consider whether to approve a scheme designed to bring some charitable endowments that had been excepted from an earlier scheme and which were managed by their own separate governing body within the administration of the main governing body of Christ's Hospital. Chitty J declined to override the opposition of the existing governing body of the excepted endowments saying this at pages 888-9:-

> "No case of breach of trust or maladministration of any kind is suggested by the Attorney-General against the governing body. … The trusts remain and are capable of being executed. These are the facts which give rise to the question of the jurisdiction of the Court in settling a scheme for the regulation of a charity. …
>
> I prefer to state my own opinion broadly. 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. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing

> governing body of their right of control over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word, I cannot, under guise of executing the trusts cy-près, upset the constitution of the present governing body, or, by transferring their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than an Act of Parliament will suffice".

50. As will be apparent from the passage that I have cited, the *Christ's Hospital* case related only to charities established by statute or Royal Charter, but it is nonetheless important to an understanding of the legal position of incorporated charities.

51. In *In re Girls' Public Day School Trust Limited* [1951] 1 Ch. 400, the question was whether certain properties owned by the charitable company were exempt from a development charge under section 85 of the Town and Country Planning Act 1947. That turned on whether the property was held for charitable purposes only. Roxburgh J held at page 406 that it was not, because certain preference shareholders (who had lent money to the company) could have put the company into liquidation and procured the proceeds of sale of the properties to be paid to them (see page 406). The members' control of a charitable company is now restricted by sections 197, 198 and 201 of the Charities Act 2011, so although the decision is not directly relevant, it illustrates the principle that, before increased statutory regulation, members of charitable companies (albeit preference shareholders) could in theory control the destination of the assets held for charity.

52. In *Gaiman v. National Association for Mental Health* [1971] 1 Ch. 317, 302 individual (Scientologist) members of a company limited by guarantee challenged their expulsion as members by the directors on the grounds that the article of association that permitted the course that had been adopted conflicted with section 11 of the Companies Act 1948 as to the form of required articles or with the rules of natural justice. Megarry J dismissed the challenge because section 11 was not mandatory and because the directors had not breached their fiduciary duties, but in doing so he made clear at pages 331-2 that a member of such a company had his rights as a member whatever his motives or intentions might have been in becoming a member.

53. The next case, *Construction Industry Training Board v. Attorney-General* [1973] Ch. 173, raised the issue of whether the Board created by a statutory instrument was a charity within the meaning of section 45(1) of the Charities Act 1960. That section defined a charity as: "any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities". The substantive question was whether the Board was "subject to the control of the High Court". The majority of the Court of Appeal (Buckley LJ and Plowman J) held that it was. Russell LJ dissented. The similarity of section 45(1) to the current section 1 of the Charities Act 2011 set out above is to be noted. In the course of his judgment, Buckley L.J. made some general observations in relation to the jurisdiction of the courts to regulate the proper application of funds devoted to charitable purposes. At pages 186-187, he suggested that the court could exercise any jurisdiction that might be available in the execution of trusts and that "[i]n 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" (c.f. his later observations on the *Construction Industry Training Board* case in *Von Ernst & Cie. S.A. v. Inland Revenue Commissioners* [1980] 1 W.L.R. 468 at pages 479-480, and Bridge LJ's rejection of the concept that such assets were held on trust at page 475).

54. In *Liverpool and District Hospital for Diseases of the Heart v. Attorney General* [1981] Ch. 193, the question was whether the assets of a liquidated charitable company limited by guarantee should be distributed to its members under section 265 of the Companies Act 1948 or applied cy-près in accordance with clause 9 of its memorandum to another charitable institution with similar objects. Slade J construed section 265 alongside section 302 of the Companies Act 1948 so as to allow the assets to be distributed in accordance with clause 9 of the memorandum, and held that the court's jurisdiction to order a cy-près scheme arose where a corporate body, even though not strictly a trust, was under an obligation to apply its assets for exclusively charitable purposes. Slade J made a comprehensive review of the authorities before concluding at page 209 that a company formed under the Companies Act 1948 for charitable purposes is "in a position *analogous to that of a trustee* in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs", but was not in a strict sense a trustee of its assets (see also page 214F-G). In relation to the ability of the court to invoke its cy-près jurisdiction, Slade J said this at pages 213F-214D:-

> "I think, however, that *In re Dominion Students' Hall Trust* [1947] Ch. 183 and *Construction Industry Training Board [supra]* are authority for the proposition that the court may have jurisdiction to intervene in the affairs of a company, even though a trust in the strict sense does not exist in relation to its assets. … in the other cases relied on (such as *In re French Protestant Hospital* [1951] Ch. 567), [when] the court referred to the existence of a trust, they were, in my judgment, using the word "trust" in the wider sense to which I have referred. … In my judgment the so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust, means no more than this: the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes; for the jurisdiction of the court necessarily depends on the existence of a person or body who is subject to such obligation and against whom the court can act *in personam* so far as necessary for the purposes of enforcement".

55. Mr Taube relied on the last case I shall cite in this connection, which concerned a charitable trust, not a charitable company. In *Re J.W. Laing Trust* [1984] 1 Ch. 143, the question was whether the court had jurisdiction to abrogate the settlor's stipulation that the capital and income were to be wholly distributed to charitable purposes within 10 years of the settlor's death. Peter Gibson J held that the court could do so under its inherent jurisdiction, saying at page 153F that he accepted that: "the court … 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 10 years of the settlor's death".

56. Tudor on Charities, 10th edition, 2015, deals with these issues at paragraphs 10-128 to 10-136 and 17-001 to 17-009. At paragraph 10-128, the editors express the view that the court should not exercise its jurisdiction over a charitable company in any way which will conflict with the Companies Act 2006. At paragraph 17-003, the editors suggest that generally the directors, not the members, of a charitable company will be its charity trustees as defined in section 177 of the Charities Act 2011, and that "such authority as there is on the subject" "does not in the general case impinge on the normal company law principles" that members may exercise their rights in their own selfish interests.

57. It can immediately be seen that there is a dearth of clear authority on some of the questions at issue in this case, namely what duties the members of a charitable company limited by guarantee without a share capital owe to the company, and what jurisdiction the court can exercise over them. I shall return to these questions under issue 5.

Reasons for joining Dr Lehtimaki

58. I turn then to give my reasons for deciding to join Dr Lehtimaki. The other parties were broadly in favour of the joinder so as to ensure that the litigation could achieve finality. The Attorney General particularly thought that Dr Lehtimaki should be joined so that he could be directed as to how to vote on any members' resolution that was required.

59. Mr Morpuss, on the other hand, opposed joinder. He explained that Dr Lehtimaki had always understood as a member that he was going to be able to vote on the required members' resolution. Dr Lehtimaki wanted to obtain further evidence as to BWP and other matters, which were the legitimate concerns of someone with a fiduciary duty. He did not wish to surrender his discretion to the court. He did not understand that anyone could tell him how he could vote and that was his key concern. Mr Morpuss submitted that it would be unfair to Dr Lehtimaki to make him a party on the third day of such a large trial. In any event, there was no need to join him because the court could decide who should vote, and then he could vote having taken account of all the necessary evidence that he felt he should take into account. On the substance of whether Dr Lehtimaki could be ordered to vote in a particular way, Mr Morpuss supported CIFF's submissions.

60. I concluded that I should join Dr Lehtimaki as a defendant to these proceedings under CPR Part 19.2 essentially for the following reasons. First, on one possible outcome of the arguments put forward by the other parties, it might be necessary or desirable in order to achieve finality in the litigation for the Court to make an order that bound Dr Lehtimaki. The court would wish to have Dr Lehtimaki's submissions on whether it had jurisdiction to order a member to vote in a particular way on a section 217 resolution and whether it should do so in this case. The court might, for example, conclude that it was, under issue 5, possible and desirable to abrogate a section 217 resolution. Secondly, it seemed to me that possible future litigation might well be avoided if Dr Lehtimaki were directly bound by the decision and the order of the

court. There was a distinct risk that Dr Lehtimaki might think, possibly wrongly, that he had a completely unfettered discretion to vote differently from the way the court had decided. That was indicated by the approach that he had expressed in his 3rd May 2017 letter to the court (set out in part above). If the court were to disagree with Dr Lehtimaki's analysis, it could only enforce its view against him if he were a party.

61. I said, in the course of argument, that I had a measure of sympathy for Dr Lehtimaki having thought, albeit perhaps wrongly, that he was certainly going to be allowed to vote on a general resolution when, in fact, that was not certain, but only one possibility. I took the view, however, that I could not allow that sympathy to stand in the way of the proper resolution of these public interest charity proceedings. Since Dr Lehtimaki had already filed substantive evidence in the proceedings and was only being joined to enable him to deal with a specific legal issue, it did not seem to me that it was unfair to join him. He had already dealt as he wished to do with the other issues in the case, though of course he was given the opportunity to say whatever else he thought appropriate on any issue before the court.

62. In fact, Mr Morpuss made clear that his client did not wish to disrupt or stand in the way of the proper progress of these proceedings. Ultimately, once Dr Lehtimaki was joined, I made directions giving him and his lawyers time to file further evidence and submissions after the oral stage of the argument was concluded.

