Case No: HC 2015 003105

Neutral Citation Number: [2016] EWHC 876 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 21 April 2016

IN THE MATTER OF THE CUP TRUST
AND IN THE MATTER OF SECTION 78(5) OF THE CHARITIES ACT 2011

Before :

MR. JUSTICE SNOWDEN

- -

Between :

THE CHARITY COMMISSION FOR ENGLAND AND WALES — **Claimant**

- and –

(1) MOUNTSTAR (PTC) LIMITED
(a private trust company incorporated under the laws of the British Virgin Islands)
(2) JONATHAN BURCHFIELD
(Joint Interim Manager of The Cup Trust)
(3) ANN PHILLIPS
(Joint Interim Manager of The Cup Trust)

Defendants

- -

Ben Jaffey (instructed by **Charity Commission**) for the **Claimant**
Keith Gordon (instructed by **Osborne Clarke LLP**) for the **First Defendant**
Jonathan Davey QC (instructed by **Stone King LLP**) for the **Second and Third Defendants**

Hearing date: 19 January 2016

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Judgment

MR. JUSTICE SNOWDEN :

1. This case concerns the use of a charity in tax avoidance. It is an application issued on 24 July 2015 by the Charity Commission for England and Wales ("the Charity Commission") pursuant to section 78(5)(b) of the Charities Act 2011 ("the Charities Act"). The Charity Commission seeks a direction from the court sanctioning a decision of the Second and Third Defendants ("the Interim Managers") who are solicitors and partners in Stone King LLP, and who were appointed joint interim managers of a charity known as "the Cup Trust" by orders of the Charity Commission on 26 April 2013 and 18 February 2014 respectively.

2. The Cup Trust was created pursuant to a declaration of trust dated 10 March 2009 and was registered as a charity on 7 April 2009. The First Defendant, ("Mountstar"), which is a BVI company, was the sole corporate trustee of the Cup Trust. It is common ground that in 2010 the Cup Trust was involved in a tax avoidance scheme ("the Scheme") devised and promoted by entities related to a Mr. Matthew Jenner ("Mr. Jenner") who was a tax adviser and a director of Mountstar until his resignation on 10 April 2014 and subsequent bankruptcy in March 2015.

3. The purpose of the Scheme was to enable UK taxpayers who were clients of a firm known as HNW Tax Advice Partners ("HNWTAP"), with which Mr. Jenner was associated, to claim higher rate tax relief on what were portrayed as charitable donations to the Cup Trust. HNWTAP charged its clients an up-front fee for participation in the Scheme, and will charge them a contingency fee if the Scheme successfully qualifies for higher rate tax relief.

4. In addition, the Cup Trust has made claims totalling about £46 million for Gift Aid on the "donations" from the taxpayers. If successful in recovering such Gift Aid, the Cup Trust will pay a contingency fee of about £6.3 million to a partnership called "Harry Associates" that has been acknowledged by Mr. Jenner to be a vehicle for the payment of fees to independent financial advisers who introduced the participant taxpayers to HNWTAP, and to others connected with the Scheme.

5. Those Gift Aid claims have been rejected by HMRC. The decision by the Interim Managers for which the Charity Commission seeks the sanction of the court is to discontinue the Cup Trust's appeal to the First Tier Tribunal (Tax) (the "FTT(T)") against HMRC's rejection of its claims. The Interim Managers have been advised by leading counsel that the Cup Trust's prospects for a successful appeal are "very slim indeed, or negligible", and that the terms of an offer by Mountstar to fund the appeal are inadequate.

6. Mountstar, now acting by its sole remaining director, Mr. Anthony Mehigan ("Mr. Mehigan"), disputes those propositions and has submitted revised funding proposals. It contends that the Cup Trust's appeal should not be discontinued by the Interim Managers, but should proceed with funding provided by Mr. Mehigan, leaving it to HMRC to apply to strike out the appeal or determine it summarily if it considers the appeal is hopeless.

<u>The Scheme</u>

7. The tax avoidance Scheme devised by Mr. Jenner had a number of stages. In outline,

   i) the Cup Trust borrowed money interest-free for a day from a Mr. McCulloch, who was an associate of Mr. Jenner;

   ii) the Cup Trust used the borrowed money to purchase gilts at market value from another trust ("the VL settlement");

   iii) the Cup Trust then sold the gilts at a nominal value (0.01% of full value) to an intermediary, a Mr. Clark;

   iv) Mr. Clark then sold the gilts on to a high-net-worth individual UK-based taxpayer at the same nominal value;

   v) the taxpayer then sold the gilts back to the VL settlement at full market value;

   vi) the taxpayer then "donated" the proceeds of the sale of the gilts plus a nominal sum (0.02% of the full value) to the Cup Trust;

   vii) the Cup Trust then used the "donation" to repay the original loan from Mr. McCulloch; and

   viii) the Cup Trust held a call option over the gilts which it could exercise if for any reason it did not receive a matching donation from the taxpayer that would compensate it for the sale at an undervalue.

8. All of the steps set out above were transacted utilising a trustee, which held the funds in its bank account and also held legal title to the gilts on bare trusts for the relevant parties at all times. The sales were all effected by transfers of beneficial ownership of the gilts and monies between the bare trusts, each such transfer being executed by Mr. Jenner on behalf of a company acting as common attorney for all of the parties. This enabled the entire sequence of steps to be executed on the same day, virtually simultaneously, and repeated many times over the course of a day. The entire process described above was repeated 826 times in ten rounds between 30 January 2010 and 28 November 2010, and involved 300-400 taxpayers. The total value of the "donations" made by the taxpayers to the Cup Trust was some £176 million. Each of the taxpayers then claimed higher rate tax relief on their "donations" (totalling some £55 million) and the Cup Trust claimed Gift Aid (totalling some £46 million).

