

## THE CHARITABLE COMPANY - A FURTHER INSIGHT Malcolm Leatherdale<sup>1</sup>

There is a quiet revolution taking place which will affect the way all charities, including charitable companies, are in future to be regulated. The 1992 Charities Act was virtually the last piece of legislation to slip through before the 1992 general election and the implications of this new Act are significant not only for charities in general but for charitable companies in particular. The new Act is an amending Act and therefore it should be appreciated that the Charities Act 1960 was not repealed in its entirety, but substantially amended and extended. The Charities Act 1993 consolidates both Acts.

It is not known how many charities<sup>2</sup>, let alone charitable companies, there are in existence because one of the defects under the old system was that the central register of charities kept by the Charity Commission was incomplete and certainly not up to date. This defect was recognised before the passing of the new Act and attempts have been made in the meantime to bring the information on the register up to date by putting it onto a database. Charities, including charitable companies, with an income of less than £1,000 a year will no longer have to register and those within that income category which have already registered will be removed. If, however, the income were to increase beyond £1,000 per year then application would have to be made to re-register the charity.

It may come as a surprise to many to learn that the estimated income of charities in the United Kingdom is something of the order of £17 billion per annum and in that sense charitable business constitutes a substantial part of economic activity.

The new Act draws on some aspects of companies legislation in creating the new regime under which trustees of charities, not just charitable companies, must operate. However, the purpose of this article is not to examine the position of trustees of charities generally, but to look specifically, although only in outline, at their role and responsibilities within the context of charitable companies. The Charity Commission have reported that the number of charities being set up as companies limited by guarantee is increasing. Charitable companies have a dual set of responsibilities both as charities and as companies and are therefore subject to both charity law and company law, and a likely consequence of this is that some conflict between the two may arise in the future.

---

<sup>1</sup> Malcolm Leatherdale, LLB (London), ACIS, Solicitor  
Partner in Shentons Solicitors, Winchester, Hampshire.  
Tel: 0962 844 544 Fax: 0962 844 501 .

<sup>2</sup> There are approximately 170,000 registered charities.

Charitable companies are of course already subject to the accounting requirements imposed by the Companies Acts and have to file their accounts with the Registrar of Companies in accordance with the regulations that apply to all companies depending on specified financial criteria<sup>3</sup>. The new Act expressly releases charitable companies from many of the accounting requirements imposed by the new Act because such companies will continue to fulfil their obligations under the Companies Acts instead<sup>4</sup>. Nevertheless, charitable companies will be subject to a number of the provisions introduced by the new Act. For example, a charitable company will in future have to prepare an annual report (the contents of which have yet to be specified) in addition to its accounts.<sup>5</sup> The obligation is likely to apply to all charities, including those charitable companies which at present do not have to deliver a directors' report to the Registrar of Companies although in practice many such companies do so.

The obligatory annual report must describe the activities of the charity for the previous year and also provide some other basic information about the charity and the individuals who administer it. The contents of the annual report will be the subject of regulations to be made by the Home Secretary in due course and, although a charitable company is obliged under company law to prepare a directors' report each year for its members, such companies will in due course have to prepare an annual report in the format to be prescribed and file such report with the Charity Commissioners.

Hitherto, charitable companies were not obliged to file their accounts with the Charity Commissioners but in future it will be necessary to do so, together with the annual report in the prescribed form, within 10 months of the end of the charitable company's financial year.<sup>6</sup> Failure to file may give rise to the prosecution of trustees (who are generally the same persons who are the directors of the company) in the same way as prosecutions can be brought against defaulting directors at the instigation of the Registrar of Companies.

From Spring 1994 all registered charities will be required to file an annual return with the Charity Commissioners.<sup>7</sup> The annual return will be in a form to be issued by the Commissioners and the return must be filed within 10 months of the end of the charity's financial year. In future the Charity Commissioners will make available for public inspection the annual reports and accounts of all registered charities and it will also be possible under the new Act for members of the public to obtain accounts direct from the charity concerned. There is an obligation to provide such accounts to a member of the public within 2 months of the date of the request. The charity can make a reasonable charge to cover the costs of meeting

---

<sup>3</sup> Companies Act 1985 ss.247 and 248.

<sup>4</sup> CA 1992 s.19(5) and 20(7).

<sup>5</sup> CA 1992 s.23.

<sup>6</sup> CA 1992 s.23(4).

<sup>7</sup> CA 1992 s.26.

the request, but if an applicant has paid the costs and yet the director-trustees fail to provide the copy of the accounts without a proper excuse, such failure could lead to the prosecution of the director-trustees of the charitable company.<sup>8</sup>

The new Act<sup>9</sup> specifies the categories of persons who shall be disqualified from being charity trustees or trustees for a charity, and these are persons who:

1. Have been convicted of any offence involving dishonesty or deception;
2. Have been adjudged bankrupt or sequestration of their estate has been awarded and (in either case) have not been discharged;
3. Have made a composition or arrangement with or granted a trust deed for their creditors and have not been discharged in respect of it;
4. Have been removed from the office of charity trustee or trustee for a charity by an order made by the Charity Commissioners or the Court on the grounds of any misconduct or mismanagement in the administration of a Charity;
5. Have been disqualified under the Company Directors Disqualification Act 1986 or are subject to an Order made under Section 429(2)(b) of the Insolvency Act 1986 (Failure to pay under a County Court Administration Order).