63. I turn now, therefore, to deal with the issues that arise for determination.

Issue 1: Is this a case in which the trustees seek the court's approval to a momentous decision they have, in their discretion, decided to take, or a case in which they have surrendered their discretion to the court?

64. In *Public Trustee v. Cooper* [2001] WTLR 901, Hart J cited at pages 922-4 from an unreported chambers judgment delivered by Robert Walker J in *Re Egerton Trust Retirement Benefit Scheme*. That passage identified four categories of case in which the court has to consider actions taken or to be taken by trustees, as follows:-

> "*… it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).*
>
> > *(1) The first category is where the issue is whether some proposed action is within the trustees' powers …*
> >
> > *(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the*

> *trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.*
>
> *(3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.*
>
> *(4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court …*".

65. Before citing this passage, however, Hart J referred to and relied at page 922 upon the trustees' application and communications indicating that, in that case, they were not, in seeking the court's assistance, intending to surrender their discretion to the court. *Public Trustee* was very clearly, therefore, not a category 3 case. After citing from Robert Walker J, Hart J emphasised at page 924 that a particular application might straddle the categories, and that some caution needed to be exercised before assuming there was always a bright-line distinction between cases where the trustees surrender their discretion and where they do not.

66. It can also be noted at this stage that this regime applies to charitable trusts and to charitable companies as much as it applies to private trusts. Mummery LJ (with whom Morritt LJ agreed) said this at page 350 in *Gaudiya Mission v. Brahmachary* [1998] Ch. 341:-

> "Under English law charity has always received special treatment. It often takes the form of a trust; but it is a public trust for the promotion of purposes beneficial to the community, not a trust for private individuals. It is therefore subject to special rules governing registration, administration, taxation and duration. Although not a state institution, a charity is subject to the constitutional protection of the Crown as *parens patriae*, acting

> through the Attorney-General, to the state supervision of the Charity Commissioners and to the judicial supervision of the High Court. This regime applies whether the charity takes the form of a trust or of an incorporated body".

67. All parties, with the exception of Ms Cooper, were agreed that this was a case where the trustees had surrendered their discretion to the court. In oral argument, Mr Taube QC did not press his argument that this was a category 2 case (as described in *Public Trustee supra*). He was right, in my view, to adopt that course.

68. In my judgment, it is quite clear that this case falls broadly within Robert Walker J's third category, albeit that I accept that this is a case in which there is not quite as bright a distinction as there might be in other cases. First, the trustees have themselves said that they have surrendered their discretion to the court, and their view is critical to what is predominantly a question of fact. Secondly, the trustees have not, as a matter of form, sought approval to the April and July agreements; instead, they have asked for the court to consider approving the making of the Grant in future. Thirdly, clause 3(ii) of the CIFF Letter indicates that Sir Christopher and Ms Cooper have agreed to indicate to the court that they fully support the making of the Grant. Such support would be unnecessary if the court were being asked to review the propriety of an existing exercise of the trustees' discretion. It is far more appropriate to a situation in which the trustees have agreed to ask the court to exercise that discretion. I acknowledge that the trustees have actually agreed to make the Grant, but they have done so expressly subject to the approval of the Commission or the court.

69. On issue 1, therefore, I decide that this is a case in which the trustees of CIFF have, in the circumstances that have occurred, surrendered to the court their discretion in relation to the making of the Grant.

Issue 2: Would the grant confer a material benefit, whether directly or indirectly, on Ms Cooper within the proper meaning of clause 5.2 of CIFF's Memorandum, so as to require the written approval of the Commission in advance?

70. The trustees argued that the Grant would not confer a material benefit on Ms Cooper within the meaning of clause 5.2 of the Memorandum. They relied first on the definition in clause 10.1 of the Articles, and secondly on a line of authorities indicating that an incidental benefit to a trustee does not jeopardise the propriety of an otherwise appropriate exercise of a trustee's discretion (see, for example, Lightman J's decision in *Fuller v. Evans* [2000] 1 All ER 636 at pages 638-9).

71. The Attorney General submitted that it was obvious that Ms Cooper's rights as a founder and trustee of BWP were rights of a fiduciary character that could not be bought or sold, and so could not be enhanced in value by making the Grant. Mr Taube drew attention to the articles of BWP that limited private benefits and referred to the authorities demonstrating that the power of appointment of trustees was a fiduciary power, in respect of which any benefit received had to be repaid to the fund (see *In re Skeats' Settlement* (1889) 42 Ch. Div. 522 per Kay J at 526, and *Sugden v. Crossland* (1856) 3 Sm. & Giff. 191 per Sir John Stuart VC at 194). Mr Taube also submitted that cases such as *Re Clore's Settlement Trusts* [1966] 1 W.L.R. 955 and *X v. A* [2006] 1 W.L.R. 741 were not relevant to the type of benefit alleged in this case.

There was no question of the Grant relieving Ms Cooper of any moral obligation to contribute US$360 million to BWP. Mr Taube pointed also to the circumstances that led up to the Grant being agreed, and in particular to the discussions between Sir Christopher and Ms Cooper about splitting CIFF's fund, the events concerning their recusal, and the allegations made by Sir Christopher that Ms Cooper's conduct amounted to bribery (by offering to take less in the divorce settlement if the Grant was made) and breach of a fiduciary duty to CIFF. Lord Grabiner QC had advised, in the opinions that I have been shown, that there was in fact no impropriety. CIFF then asked for a contribution to match the Grant, before – ultimately - the US$40 million payments were agreed.

72. In my judgment, one has to consider first the purpose of clause 5.2, which is, as Mr Crow submitted, to prevent trustees from receiving benefits except in defined circumstances and in other cases only with the approval of the Commission. The defined circumstances are those that might be expected – such as out of pocket expenses, and liabilities incurred in running the charity. The catch-all in clause 5.2.5 is for all other payments or benefits which can only be provided with the approval of the Commission. This is not an absolute bar, but only a procedural pre-condition. In these circumstances, it would be wrong to construe the clause too narrowly. An appropriate benefit will only have to surmount the hurdle of Commission approval, which would allow proper independent scrutiny and transparency to protect the charity's assets. The situation is very different from the cases relied upon by the trustees that concerned incidental benefits to trustees that risked jeopardising charitable status (*In re Coxen* [1948] 1 Ch. 747, and *Royal College of Surgeons v. National Provincial* [1952] AC 631), or a proper use of trust funds (*Fuller v. Evans supra*, and *Oakes v. New South Wales Commissioner of Stamp Duties* [1954] A.C. 57 at pages 72-3).

73. Once one understands the purpose of clause 5.2, it is necessary to consider the proper meaning of the definition of "material benefit" namely "a benefit which may not be financial but has a monetary value". Mr Crow submits that the Grant has a monetary value to Ms Cooper because she was prepared to pay money in order to secure it, even if she would not benefit directly financially from its payment.

74. I was at first attracted to the argument that the monetary value that is being referred to in the definition of "material benefit" is the monetary value of the benefit once received, rather than the monetary value of the acquisition of the benefit. But that now seems to me to be at odds with the words used. If the definition is read in to the provisions of clause 5.2, it provides that "[a] Trustee must not receive any payment of money or other [benefit which may not be financial but has a monetary value] from [CIFF] except …with the written approval of the Commission". The embargo is on "receipt" of a benefit with a monetary value. Thus if, as Mr Crow suggested, Ms Cooper would have "paid" for the Grant by accepting less by way of divorce settlement, it would, it seems to me, suggest that the benefit being received had a "monetary value" to her. The question then remains, of course, whether the benefit was received by Ms Cooper, when the Grant went to BWP in which she had no proprietary or beneficial interest.

75. On that question, it seems to me that *Re Clore supra* and *X v. A supra* have some bearing. In the latter case, the question was whether the exercise of a power of appointment in favour of a wife was for her benefit when what was proposed was that

the advancement should be paid to a charity of her choice and of which she was a trustee. Hart J held that the transaction was not for the wife's benefit because it did not, on the facts, relieve her of the moral obligation to make a contribution of that size, since the gift much exceeded her free assets. He did, however, hold that "benefit" in that trust context was not confined to the beneficiary's direct financial situation and could include the discharge of a moral obligation. Such a gift was for the benefit of the beneficiary where, viewed objectively, it could fairly be regarded as being for the beneficiary's benefit and where the beneficiary himself felt an obligation (see paragraphs 33-45 of Hart J's judgment).

76. Likewise here, in my judgment, it would be surprising if payment of the Grant did not involve Ms Cooper receiving a benefit which has a monetary value from CIFF if she very much desired the Grant to be made, was prepared to reduce her own financial claims if it were made, and it could fairly be regarded as for her benefit. The Grant here is not satisfying any moral obligation of Ms Cooper, but that is obviously not the only kind of benefit contemplated by clause 5.2.

