29 July 2020

PRESS SUMMARY

Lehtimäki and others (Respondents) v Cooper (Appellant)
[2020] UKSC 33
On appeal from: [2018] EWCA Civ 1605

JUSTICES: Lord Reed (President), Lord Wilson, Lord Briggs, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEAL

In 2002, Sir Christopher Hohn and Ms Jamie Cooper, who were then married, set up The Children's Investment Fund Foundation (UK) ("**CIFF**"), a charitable company limited by guarantee, helping children in developing countries. CIFF has a board of trustees (directors), and members. Governance issues emerged when their marriage broke down. The parties agreed that Ms Cooper should resign as a member and trustee of CIFF, and that CIFF should make a grant ("**the Grant**") of $360 million to Big Win Philanthropy ("**BWP**"), a new charity founded by Ms Cooper. Under the Companies Act 2006, s. 217 and the Charities Act 2011, s. 201, payments by a company in connection with the loss of office of a director (here Ms Cooper) must be approved by the members of the company and the Charity Commission. The Charity Commission authorised the trustees of CIFF to obtain the approval of the court. So, the trustees started proceedings in the name of CIFF and surrendered their discretion on the transaction to the court. As to s.217, the members of CIFF were Sir Christopher, Ms Cooper and Dr Lehtimäki. Only Dr Lehtimäki as the sole non-conflicted member, would vote on the resolution ("**the resolution**") to approve the Grant. Dr Lehtimäki (a party to the trustees' proceedings) did not surrender his discretion or make his voting intentions clear.

The Chancellor of the High Court (Sir Geoffrey Vos) determined that he should exercise the trustees' discretion by approving the Grant, which he held was in CIFF's best interests. He accepted that a reasonable fiduciary could disagree with this conclusion. As to the resolution, Dr Lehtimäki did not consider that he was bound to vote in favour, although throughout the proceedings it has been unclear what his actual voting intentions are. The Chancellor held that, as a member of CIFF, Dr Lehtimäki was also a fiduciary and that, once the court had approved the Grant, he would be in breach of his fiduciary duty if he voted against the resolution. He ordered Dr Lehtimäki to vote in favour of the resolution. The Court of Appeal (Gloster VP, Richards and Newey LJJ) agreed that Dr Lehtimäki was a fiduciary but held that he had not threatened to act contrary to his fiduciary duty, since he had stated that he intended to act in what he considered would promote CIFF's charitable purposes. The Court of Appeal discharged the order against Dr Lehtimäki.

Ms Cooper appeals to the Supreme Court and seeks an order requiring Dr Lehtimäki to vote in favour of the resolution. Dr Lehtimäki and Sir Christopher contend that: (1) no such order can be made as a member is not a fiduciary; (2) that, if he was, there is a principle of trust and charity law that the court does not generally intervene in the exercise of a fiduciary's discretion unless he is acting improperly or unreasonably ("**the non-intervention principle**"); and, (3) that Companies Act, s 217 precluded the court from giving Dr Lehtimäki the direction to vote.

JUDGMENT

The Supreme Court, Lord Reed (dubitante) concurring in the order, allows that appeal and makes an order requiring Dr Lehtimäki to vote in favour of the resolution for the following reasons:

Issue 1: Dr Lehtimäki is a fiduciary when acting as a member of CIFF

Lady Arden gives the sole judgment on this issue. The distinguishing characteristic of a fiduciary is that he owes a single-minded duty of loyalty in matters covered by his duty **[44]**. A member of a charitable company in principle owes this duty. A charitable company itself is analogous to a charitable trustee, in the sense that it holds its assets subject to a binding obligation to apply them for charitable purposes only. The practical objections to members being fiduciaries (with duties to make their own investigations before voting and so on) are met by the fact that trust law allows such duties to be shaped by contract and in this case the members' duties are shaped by the company's constitution, as well as relevant legislation. So, the duty is essentially a contract-and-statute-based model **[92].** The holding that a member is a fiduciary does not mean that there may not be matters on which a member can vote which only concern him personally and not the charity **[101]**.

Issue 2: The Court can direct Dr Lehtimäki to vote in favour of the resolution

Lord Briggs, with whom Lord Wilson and Lord Kitchin agree, considers that once a court has decided whether a transaction is in the charity's best interests, that question is finally resolved. The Chancellor was right that the member no longer has a free vote. The charity's fiduciaries (whether or not parties) were obliged to use their powers to ensure that the court's decision was implemented. It would be a plain breach of duty for a fiduciary not to follow that decision **[207-208].** If the decision was wrong, it could be appealed **[210]**. The concept that a fiduciary is entitled to form his own subjective judgment about a matter assumes that there are different conclusions about the matter which might reasonably be reached. This is no longer the case where a court has decided the issue **[218]**. If there was no such breach of duty, Lord Briggs agrees with Lady Arden that this case constitutes an exceptional case in which the non-intervention principle does not apply **[217]**.

Lady Arden holds that this care is a rare exception to the non-intervention principle because of the existential threat to CIFF caused by the deeply felt dissension between the two founders **[137]**. She rejects the majority's analysis. The order approving the Grant did not give jurisdiction to make an order directing Dr Lehtimäki to vote on the beach of duty basis **[180]**. Moreover, a member's duty is subjective: Dr Lehtimäki did not threaten to breach that duty. There are strong reasons of policy for the subjective approach to fiduciary duties and for the non-intervention principle, such as the policy of encouraging persons to act as fiduciaries **[187]**. The majority's analysis also means that members are automatically in breach of duty if they fail to implement a transaction approved by the court at the trustees' request, and this was contrary to the ethos of a membership charity, in which members who desire to do more than give may play a part in the direction of the charity. In addition, when the vote is taken, circumstances may have changed **[194]**.

Issue 3: Companies Act 2006, s 217 does not prevent the court from directing a member to vote

Lady Arden gives the sole judgment on this issue. Charities operate within a public law framework, where the court does not in general substitute its own judgment for that of the decisionmaker. However, s. 217's purpose is to ensure adequate disclosure to, and approval by, the company's members **[159]**, and the right to vote can be restricted by the company's constitution or by orders made under the 2006 Act. In these circumstances, where the matter is internal to the charitable company, the court can in an appropriate case direct one of its members how to vote **[165]**.