However, the Charity Commissioners do have a discretion and can waive an individual's liability to be disqualified so that he or she may continue to act as a trustee.

Very importantly, the new Act strengthens and enhances the Charity Commissioners' control and supervisory role by tightening the provisions in the 1960 Act relating to the general power to institute enquiries as well as the power to obtain information and documents. Section 6 of the new Act amends Section 6 of the 1960 Act accordingly. Section 8 of the new Act amends Section 20 of the 1960 Act by increasing the power of the Commissioners to act for the protection of charities, the consequences of which may lead, for example, to the suspension of any charity trustees, which would include director-trustees of charitable companies. The Charity Commissioners may also appoint a receiver or manager of a charity in certain circumstances. This means, therefore, that director-trustees are subject to this additional source of regulation and sanction quite separate from the provisions in the Companies Acts and the Insolvency legislation.

In case anyone is sceptical about the Charity Commissioners' resolve to take trustees to task for questionable behaviour, it should be borne in mind what happened to former trustees of War on Want. The Charity Commissioners considered that an advertisement in 1987 was too political and declared that the trustees, including those who were not present at the meeting which approved the

---

<sup>8</sup> CA 1992 s.27.

<sup>9</sup> CA 1992 s.45.

campaign, should repay the sum of £36,000 (the cost of the advertisement) plus interest. Altogether twenty seven individuals were implicated and each had to pay the sum of £2,000 at the rate of £25 per month. A salutary lesson and the more so because the Charity Commissioners now have the increased and additional powers under the new Act.

One of the problems which has caused difficulty in the past was that the Charity Commissioners had no power to require a charity to change its name, particularly where two charities had similar, or in some cases, the same names. Section 4 of the new Act gives the Commissioners such power and where a direction is given pursuant to that power and the charity is a company the direction shall be taken to require the name of the charitable company to be changed by resolution of the *directors* of the company. This brings the position of charities broadly into line with the system of control of company names introduced by the Companies Act 1981 which gave the Secretary of State the power to direct a company to change its name within twelve months of registration if the name was too like the name of another company already registered at the time of the registration.

Section 5 of the new Act also states that Section 380 of the Companies Act 1985 (Registration, etc., of Resolutions and Agreements) shall apply to any resolution passed by the directors in compliance with any such direction and where the name of such a charity is changed in compliance with any such direction the Registrar of Companies shall enter the new name on the Register of Companies in place of the former name and shall issue a Certificate of Incorporation altered to meet the circumstances of the case. It should be noted that these provisions override the normal procedure where a company wishes to change its name of its own volition which under the Companies Acts can only be done by the *members* passing a Special Resolution to that effect at a General Meeting.

Every registered charity with a gross income in excess of £5,000 per annum must ensure with effect from 1st January 1993 that the fact that it is a registered charity appears on all cheques as well as a number of official and other financial documents including any written or printed notice or advertisement which is intended to persuade a person to give money or property.<sup>10</sup> It is not necessary to state the registered number but there is the option to do so.

Any Secretary of or legal adviser to a charitable company should be mindful of the need to review periodically the contents of the company's Memorandum & Articles of Association.<sup>11</sup> The Memorandum & Articles of Association of many old established charitable companies may have not kept pace with changes in legislation and developments in practice and procedure. A charitable company, like any other company, must have members who can clearly be shown to be such for the purpose of passing resolutions at general meetings. In many cases the Articles of charitable companies contain archaic and anachronistic rules

---

<sup>10</sup> CA 1992 s.3.

<sup>11</sup> The Charity Commissioners have issued a draft model Memorandum and Articles of Association for a charitable company: GD, 1st January 1993.

prescribing and defining who are their members. Many of those associated with the charity in some way will regard themselves automatically as members of the charity but this would not make them members of the company if the correct procedure leading to membership has not been followed. Indeed, in many instances it would be quite inappropriate for all those associated with the charity to be members of the charitable company; the practical problems of holding general meetings with many hundreds or possibly thousands of members would be considerable.

The question therefore that must be considered is, can it be said with absolute certainty who are currently the charitable company's members? It does not follow that the director-trustees of a charitable company are members if they have not complied with the rules set out in the Articles of Association defining the means by which membership is attained. The trustees of a charitable company invariably comprise its directors and as such they are subject to all the rules under company law affecting directors. Director-trustees should be aware of their dual capacity and what the consequences may be if they are in breach of the many requirements imposed by company law and the penalties which can be levied.

The Articles of Association should set out clearly the division of responsibility between the director-trustees (who may well be described as the council or similar) and those responsible for day to day management, often described as the executive committee. Are the provisions in the Articles relating to the proceedings of general meetings sensible or should they be reviewed so as to reflect what actually happens in practice?

From 1st January 1993, any charitable company wishing to alter its objects or any provisions in its Memorandum or Articles of Association relating to the way in which the company's assets and property may be applied must first obtain the written consent of the Commissioners to the alterations.<sup>12</sup> This can be a protracted process. The consent of the Commissioners must be obtained before the special resolution of the members of the charitable company is passed and any purported alteration made without the Commissioners' prior written consent will not be valid. It is important to appreciate therefore that the consent of the Commissioners cannot be obtained retrospectively.

---

<sup>12</sup> CA 1992 s.40.