77. It is, in my judgment, relevant, but not conclusive, that Ms Cooper will gain no proprietary interest in the money represented by the Grant, because of the exclusively charitable status of BWP. She will, however, gain some benefit from the Grant because she will be the founder and a trustee of a charity with an endowment of an additional US$360 million. To a person whose life's work is in charity and philanthropy, that must be regarded in normal understanding as a "benefit". The principle that non-monetary benefits including moral benefits can be material does, I think, carry over from the situation in *Re Clore supra* and *X v. A supra* to the position in this case. Ms Cooper will, if the Grant is made, have the benefit of being able to use her considerable talents to direct the significant funds represented by the Grant towards projects that she personally supports within CIFF's charitable objects. I do not think that clause 5.2 is drafted in a restrictive way that requires the court in these circumstances to ignore these tangible benefits. I remind myself that the fact that Ms Cooper was prepared to accept less money if the Grant were made is reflected in the opinions of counsel that have been placed before the Court. I can well understand why she might have been prepared to take that course. Clause 5.2 is not an absolute bar on benefits, but merely allows the Commission the opportunity to review what is proposed in advance. It should be able to do so in this case.

78. I do not think the fact that, on authority, an incidental benefit to a trustee does not jeopardise the propriety of an otherwise appropriate exercise of a trustee's discretion has any bearing on the proper meaning of clause 5.2 in this case.

79. In my judgment, therefore, the answer to issue 2 is that the making of the Grant would confer a material benefit on Ms Cooper within the proper meaning of clause 5.2 of the Memorandum, so as to require the written approval of the Commission in advance.

Issue 3: Would the Grant be a payment for loss of office within the meaning of section 215 of the Companies Act 2006 so as to require the approval of CIFF's members under section 217 of the Companies Act 2006, because it would be (a) consideration for or in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and either (b) a payment to a person connected with Ms Cooper, or (c) a payment to any person at the direction of, or for the benefit of, Ms Cooper or a person connected with her?

80. The questions posed under this heading arise directly from the terms of sections 215(1) and (3) of the Companies Act 2006. The first question is whether the Grant is to be paid "as consideration for or in connection with" Ms Cooper's retirement from her office as a trustee of CIFF, and the second question is whether the Grant would be made to a "person connected with Ms Cooper", namely BWP. If there is a positive answer to both these questions, there will be no need to consider whether the Grant would be a payment made "at the direction of or for the benefit of" Ms Cooper.

81. Before dealing with these issues, it is important to understand that Chapter 4 of the Companies Act 2006 sets up a regime under the heading "Transactions with directors requiring approval of members". The provision requiring a members' resolution in section 217 of the Companies Act 2011 is expressly applied to charitable companies by section 201 of the Charities Act 2011 (set out above), which adds an additional layer of control by requiring Commission approval before the members' resolution is passed. Thus the legislature can be taken to have expressly decided that the regime established in sections 215-217 of the Companies Act 2006 is to be specifically applicable to charitable companies. Any attempt, therefore, to limit or confine the application of the general Companies Act provisions on the basis of the special position of charitable companies would seem to be inappropriate.

82. It was, of course, common ground that the Grant would not be a payment to Ms Cooper directly, and that she would not take any direct beneficial interest in the monies represented by the Grant.

Would the Grant be paid as consideration for or in connection with Ms Cooper's retirement as a trustee of CIFF?

83. Mr Henderson submitted that the Grant would not even be "in connection" with Ms Cooper's retirement from office, because she will have resigned unconditionally as a trustee before the Grant is made. He pointed to the fact that, whilst past directors were mentioned in section 215(1), they were excluded from sections 215(3), 252, and 254 of the Companies Act 2006. Reading "past director" into those sections would have potentially irrational consequences if, for example, Ms Cooper were to move in and out of the extended definition over the lifetime of the Grant as her membership and voting rights in BWP changed.

84. In my judgment, this approach to the construction of these sections is inappropriate. The term "payment for loss of office" is defined as being a payment "to a director or past director". Thus, when one comes to construe section 217(1), the prohibition is on making "a payment for loss of office [being a payment to a director or a past director] to a director … unless the payment has been approved by a resolution of the members". It may be infelicitous to have added "to a director" into section 217(1) without also adding "or a former director", but that infelicity does not lead to the

conclusion that former directors were to be excluded. The purpose of the statutory regime would be frustrated if directors could pay a retiring colleague compensation for loss of office without member approval simply by waiting until after the retiring director had resigned.

85. Mr Taube then argues that CIFF's purpose is not to make any payment by way of Grant as "consideration" for or even "in connection with" Ms Cooper's loss of office. CIFF's purpose is to exercise its charitable grant making powers in favour of BWP. In *Mercer v. Heart of Midlothian plc* [2001] SLT 945, Lord Macfadyen in the Outer House held that the purpose of section 215's predecessor was to "give to the members of the company control over transfer of funds belonging to the company by the Board to a retiring director". As he said in paragraph 29: "[t]he focus is on the potential depletion of the company's assets, not on the benefit received by the retiring director" so that "it is not enough, for the purpose of characterising the benefits as a payment, to aver … that [the assets in question] have a money value. What matters, it seems to me, is the cost to the company, not the gain by the retiring director". Since the cost to CIFF of making the Grant will be incurred wholly as part of its charitable activities, Mr Taube submitted that it was outside the intended scope of sections 215 and 217.

86. This is an ingenious argument, but nonetheless, in my judgment, wrong. First, as I have said, the prohibition applies as much to charitable companies as it does to ordinary trading companies. Secondly, the fact that the focus of the legislation is on the depletion of the company's assets does not mean that a payment made to a charity connected with a director would not be caught just because it is a charity. The assets of CIFF will be depleted by the Grant, and if the payment satisfies the other requirements of sections 215 and 217, it will be caught by the legislation. Thirdly, there can in my view be no substitute for a proper analysis of whether the Grant would in fact be paid as consideration for or in connection with Ms Cooper's retirement as a trustee of CIFF.

87. In my judgment, this issue is relatively clear. On the evidence, the Grant was agreed to be paid both in consideration for and in connection with Ms Cooper's retirement. Three factors are sufficient to make this point good. First, the CIFF Letter itself provided expressly that the Grant would be "in consideration for" Ms Cooper's retirement, when it said in paragraph 1 "[i]n consideration of the undertakings on the part of the Members [including Ms Cooper] set out in this letter … we agree to make the Proposed Grant". Ms Cooper had agreed in the attached Letter of Intent to resign as a trustee of CIFF, and her commitments in that Letter of Intent were expressly mentioned in paragraph 4 of the CIFF Letter. Secondly, Lord Malloch-Brown's witness statement says expressly that "it was an inherent part of this proposal that [BWP] would receive a substantial grant from [CIFF]" and that "[This proposal] was inextricably linked to governance changes at [CIFF] and to Ms Cooper's resignation from [CIFF]". Thirdly, Ms Cooper's own witness statement said that "[i]n consideration of certain undertakings by [Sir Christopher] and me, CIFF agreed to make the Proposed Grant of $360 million to my proposed new foundation". One of Ms Cooper's own undertakings was to resign as a trustee.

88. In addition to these reasons, CIFF's own application to the Commission acknowledged that the unusual Grant was part of the April agreements and that the departure from the usual grant-making policy was in order to resolve the governance difficulties. Thus, I have no doubt on the basis of the evidence adduced by the parties

that the proposed Grant would constitute a payment as consideration for or in connection with Ms Cooper's loss of office as a trustee of CIFF, within the proper meaning of section 215(1) of the Companies Act 2006.

89. In reaching this conclusion, I have not thought it necessary to rely on the Australian case of *Re Claremont Petroleum NL v. Cummings* (1992) 110 ALR 239, where Wilcox J of the Federal Court considered similar statutory language in the Companies (Queensland) Code 1981, and concluded in paragraphs 142-3 that "in connection with" was a phrase of "wide import", which did not necessarily require a causal relationship but included things that "have to do with" or are "bound up or involved" with one another. But that case shows, at least, that the words "in connection with" in section 215(1) are not to be narrowly construed.

90. The next argument advanced by Messrs Henderson and Taube was that, because CIFF's trustees have surrendered their discretion to the court, the Grant will not be paid unless the court exercises its discretion, so that the causative connection between the April agreements and the Grant would be broken, and section 215 would not apply to it. I can deal with this point briefly, because it is not, I think, a causation question at all. The question under this heading is whether the Grant will be a payment in connection with Ms Cooper's loss of office. That is a question to be determined on the proper construction of section 215(1) and the evidence. The question whether the court's approval abrogates the need for a members' resolution is one to be addressed under issue 5 below. It raises rather more complex issues that are not, in my view, primarily ones of causation.

Would the payment be to a person connected with Ms Cooper or to any person at the direction of, or for the benefit of, Ms Cooper or any person connected with her?

91. I shall deal first with the question of whether the proposed Grant would be a payment to a person connected with Ms Cooper within section 215(3)(a).

