Charities – The Duties of Members

It has always been clear that a director of a company owes a fiduciary duty to act in the best interests of the company. A shareholder on the other hand has no such duty and, subject to some limits, can act entirely in their own interests in deciding how to vote. The right to vote is, according to a 1939 judgment, part of the property rights of owning a share and can "be enjoyed and exercised for the shareholder's personal advantage".

But what about the members of a charitable company? It seemed anomalous that although the directors of a charitable company owed a fiduciary duty to act in the best interests of the charity the members owed no duty to the charity and could vote in their own interests. Nevertheless, the law was unclear.

The inconsistency was highlighted when CIOs were introduced as a new legal form for charities. Section 220 Charities Act 2011 provided that "each member of the CIO must exercise the powers that the member has in that capacity in the way that the member decides, acting in good faith, would be most likely to further the purpose of the CIO".

Was the same test applicable to the members of a charitable company and, if so, what does "good faith" mean? Two recent cases have shed some light on it. In *Children's Investment Fund Foundation v Attorney General (2019)* ("CIFF") the Court of Appeal held that the duty of a member of a charitable company has the same as the duty of a member of a CIO set out in the Charities Act. A member of a charitable company is not in the same position as a shareholder in a for profit company because:

- A share in a company is property to which voting rights attach. A member of a charitable company does not own a share in the property of the charitable company.
- Membership of a charity is for the benefit of the charity, not the member, and members have undertaken a responsibility to the charity.

The test of good faith however is a subjective test. It is what the member decides "in good faith" is in the best interests of the charity and in the absence of compelling evidence of bad faith, the court will not intervene.

The first time that the question of "good faith" has subsequently been raised in a reported case is in *Re Ethiopian Orthodox Tewakedo Church St Mary of Debre Tsion,* a High Court decision reported on 10th June. The congregation of a church was split into two factions. In elections for a new governing body, one faction voted en

Tel: 0344 967 0793 | Email: info@LA-Law.com | www.lesteraldridge.com

bloc against any candidates who belonged to the other faction. It was argued that the candidates were well qualified and that the votes could not have been cast in good faith.

The court held that despite the en bloc voting, it was not possible to say that either side or its supporters did not in good faith subjectively believe that the views that they held on the relevant issues were the views most likely to further the purposes of the CIO/church. It was possible that members had voted out of blind obedience to one side or the other but there was no sufficient evidence that they did.

The Court of Appeal in CIFF suggested that it would be good practice for the chair of a meeting of the members of a charitable company to remind the members of their duty prior to any vote. It remains to be seen however what evidence would be sufficient to show that a member had not exercised a vote in what he or she in good faith was in the best interest of the charity. The decision of the Court of Appeal in CIFF has however been appealed to the Supreme Court so charities may soon receive further guidance on this vexed subject.

Contact our Charities & Social Enterprise team on 01202 786138.

Tel: 0344 967 0793 | Email: info@LA-Law.com | www.lesteraldridge.com