92. Mr Taube placed great reliance on the provisions of section 252 defining the meaning of "a person connected with a director". That section is in the following terms:-

> "(1) This section defines what is meant by references in this Part to a person being "connected" with a director of a company (or a director being "connected" with a person).
>
> (2) The following persons (and only those persons) are connected with a director of a company—
>
> (a) members of the director's family (see section 253);
>
> (b) a body corporate with which the director is connected (as defined in section 254);
>
> (c) a person acting in his capacity as trustee of a trust—
>
> (i) the beneficiaries of which include the director or a person who by virtue of paragraph (a) or (b) is connected with him, or

> (ii) the terms of which confer a power on the trustees that may be exercised for the benefit of the director or any such person,
>
> other than a trust for the purposes of an employees' share scheme or a pension scheme;
>
> (d) a person acting in his capacity as partner—
>
> (i) of the director, or
>
> (ii) of a person who, by virtue of paragraph (a), (b) or (c), is connected with that director;
>
> (e) a firm that is a legal person under the law by which it is governed and in which—
>
> (i) the director is a partner,
>
> (ii) a partner is a person who, by virtue of paragraph (a), (b) or (c) is connected with the director, or
>
> (iii) a partner is a firm in which the director is a partner or in which there is a partner who, by virtue of paragraph (a), (b) or (c), is connected with the director. …"

93. Mr Taube stressed the words in parentheses in section 252(2) "and only these persons". He submitted that the section provided for a complete list of persons deemed to be "connected with" a director. He drew specific attention to section 252(2)(c), which operated, he submitted, so as to exclude payments to trustees unless the retiring director or a person otherwise connected with him is a beneficiary of the trust. Mr Taube concluded that, properly understood, a payment to a charitable company was not within the mischief provided for in section 252 at all, because such a company holds its assets on trust for charitable purposes and not for the director or any other connected person beneficially. That was the case with Ms Cooper and BWP, said Mr Taube, because she had and could have no beneficial interest in the Grant or the assets of BWP held for exclusively charitable purposes.

94. Mr Taube sought to get around the provisions of section 254 of the Companies Act 2006 by submitting that section 252(2)(b) (relating to directors connected with a body corporate) was inapplicable to a charitable company receiving a payment, to which only section 252(2)(c) applied. Section 254 in fact provides as follows:-

> "(1) This section defines what is meant by references in this Part to a director being "connected with" a body corporate.
>
> (2) A director is connected with a body corporate if, but only if, he and the persons connected with him together—
>
> (a) are interested in shares comprised in the equity share capital of that body corporate of a nominal value equal to at least 20% of that share capital, or

> (b) are entitled to exercise or control the exercise of more than 20% of the voting power at any general meeting of that body.
>
> (3) The rules set out in Schedule 1 (references to interest in shares or debentures) apply for the purposes of this section.
>
> (4) References in this section to voting power the exercise of which is controlled by a director include voting power whose exercise is controlled by a body corporate controlled by him.
>
> (5) Shares in a company held as treasury shares, and any voting rights attached to such shares, are disregarded for the purposes of this section.
>
> (6) For the avoidance of circularity in the application of section 252 (meaning of "connected person") —
>
> > (a) a body corporate with which a director is connected is not treated for the purposes of this section as connected with him unless it is also connected with him by virtue of subsection (2)(c) or (d) of that section (connection as trustee or partner); and
> >
> > (b) a trustee of a trust the beneficiaries of which include (or may include) a body corporate with which a director is connected is not treated for the purposes of this section as connected with a director by reason only of that fact."

95. Mr Taube submitted that, in relation to a payment to a charitable company, one never reached section 254(2), because the payment was effectively excluded from the operation of section 252(2)(b) by section 252(2)(c). He relied by analogy on *Granada Group Ltd v. The Law Debenture Pension Trust Corporation Plc* [2016] EWCA Civ 1289, which concerned the operation of section 320 of the Companies Act 1985 (now section 190 of the Companies Act 2006), which imposed restrictions on substantial property transactions with directors. The company had set up a pension benefits scheme for certain of its directors, which involved peculiar security arrangements. Later, the company argued that the arrangement was unlawful as a transaction which would have required a members' resolution to be valid. At first instance, Andrews J held that the trustee received payments for the benefit of the company's directors, but did so as a pension trustee. This was the case notwithstanding that the pension scheme had only a small group of beneficiaries who were all directors. The decision was upheld by the Court of Appeal. Section 320 did not apply because the trustee was acting in its capacity as trustee under a pension scheme, so that it was not a person "connected with" the directors.

96. Mr Crow responded to these arguments by submitting that section 215(3)(a) asked only the question of whether the payment was to a person connected to a director. It did not ask about the character of the payment. That was underlined by section 215(3)(b) which did, in contrast, direct attention to the question of benefit. Section 215(3)(a) would, submitted Mr Crow, be redundant if the payment had also to benefit the director under section 215(3)(b). Section 217(3) reinforced the point by requiring the resolution approving such a payment to state the amount of the payment, not any quantification of the benefit to the recipient. The requirement for the approval of

members of such payments applied a layer of corporate governance to payments made by companies. It looked to payers not payees.

97. In my judgment, Mr Crow's submissions on this point are to be preferred. Section 215(3) is, I think, the governing provision. A payment requires members' approval if it is made **either** to a person connected with a director **or** to any person at the direction of or for the benefit of the director. They are cumulative protections. Section 252(2) then provides a complete list of those persons that are to be regarded as connected with a director. It explains that those persons are (broadly) family members, bodies corporate with which the director is connected, trustees holding for the benefit of a director, partners of the director, and firms in which the director is a partner. There is no basis to regard the provisions of section 252(2)(c) as holding some unexpressed special position in that list, as Mr Taube's submissions imply. The obvious and proper construction of section 252 is, in my judgment, that the legislation was intended to catch payments to the persons mentioned in section 252(2), and only to those persons. If, therefore, the payment is to a "body corporate with which the director is connected (as defined in section 254)", then the payment is caught by section 215(3)(a). It matters not that the payment might not be within section 252(2)(c) because it is made to a company that will hold the money on trust for beneficiaries other than the director personally.

98. In these circumstances, one should move from a consideration of section 252(2)(b) to a consideration of section 254 as section 252(2)(b) specifically directs. In this case, the relevant sub-section, section 254(2)(b), provides that a director is connected with a body corporate if, but only if, she and the persons connected with her are "entitled to exercise or control the exercise of more than 20% of the voting power at any general meeting of that body".

99. As it seems to me, the answer to this latter question is simple. It is unaffected by Ms Cooper's somewhat convoluted arguments that she cannot properly be regarded as exercising the members' voting power of BWP because of its exclusively charitable objects, the controls in section 201 of the Charities Act 2011, or the ring-fencing of the uses to which the Grant can be put. The fact is that Ms Cooper is the only member of BWP, which is a company limited by guarantee without a share capital. She is, therefore, entitled to exercise or control the exercise of 100% of the voting power in BWP at any general meeting of BWP. It, therefore, seems to me that the Grant will be a payment for loss of office to Ms Cooper within the proper meanings of sub-sections 215(1)(c), 215(3)(a), 252(2)(b) and 254(2)(b). It will, therefore, require the approval of a resolution passed by the members of CIFF, subject to the following issues that the court must determine.

100. I am not dismayed by this result as Mr Taube suggested that I might be. It seems to me that the provisions of sections 215 and 217 of the Companies Act 2006 were deliberately applied to charitable companies by the legislature (see section 201 of the Charities Act 2011). It would be a retrogressive step to construe the controls imposed by those sections narrowly or artificially, when they simply operate to bring the terms of a proposed payment connected with the retirement of a director to light and to be considered by the Commission and the membership of the company. Nor do I think that any analogy with the *Granada* case *supra* can affect the clear and proper construction of the statutory provisions I have mentioned.

101. I conclude, therefore on this issue that the Grant would be a payment for loss of office within the meaning of section 215 of the Companies Act 2006 so as to require the approval of CIFF's members under section 217 of the Companies Act 2006, because it would be a payment made as consideration for and in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and a payment to BWP, a person connected with Ms Cooper.

102. In the circumstances, I have not found it necessary to go on to consider the interesting arguments addressed by the parties as to whether the Grant would also be properly regarded as a payment to any person at the direction of, or for the benefit of, Ms Cooper or a person connected with her within section 215(3)(b) of the Companies Act 2006.

Issue 4: If the Grant does require the approval of CIFF's members under section 217, are either or both of Sir Christopher and Ms Cooper (a) deprived of the right to vote because they owe fiduciary duties as members of CIFF and have a conflict of interest, (b) contractually deprived of the right to vote, and/or (c) contractually or otherwise obliged to vote in a particular way?

103. This issue now assumes more importance, since I have decided that the payment of the Grant will be caught by sections 215 and 217 of the Companies Act 2006. The question here, however, is whether Sir Christopher and/or Ms Cooper are permitted to vote on any members' resolution that is now required under those sections. They may be deprived of the right to vote either by contractual obligation or by a conflict of interest. If permitted to vote, they may then be required to vote in a particular way as a result of one or more such obligations.

104. In the broadest outline, Mr Henderson submitted that the members of CIFF were not subject to fiduciary obligations, and that the fiduciary duties owed by Sir Christopher and Ms Cooper to CIFF as trustees did not affect their right to vote as members. Moreover, in relation to the April agreements, the Letter of Intent was to be construed as just that, and of no binding contractual effect upon them. Its contractual force bound only CIFF and not Sir Christopher and Ms Cooper. They, therefore, only owed obligations to CIFF, but not to each other, to refrain from voting. Mr Henderson asked the court to consider directing CIFF to waive these obligations so that Sir Christopher and Ms Cooper would be required to vote in favour of the Grant on the basis of their obligation in clause 3 of the CIFF Letter to provide support for the satisfaction of the condition. Mr Henderson submitted that Ms Cooper's recusal could either be waived by CIFF or overcome by an appropriate court order. Either way, Sir Christopher and Ms Cooper should both be obliged contractually to vote in favour of the Grant.

105. Mr Crow submitted that in consideration for Sir Christopher's promises of qualified support for the Grant and for the covenant to pay US$40 million to BWP, he had bought the right **not** to vote in relation to the Grant. Ms Cooper had expressly recused herself and she also should not be permitted to vote. Mr Crow stressed Sir Christopher's concerns about the propriety of the proposed Grant at the time of the April and July agreements; his primary aim was to remain uncontaminated by any breach of duty. It was, submitted Mr Crow, implausible to suggest that the undertakings given by Sir Christopher and Ms Cooper bound them only as trustees

and not as members. Moreover, none of these contractual obligations could be waived unilaterally by CIFF or waived by the directions of the court.

106. Mr Taube submitted that the relevant factual matrix included the fact that no-one had realised in April 2015 that a section 217 resolution might be required. The April agreements were a final deal subject only to obtaining court approval, and this should govern their construction. The court, he said, could direct Sir Christopher and Ms Cooper to vote, and pointed to cases such as *In re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 where the court had held that it could authorise conflicted directors to take appropriate steps notwithstanding their conflicts of interest (see pages 40F-41H per Lindsay J). Whilst the Letter of Intent was written by Sir Christopher and Ms Cooper expressly "as members and trustees", the CIFF Letter was only signed by them in their capacity as trustees and should not be taken to constrain them in their capacity as members. Therefore, the operative part of the April agreements for present purposes was the undertaking to use all reasonable endeavours to obtain approval for the Grant, which would require them to vote in favour of a section 217 resolution. Mr Mullen did not offer any detailed submissions on this point, taking the position that an order of the court under its inherent jurisdiction would render the issue nugatory.

107. In my judgment, it is clear that Sir Christopher and Ms Cooper are contractually bound to refrain from voting on a section 217 resolution. The CIFF Letter provides in clause 4 that each of Sir Christopher and Ms Cooper "undertakes to [CIFF] to fulfil all of his or her commitments under the [Letter of Intent]". The Letter of Intent provides in terms that "[b]ecause both of [Ms Cooper] and [Sir Christopher], as trustees of [CIFF], have a conflict of interest, neither will vote on the Proposed Grant". In my judgment, the fact that this provision explains that Sir Christopher and Ms Cooper have a conflict of interest "as trustees of CIFF" does not limit what they agreed to do, namely, quite generally, not to "vote on the Proposed Grant". They wrote the Letter of Intent expressly as both trustees and members of CIFF, and expressly agreed unconditionally not to vote on the Grant. The Letter of Intent was given binding contractual effect by the CIFF Letter. There is nothing, I think, in Mr Henderson's point that CIFF can waive these obligations, because the obligation in clause 4 of the CIFF Letter is framed as an undertaking to CIFF to fulfil their commitments under the Letter of Intent. The obligations in the Letter of Intent were agreed between Sir Christopher and Ms Cooper by their signing it. The drafting might be explained because CIFF had not itself signed the Letter of Intent. Either way, it would be over technical and uncommercial to construe the clear terms of the April agreements as allowing the protagonists to vote on any resolution in relation to the Grant when they had expressly said they would not do so. I do not think that it makes any difference to this stark position that the parties had not realised in April 2015 that a section 217 resolution might be necessary. They knew some steps and votes would be required to put the Grant in place, and they agreed that they would only be involved in those steps and votes in specified and limited ways. They should, I think, each be held to what they agreed.

108. In these circumstances, I cannot see that it is necessary to resolve the other questions argued by the parties under this issue. It will, however, be necessary to consider the question of what fiduciary duties the members of CIFF owe under issue 5 below, as will shortly appear. The issues of waiver and what orders might be made in respect of

conflicted trustees do not, therefore, directly arise, and I shall therefore say no more about them, once again notwithstanding the interesting and detailed arguments addressed to them by counsel.

109. In my judgment, therefore, the answer to issue 4 is that Sir Christopher and Ms Cooper are deprived of the right to vote on a section 217 resolution because they are contractually obliged not to do so.

110. Logically, I should now move to consider issue 5 as to whether the need for a section 217 resolution can be abrogated in the circumstances of this case. As it seems to me, however, that issue is best postponed until I have actually considered whether the court should approve the Grant, now that the trustees of CIFF have relinquished their discretion on that question to the court. I will, therefore, consider issues 6 and 7 at this stage, before considering, if necessary, how the court should approach the need for a members' resolution under section 217 of the Companies Act 2006.

Issue 6: What factors should the court take into account in deciding whether to approve the making of the Grant, and in particular what weight should the court attach to the risk of tax being payable on the making of it?

111. This issue is evidence intensive. As I said when I dealt with the evidence above, however, it would unacceptably lengthen this judgment if I were to set out all the matters that have been adumbrated in the lengthy evidence before the court. Suffice it to say that I have read that evidence and the exhibits in detail, and I will limit myself to summarising the arguments that the parties have adduced or derived from it.

112. Mr Henderson emphasised CIFF's size and its unique focus on the object of improving children's lives. He identified three main factors that weighed in favour of making the Grant. First, he pointed to the interests of finality so that CIFF can resume its considerable work for the public benefit. Secondly, the Grant would procure a further US$40 million for charity in view of Ms Cooper's conditional obligation to provide that additional sum to BWP. Thirdly, the Grant would give effect to the spirit of the April agreements, insofar as such a consideration can burden the consciences of charity trustees.

113. Mr Henderson also listed a number of factors that he said could potentially weigh for or against the making of the Grant, but which should, he submitted, be regarded either as equivocal or of little weight. First, BWP's work would complement CIFF's work, so the Grant could be seen as a method of advancing CIFF's charitable purposes. The money representing the Grant would, however, be available for CIFF to advance these purposes directly if it were not made. Secondly, the Grant would augment Ms Cooper's ability to use her talents to advance charitable activities. She would, however, be able to do so anyway, because she controls other well-endowed charities, including BWP's US counterpart (previously CIFF US). Thirdly, the terms of the Grant will require ongoing contact, cooperation and monitoring between CIFF and BWP. This is, however, predicted to be manageable, and not to require Sir Christopher's personal involvement. Fourthly, the making of the Grant would serve the wider interests of the charity sector, because it would encourage the resolution of seemingly intractable disputes between donors and founders, who are often very personally involved in their charitable organisations. This factor was, however,

particularly equivocal because the Grant might also set a bad precedent by allowing outgoing charity trustees to insist on extravagant gifts as a condition of their departure. Fifthly, the making of the Grant is overshadowed by Sir Christopher's allegations of bribery against Ms Cooper, even though those allegations were said by leading counsel to be without foundation.

114. Mr Henderson then pointed to four factors that weighed against making the Grant. First, CIFF would lose direct control of a substantial sum of money. Secondly, the Grant would be of a size and kind that was unprecedented for CIFF, which usually made grants on a programmatic basis. Thirdly, the Grant could entail adverse reputational damage to CIFF if it were interpreted as a payment to Ms Cooper as part of the divorce settlement; this factor would weigh more heavily if the court were to find that there had been a benefit to Ms Cooper. Fourthly, if any tax were payable out of charity funds as a result of making the Grant, that would be a very negative feature pointing strongly against it, as would the possibility of costs being incurred in the resolution of a dispute with HMRC.

115. Mr Crow drew the court's attention to a number of further factors weighing against making the Grant. First, the origin of the decision to make the Grant lay in CIFF's governance problems, which were later resolved by Ms Cooper's irrevocable Deed of Resignation. The Grant would therefore constitute a loss to CIFF's endowments for a "prize that had already been won". Secondly, whilst the effect of the Grant would simply be a payment between charities, its *purpose* would be to secure a trustee's resignation; such a payment was not within the real scope of the trustees' grant-making powers. Thirdly, and ancillary to this point, the quantum of the Grant was not the product of any assessment of BWP's programmatic needs, but of haggling bound up in the financial dispute originating from Sir Christopher and Ms Cooper's divorce proceedings. Fourthly, the Grant was unprecedented, or at least eccentric, in CIFF's practice in three respects: it was not matched by equal contributions from anyone else, its size was wholly unprecedented, and it was an open-ended grant to another grant-making charity rather than one tied to a particular programme. Fifthly, the Grant would set a poor precedent in that it would allow charitable funds to be used to resolve personal disputes between trustees, when trustees ought properly to resign if their personal position was hampering the charitable work of their organisation.

116. Mr Taube stressed the factors weighing in favour of the making of the Grant. First, he said it would avoid losing Ms Cooper's talented services to charity; the Grant would unleash her creativity and her capacity to contribute to the public benefit. Secondly, BWP was an appropriate object for a Grant of this size and nature, because of Ms Cooper's personal attributes and also because BWP had already attracted an experienced board of trustees and excellent leads for high-level international cooperation. Thirdly, CIFF in fact often made other grants to grant-making charities, and BWP was, like CIFF, a grant-making charity, and would be limited to using the Grant for CIFF's objects. It would, however, give BWP some control over "decisions about sectors" and the ability to choose the best partners in each sector. Finally, Mr Taube underscored Ms Cooper's covenant of an additional US$40 million, which would otherwise be lost to the charitable sector.

117. I will deal now with Mr Mullen's submissions on behalf of the Attorney General. The court will obviously pay particular attention to the independence of these submissions. First, Mr Mullen submitted that the purpose of the arrangement was to resolve the

governance issues experienced by CIFF following the break-down of the personal relationship between Sir Christopher and Ms Cooper. Whilst, in the normal case one would expect feuding trustees to stand down and get out of the way, the Attorney General accepted that the resolution of these governance issues would in fact promote the objects of CIFF by enabling it to function properly. The case was unusual in that each of Sir Christopher and Ms Cooper had made an exceptional personal contribution and was an exceptional individual. The desire to secure their continuing dedication to charity was a factor for the court to consider in favour of the making of the Grant. Secondly, Mr Mullen addressed the kind of example that making the Grant would set for other charity trustees. He conceded that the example could be negative, but again reiterated the exceptional nature of the case, including CIFF's substantial endowment and the further contribution of US$40 million that approval would secure for the charitable sector. He stressed that the Attorney General's support in this case should not be taken as a blanket approval for the clearly undesirable practice of dividing a charity's assets to resolve disputes such as this between trustees.

118. The Attorney General then submitted that the following specific factors weighed in favour of making the Grant. Even though the governance issues had already been resolved by Ms Cooper's irrevocable resignation, this was properly seen in the context of the parties having agreed to the Grant. There was a public interest in the court encouraging the proper settlement of disputes and restricting the opportunity of the parties to such arrangements to renege on their agreements. Mr Mullen then submitted that the Grant would be subject to conditions to ensure the advancement of CIFF's charitable purposes; the potential advantage of a diversity of approach amongst well-endowed charities working in the same arena weighed in favour of the Grant. Although BWP was a "start-up", no doubts surrounded its structure, and it had assembled an experienced board of directors in addition to Ms Cooper's considerable expertise and experience in managing a charity of BWP's anticipated size.

119. Mr Mullen pointed to two factors that were against making the Grant. First, a real possibility of a tax liability would weigh against making the Grant. Secondly, if the court were to approve the Grant, but nonetheless to determine that the approval of the Commission and the members of CIFF were required, the Grant should not be made if these processes would lead to further dispute and expense. On balance, and with particular emphasis on the donation of a further US$40 million, the Attorney General was broadly supportive of the Grant being made.

120. After these submissions were made, Dr Lehtimaki filed the evidence I have described above. Without reproducing the structure of his analysis, the most important points that he made were as follows. First, although there was some value in solving CIFF's governance problems, that should not be weighed equally with the question of benefit to CIFF's beneficiaries. A solution to the governance problem was only relevant insofar as it contributed to CIFF's efficacy and efficiency in delivering benefit. Secondly, there were costs involved in hiving off the assets of a grant-making charity, most particularly through the loss of economies of scale and the duplication of operational costs. In this regard, Dr Lehtimaki stressed the atypical nature of the Grant and the default of CIFF's usual, careful procedure. Thirdly, information deficits and the presence of unknown quantities in the analysis, such as BWP's operational efficiency, dictated a precautionary approach.

121. Although Dr Lehtimaki adopts a position of studied neutrality, features of the parts of his evidence set out and summarised above have led me to conclude that it is perhaps more likely than not that, if he were required to vote on a members' resolution under section 217 of the Companies Act 2006, he would vote against the making of the Grant. I did not, however, see Dr Lehtimaki cross-examined, and no other party made that submission to me. I will, in those circumstances, not take any account of this suspicion in reaching my final conclusions in the case. But I thought nonetheless I should identify what might have been described by some who attended the entirety of the 4-day hearing as the "elephant in the room".

122. Before leaving the factors that weigh for and against making the Grant, I should deal with the submissions of Mr Vallat on behalf of HMRC as to the taxability of the payment representing the Grant. Sir Christopher's main concern was that the Grant would be taxed as a termination payment for Ms Cooper's loss of office under section 401 of the Income Tax (Earnings and Pensions) Act 2003 ("section 401"). On CIFF's application, HMRC granted clearance on 17th February 2017 that no such charge would arise. The clearance was, however, entirely dependent on the disclosure that had been made. One aspect of that disclosure was to the effect that the Grant, if made, would be approved by the court and not by the members of CIFF (see the letter from CIFF dated 1st December 2016 at paragraph 5.4.11).

123. Mr Vallat submitted that HMRC did not think that other tax charges would arise, but they reserved their position if the court decided either that the Grant had to be ratified by a vote of the members including Ms Cooper, or if it determined the payment was in fact a benefit to Ms Cooper within section 215 of the Companies Act 2006. In fact, the court has not determined in favour of either of these possibilities. I have determined that the Grant does *prima facie* require members' approval, but that only Dr Lehtimaki could, even in theory, vote on that resolution. I have made no determination as to whether the Grant would or would not be a benefit to Ms Cooper under section 215, even though it would be a "material benefit" to her within the particular provisions of clause 5.2 of the Memorandum.

124. Not surprisingly, Mr Vallat's oral submissions were suitably circumspect, but they were sufficient to persuade me that, despite the fact that HMRC might wish to re-open the clearance they have granted, they would be highly unlikely ultimately to determine that the Grant would be taxable. This is because Mr Vallat submitted that HMRC would not regard any intangible benefits that Ms Cooper might achieve by being the member or trustee of a charity with assets augmented by the Grant as being taxable benefits caught by section 401. There would be no value in Ms Cooper's membership of BWP, which has exclusively charitable objects. Mr Vallat said that it would create a difficult position for HMRC if the court put a monetary value on the benefit, but he rightly surmised that that did not seem likely. Indeed, I can say expressly that I have not determined that Ms Cooper will achieve any personal financial benefit from the making of the Grant, notwithstanding that I have accepted that she would have been prepared to forfeit other financial benefits to allow the Grant to be made. I should, however, record that, in submitting that an increase in status is not taxed, Mr Vallat asked that that statement should not be elevated into a general statement of principle.

125. Mr Vallat said expressly that the clearance would be rather less useful if the Grant were dependent on the approval of Dr Lehtimaki rather than the court, as one limb of

the clearance would be gone. In that situation, the clearance would have to be revisited, though unless Ms Cooper were to vote, he could not see how HMRC's analysis would be altered. Finally, Mr Vallat pointed out that, whilst company law covers connected companies as well as employees and families, revenue law does not. The company law concept of benefit may, therefore, be wider than the revenue law concept.

126. I now turn to how the court should exercise the surrendered discretion of the independent trustees of CIFF to approve or reject the making of the Grant,

Issue 7: Should the court approve the making of the Grant?

127. I do not think it is useful for me to set out again all the factors, for and against, to which the parties have directed the court's attention. Suffice it to say, however, that I have taken each and every one of those factors into account. Moreover, I have, as I have already said, paid close attention to all the evidence, even though every aspect of it is not mentioned in this judgment.

128. I would like also to record that I have not found the decision with which the court is faced an entirely straightforward one. Whilst pragmatically making the Grant would be more likely to resolve CIFF's managerial issues than not making it, it is not entirely clear why disposing of assets of US$360 million should be regarded as being in the best interests of CIFF. That said, I have resolved, perhaps counter-intuitively, that in the unique circumstances of what is an extremely unusual case, making the Grant is and will be in the best interests of CIFF. My main, but not my only, reasons for reaching this decision can be briefly summarised as follows:-

i) The April and July agreements were entered into in good faith by Sir Christopher and Ms Cooper and by the independent trustees of CIFF. It would be inappropriate to allow any of these parties to renege on such a deal unless there were strong reasons requiring the court to do so in the interests of CIFF and charity. I deprecate Sir Christopher's implicit submission that, because as part of the deal Ms Cooper had already resigned as a trustee, the court should seek to take advantage of that situation by refusing the Grant on the basis that the governance problems were anyway resolved. I acknowledge, of course, that trustees and the court may be forced to take tough decisions, but I am not sure that much has changed as to the pros and cons of the Grant in the time that has elapsed since April 2015.

ii) The April and July agreements, if carried into effect, will allow a further US$40 million to be secured for charitable purposes, and will enhance the value of the assets that will benefit from Ms Cooper's considerable talents as a charity manager in this field.

iii) The making of the Grant will, in fact, if this judgment is carried out, bring a conclusion to this incredibly hostile dispute and the governance problems that it has created for CIFF. It may be hoped that it will avoid further legal and other expenses being incurred, and equally importantly, allow the protagonists to return to devoting their efforts and talents to the charities they have founded

and to which they have so much to offer. It may be that there will be some additional costs incurred as a result of the grant being made as Dr Lehtimaki suggests, but I doubt they come anywhere near equating with the costs and disruptive effect of further litigation.

129. In stating these as my main reasons, I have taken into account the entirely compliant structure and objects of BWP and the likelihood that the Grant will be well and responsibly used for the benefit of charity if it is made.

130. I have considered the negative features of making the Grant, but do not consider that they outweigh the massive advantages of the factors I have mentioned. I acknowledge the unprecedented nature of the Grant for CIFF and also for charity generally, and the supposedly bad precedent that it sets. But it seems to me that exceptional situations demand exceptional solutions. I have had, in the course of this case, no basis to question the independence of mind of the independent trustees that reached the original decision to allow the Grant to go forward. I respect their good faith in adopting the solution that the Grant provides. I have also paid very careful attention to the independent submissions of the Attorney General supporting the Grant. It is his sole duty in this regard to protect the interests of charity. In my judgment, his approach in this case was entirely correct and appropriate. I do not accept that the making of the Grant will give rise to reputational damage for either CIFF or the charitable sector more broadly. It will draw a line under an unfortunate dispute.

131. Having then decided to approve the Grant, I return to issue 5 to consider what further approval is required from the Commission and Dr Lehtimaki, the only voting member of CIFF.

Issue 5: In any event, if the court approves the making of the Grant, does that abrogate the need for either (a) the Commission's written approval under clause 5.2.5 of CIFF's Memorandum and/or under section 201 of the Charities Act 2011, or (b) a members' resolution under section 217 of the Companies Act 2006?

132. This issue now resolves itself primarily into the question of whether Dr Lehtimaki is to be given the opportunity to take the final decision for or against the Grant by voting on CIFF's members' resolution under section 217 of the Companies Act 2006, notwithstanding (a) the matter having been referred to the court with the approval of the Commission, (b) the court having accepted the trustees' surrender of their jurisdiction, and (c) the court having approved the making of the Grant. Dr Lehtimaki has made it perfectly clear that he wishes to take that decision himself; he has said that he will take the court's judgment into account, but not that he would feel in any sense bound by it. It is true that there are other formal issues raised under this heading, but I see this as the main remaining substantive question.

133. The parties' competing positions on this issue are broadly as I have already set out above under the heading of "the court's jurisdiction over charities generally and charitable companies in particular". In addition, however, Mr Crow submitted that the Court's approach to this situation might depend where the court "came out on the scale" as to the desirability of making the Grant. He submitted that, if the court thought that reasonable fiduciaries might vote for or against the Grant, but the court

was 55% in favour of making it, it would not be possible to interfere with Dr Lehtimaki's free vote, but if the court thought that it was a "90% case" so that it would be verging on the improper not to approve the Grant, the situation might be different. Notwithstanding this somewhat mercurial approach, Mr Crow's main submission remained, in effect, that the court could not interfere in the members' resolution absent actual or threatened bad faith. The Companies Act split of functions between directors or trustees and members should be respected.

134. I should first explain my approach to Mr Crow's "scale". I made it clear in the course of the hearing that I would not be resolving any disputed questions of fact on this application; nor could I because this was a CPR Part 8 claim and there were no pleadings and no factual issues joined. Accordingly, whilst at various stages in the evidence and the hearing, allegations of bad faith have been alluded to, none has been put forward for decision. I am not, therefore, deciding and could not decide whether any of the trustees or members or former trustees or members of CIFF have in the past or are likely in the future to act in bad faith. Moreover, since the CPR Part 8 procedure has been adopted and signed up to by all the parties in order to seek the court's views on the proposed Grant, I would deprecate any future attempt to go back on that approach so as to allege and litigate allegations of bad faith in relation to the Grant.

135. For these reasons, it does not seem to me necessary or appropriate to say where I am on Mr Crow's "scale". I have made the clear decision that the Grant should be approved for the reasons I have sought already to give. It is of no help to say how strongly I feel about that decision. I am not saying that no reasonable trustee or fiduciary could disagree with my view, nor could I bearing in mind the way the matter was argued; nor, for the avoidance of doubt, am I saying that anyone who disagreed with my view would automatically be acting in bad faith. Again, that is not what this litigation was about.

136. I return then to the central question of the court's powers over the members of charitable companies limited by guarantee.

Do members of an exclusively charitable company limited by guarantee without a shareholding owe fiduciary duties?

137. The parties have, somewhat surprisingly, been almost unanimous in assuming, at least for the sake of argument, that members of CIFF would owe fiduciary duties to act in the best interests of CIFF and not to act under a conflict of interest in considering a section 217 resolution. In my judgment, however controversial that assumption may be, the parties were right to make it. I say this for several reasons.

138. The starting point is the legislation, which creates a regime that has been strengthened over time for the control of charitable entities, trusts and companies. Section 1 of the Charities Act 2011 defines a charity as an institution which is established for charitable purposes only and "falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities". Section 69 of the Charities Act 2011 provides that the Commission may by order exercise the same jurisdiction and powers as the High Court for purposes including the transfer of property or payment.

The protections alluded to in *Gaudiya Mission supra* are thus reflected in statute, making charities subject to the "constitutional protection of the Crown as *parens patriae*, acting through the Attorney-General, to the state supervision of the [Commission] and to the judicial supervision of the High Court".

139. Section 105 of the Charities Act 2011 then descends to detail in relation to the Commission's power to authorise dealings with charity property, providing first that the Commission can sanction any proposed transaction which appears to it to be expedient in the interests of the charity, whether or not it would otherwise be within the powers of the "charity trustees". Secondly, section 105 provides that any direction given by the Commission is binding on the "charity trustees" as if contained in the trusts of the charity. The "charity trustees" are defined in section 177 as meaning "the persons having the general control and management of the administration of the charity".

140. There was a debate in argument about whether "charity trustees" could include the members of a charitable company limited by guarantee, where the members' only powers were in relation to the control and management of the administration of the charity. Whilst that is the position here as the provisions of the Articles that I have cited above demonstrate, I do not think that those Articles envisage the members as being "charity trustees", not least because the **trustees** are expressly said in clause 3.1 of CIFF's Articles to fall into that category. Moreover, the member/trustee distinction is preserved in the Charities Act 2011 most obviously in the provisions of section 201, which refers specifically to the consent of the Commission being needed in addition to that of the members in respect of certain specified corporate actions regulated by the Companies Act 2006.

141. Mr Henderson and Mr Crow referred me to *Northern Counties Securities Ltd v. Jackson & Steeple Ltd* [1974] 1 WLR 1133, where Walton J at pages 1144-5 reiterated that, when a shareholder is voting for or against a particular resolution, he is voting as a person owing no fiduciary duty to the company and who is exercising his own right of property to vote as he thinks fit. But that was neither a charity case, nor a case where the company was limited by guarantee with no share capital. It is, I think, relatively clear that a member of a charitable company limited by guarantee without a share capital voting in the charity's general meeting is not a "person exercising his own right of property, to vote as he sees fit". Unlike the member of a trading company who has a proprietary interest in his shares, the member of the charitable company has powers that are all directed at aspects of the management and administration of the charity designed to achieve the charity's exclusively charitable objects. The most important power in such cases, as in this case, is the appointment of trustees to manage the charity's affairs.

142. The question of who is a fiduciary was addressed by Millett LJ in *Mothew v. Bristol & West Building Society* at page 18 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. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977 ed. p. 2), he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

143. The question was addressed in a similar fashion by Finn J in *Grimaldi v. Chameleon Mining NL (No 2)* [2012] FCAFC 6 as follows at paragraph 177:-

> "As to who is a 'fiduciary', while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar 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".

144. In my judgment, a member of a company limited by guarantee without a share capital with exclusively charitable objects is bound in to the regime now contained in the Charities Act 2011, the whole thrust of which is to ensure that the assets of the company are used for its exclusively charitable objects and for no other purpose. There are numerous provisions designed to prevent the trustees and members benefitting personally from the assets of the charity. Even on a winding up, the assets must go to other charitable purposes.

145. In these circumstances, I think Mr Mullen was right to submit that 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. CIFF is a charity with public interests only. Taking Finn J's *dictum*, the members of CIFF are people who assumed by their membership "a responsibility to [CIFF] as would thereby reasonably entitle [CIFF] to expect that [the members would] act in [CIFF's] interest to the exclusion of [the members'] own or a third party's interest". It is not necessary for the purpose of this case to decide in detail the nature and extent of the members' fiduciary duties, but I agree with the passages that I have referred to from the Commission's publication RS7 to the effect that, at least in the circumstances of this case, "members [of CIFF] have an obligation to use their rights and exercise their vote in the best interests of the charity for which they are a member". It would be contrary to the whole regime established by the increasingly prescriptive legislative regime reflected in the Charities Act 2011 if the member of a company such as CIFF could vote in his own interests or in a manner detrimental to the charitable objects of the company.

146. I turn then to what is perhaps the most important question in this case, namely whether, in the circumstances that now prevail, a vote of the remaining unconflicted member is necessary to approve the Grant, and, if it is, whether the court can or should direct Dr Lehtimaki as to how he should vote.

Is a vote under section 217 of the Companies Act 2006 now necessary, and, if so, can or should the court direct Dr Lehtimaki as to how he should vote?

147. Mr Morpuss argued strongly on behalf of Dr Lehtimaki that the *Christ's Hospital* case *supra* made it clear that the court could not make any order directing Dr Lehtimaki as to how he should vote on a members' resolution. In my judgment, however, that case is not directly applicable to the position of a modern charitable company, because Chitty J made it very clear that his decision was founded on the inability of the court to overrule the powers of the existing governing body that were founded in the Royal Charter established by a specific statute. As Chitty J said: "[t]o 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". There is no question here of the court overruling a statute. Section 217 of the Companies Act 2006 and section 201 of the Charities Act 2011 require the Grant to be approved by the Commission and by a members' resolution. The question is whether these approvals, or either of them, are necessary once the court approves the Grant, or whether the court should direct the remaining unconflicted member as to how he should vote on such a resolution. Those questions turn on the nature and effect of the court's approval of the Grant.

148. I have considered carefully the authorities cited above as to the nature of the court's jurisdiction over charities. I have no reason to doubt Slade J's conclusion in the *Liverpool and District Hospital* case *supra* that a company formed for charitable purposes is "in a position *analogous to that of a trustee* in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs". The question, as it seems to me, is what is the effect of a surrender by the directors of such a company of their discretion as to how they should deal with the charity's assets.

149. Section 69 of the Charities Act 2011 gives the Commission a jurisdiction to vest or transfer a charity's property and to require or entitle a person to make such a transfer or any payment. That jurisdiction is expressly stated to be concurrent to the court's jurisdiction. Moreover, section 105 of the Charities Act 2011 allows the Commission to authorise a transaction where it appears to it that it is in the interests of the charity, and it may make an order sanctioning the transaction "whether or not it would otherwise be within the powers exercisable by the charity trustees in the administration of the charity". The Commission decided, under section 70(8) of the Charities Act 2011, that it should not exercise its own jurisdiction to approve the Grant because of the contentious character and any special question of law or of fact which it might involve (see its letter dated 20th August 2015). Thereafter, however, the Commission made an order under section 115 of the Charities Act 2011 authorising CIFF to make this application to the court, and adjourned its decision under section 201 of the Charities Act 2011 as to whether it should give its prior consent to the passing of a resolution under section 217 of the Companies Act 2006 (see the Commission's letter dated 29th February 2016).

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 Lehtimaki's position as described to the court. Nonetheless, 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.

151. With that introduction, the question that faces the court is only problematic because of the possibility that Dr Lehtimaki may vote against the members' resolution to approve the Grant once the Commission has given its consent to it under section 201 of the Charities Act 2011 (if, as I shall assume for this purpose, it does). The issue, therefore, is whether the court should countenance a situation in which, after a reference by the Commission and after extensive and costly legal argument, the court and the Commission has approved a transaction, but a single member has effectively the power of veto to reject the court's and the Commission's decisions and to decline to give effect to the contemplated transaction.

152. I am mindful of the powerful arguments addressed to me based on the *Beloved Wilkes's Charity* case *supra* to the effect that, even if the member owes fiduciary duties, the court will not interfere with the exercise of a fiduciary's discretion in the absence of bad faith or his discretion being exercised on the wrong basis. But it seems to me that these arguments ignore the fundamental nature of the court's jurisdiction over charitable companies. The charitable company is, as I have said more than once, subject to the constitutional protection of the Crown as *parens patriae*, acting through the Attorney-General, to the state supervision of the Commission and to the judicial supervision of the High Court. It would be remarkable if the High Court, having reached a reasoned and considered decision as to the desirability of the Grant in the best interests of CIFF, had to defer to the eccentric, if good faith, decision made by a single member when all other members were conflicted. I say eccentric, because Dr Lehtimaki has made it abundantly clear that he is motivated entirely by an economic approach and regards himself as only acting in the best interests of unspecified beneficiaries of the charity, rather than by the correct legal principles that I have stated. It is anyway in my judgment questionable whether Dr Lehtimaki would be acting on a proper basis if he rejected the court's reasoned decision as to the appropriate course for CIFF to adopt.

153. Despite all this, Mr Crow's submission that the court simply cannot override the provisions of the Companies Act 2006 that are specifically applied to charitable companies by section 201 of the Charities Act 2011 remains a compelling one. He could have pointed to the numerous occasions in the Charities Act 2011 where the powers of the Commission are circumscribed by an embargo on authorising any act that is expressly prohibited by statute (see sections 105(8) and 85(3) by way of example). I have nonetheless concluded that it would be inappropriate for the court to defer to this most unfortunate situation. It is, in my judgment, too great a risk for the court to allow the final decision to be taken by Dr Lehtimaki without guidance from the court. If he decided against the Grant, there would no doubt be another massively expensive round of litigation which would be hugely to the detriment of the proper operation of both CIFF and, no doubt, BWP. Charity generally would also suffer. Finality is greatly to be desired and that can only be achieved, in the circumstances of

the court's existing decisions, if Dr Lehtimaki is required (if the Commission approves the Grant) also to approve it.

154. Leaving pragmatic grounds aside, the legal basis for my decision is, in my judgment, to be found in the particular circumstances of this case. 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. It is not a case of evaluating where on any scale the court's approval is located. The court has approved the Grant as being in the best interests of CIFF and charity in the exercise of its discretion and its decision must be respected. Moreover, the Commission has expressly approved the application to the court for an order under paragraph 10.2.7 of the Claim Form for "[s]uch … directions to the … Defendants or any of them, as the court shall think fit for the purpose of procuring (subject to the consent of the Charity Commission under s.201 Charities Act 2011) the passing of a resolution approving the payment of the Grant by the members of [CIFF] so as to satisfy the requirements of s.217 and/or s.218 Companies Act 2006 in relation to such payment". The Commission, therefore, contemplated that the court might make directions aimed at procuring the passing of any necessary section 217 resolution. For these reasons, I would propose to make such an order directing Dr Lehtimaki to vote in favour of the resolution to approve the Grant.

155. I should not leave this aspect of the matter without emphasising the specific nature of the decision I have reached, and the exceptional character of this case. I have looked at numerous charities' cases over three centuries and the present position has not arisen before. It may never arise again. The position might be different if there were numerous independent members of the company, or if the trustees of CIFF had not relinquished their discretion to the court. But here, the Commission and CIFF asked the court to decide and it has done so. The court is not overriding the provisions of the Companies Act 2006. It is simply determining that in the circumstances of this case, the interests of CIFF and of charity demand that the Grant is approved. For that reason, 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.

156. On issue 5, therefore, I will determine that the court's approval does not abrogate the need for either (a) the Commission's written approval under clause 5.2.5 of CIFF's Memorandum and under section 201 of the Charities Act 2011, or (b) a members' resolution under section 217 of the Companies Act 2006, but that Dr Lehtimaki

should, in the unusual circumstances of this case, be directed to vote in favour of such a members' resolution.

Conclusions

157. I can, therefore, summarise my conclusions as follows:-

i) This is a case in which the trustees of CIFF have, in the circumstances that have occurred, surrendered to the court their discretion in relation to the making of the Grant.

ii) The making of the Grant would confer a material benefit on Ms Cooper within the proper meaning of clause 5.2 of the Memorandum, so as to require the written approval of the Commission in advance.

iii) The making of the Grant will be a payment for loss of office within the meaning of section 215 of the Companies Act 2006 so as to require the approval of CIFF's members under section 217 of the Companies Act 2006, because it would be a payment made as consideration for and in connection with Ms Cooper's retirement from her office as a trustee of CIFF, and a payment to BWP, a person connected with Ms Cooper.

iv) Sir Christopher and Ms Cooper are deprived of the right to vote on a section 217 resolution as to the making of the Grant because they are contractually obliged not to do so.

v) The Grant is and will be in the best interests of CIFF primarily because it would be inappropriate to allow any of these parties to renege on the April and July agreements unless there were strong reasons requiring the court to do so in the interests of CIFF and charity. No such reasons exist. The April and July agreements will allow a further US$40 million to be secured for charitable purposes, and will allow Ms Cooper to devote her considerable talents to a charity with increased assets. The making of the Grant will bring a conclusion to this dispute and the governance problems that it has created for CIFF, and will avoid further legal and other expenses being incurred, and allow the protagonists to return to devoting their efforts and talents to charity.

vi) Subject to the consent of the Commission under section 201 of the Charities Act 2011 and under clause 5.2 of the Memorandum, the making of the Grant must be approved by the members of CIFF, of whom only Dr Lehtimaki is entitled to vote. Dr Lehtimaki will be directed by the court to vote in favour of any resolution of the members of CIFF approving the Grant under section 217 of the Companies Act 2006.

158. For the reasons, I have given, I will approve the Grant and make the orders necessary to reflect the terms of this judgment. I will hear counsel, if necessary, if the appropriate order cannot be agreed between them.