9. Net income of £176 million would have made the Cup Trust one of the larger charities in England and Wales. However, the reality was that the transactions were entirely circular, with almost all of the money and all of the gilts ending up where they started. The only monies retained by the Cup Trust at the end of the Scheme were the nominal payments made by the taxpayers. Those sums totalled about £155,000 (i.e. under 0.1% of the £176 million turnover).

10. The intended effect of the Scheme was subsequently summarised by the First Tier Tribunal (Charity) (the "FTT(C)") in a judgment dismissing a challenge by Mountstar to the appointment of the Interim Managers: see Mountstar (PTC) Limited v. The Charity Commission for England and Wales [2013] CA/2013/0001, 0003,

> "If successful the [Cup Trust] will receive some £46 million gift aid from HMRC whilst the donors' higher rate tax relief totals some £55 million. That contrasts with the more conventional gift aid arrangement where the donors give £176 million which the [Cup Trust] retains and then claims gift aid (£46 million) generating total funds of £222 million for the [Cup Trust]. The donors receive their higher rate tax relief of £55 million to offset their original donations of £176 million, leaving them £121 million out of pocket. Thus, if successful, the £155,000 of actual cash provided to and retained by the [Cup Trust] generates £46 million gift aid and £55 million tax relief for the donors at a total cost of £101 million to HMRC."

11. Before its implementation, the Scheme was the subject of a written opinion obtained from Mr. Rex Bretten QC dated 7 January 2010. Mr. Bretten concluded that the Scheme was a tax avoidance scheme and would undoubtedly be challenged by HMRC. However, he advised that provided that the arrangements were implemented as envisaged, he was of the view that it was more than likely that they ought to succeed in securing higher rate tax relief for participants in the Scheme.

12. The Scheme was notified to HMRC under the Disclosure of Tax Avoidance Scheme rules. HMRC published a notice to taxpayers dated 29 March 2010 warning that (in its view) the Scheme was ineffective:

> "Spotlight 9: Gift Aid with no real gift
>
> An avoidance scheme exploiting the Gift Aid provisions has recently been disclosed to HMRC. The scheme seeks to exploit the rules which enable a charity to claim a repayment of tax at the basic rate on a qualifying donation by an individual. The individual may claim relief for the donation on the difference between the higher and basic rates of tax.
>
> The scheme depends upon a circular series of payments. It starts with the charity purchasing, say, gilts of £100,000 which pass through a third party to an individual taxpayer for perhaps £10. The taxpayer is expected to make a sale for £100,000 and pass the money to the charity. There is an option that ensures the gilts will be returned to the charity if it does not receive a cash gift of £100,000 within one or two days.
>
> HMRC do not accept that the charity is entitled to a repayment of tax or that Gift Aid relief is due to the individual. In HMRC's view a gift has not been made to the charity as it is no better off than before entering the arrangements. Therefore Gift Aid is not due.
>
> HMRC will challenge the reliefs claimed in any instances where this scheme has been used and will litigate where appropriate."

13. Following implementation of the Scheme, the Cup Trust made its claims for £46 million Gift Aid. In October 2011 HMRC indicated that payment of Gift Aid would be withheld pending completion of its inquiries and in 2012 HMRC served notice of a formal inquiry on Mountstar relating to the Gift Aid claims. In default of receipt of requested information, HMRC also served a notice to produce documents in December 2012.

The Appointment of the Interim Managers

14. The fact that the Cup Trust had been registered as a charity and had been involved in tax avoidance proved controversial. In March 2010, following receipt of information from HMRC, the Charity Commission opened a non-statutory investigation into the Cup Trust. Almost two years later, on 7 March 2012, the Charity Commission informed Mountstar that it had closed its investigation. Having taken counsel's advice, it apparently took the view that the continued registration of the Cup Trust could not be challenged because (according to Mr. Jenner) it had been established for charitable purposes before the Scheme was known about. The Charity Commission also apparently took the view that the tax effectiveness of the Scheme was for HMRC and not the Charity Commission to determine; and how to raise funds was for Mountstar, as trustee, and not for the Charity Commission, to decide.

15. On about 31 January 2013, *The Times* newspaper and others published articles which were highly critical of HMRC and the Charity Commission, describing the Scheme as "a massive tax avoidance scam" and suggesting that HMRC and the Charity Commission were not "up to the job" of policing charity tax avoidance. Further public scrutiny continued, including an inquiry by the House of Commons Public Accounts Committee, which held a hearing in March 2013 at which the Chief Executive of HMRC and the Chair of the Charity Commission gave evidence. The Committee issued a report on 4 June 2013, the general tenor of which is apparent from the opening summary,

> "The Charity Commission (the Commission) registered the Cup Trust (the Trust) as a charity in April 2009, with a company called Mountstar - based in the British Virgin Islands - as its only trustee. Although the Trust generated 'income' of £176 million, only £55,000 has been given to charitable causes, and the Cup Trust claimed Gift Aid of £46 million. Despite its declared charitable aims, it is clear that the Trust was set up as a tax avoidance scheme by people known to be in the business of tax avoidance.
>
> The Trust does not meet the public expectations of a charity and it is unacceptable that the Commission has not been able to put a stop to this abuse of charitable status. In the first instance, it is unacceptable that the Cup Trust was registered and that insufficient due diligence took place to check that there was a clear public benefit to its purpose. From the time when the Trust was first registered as a charity, there were clear signals that should have prompted an investigation by the Commission. Elementary checks with HMRC could have alerted the Commission to the true purpose of the Trust and its trustee. By

> the Commission's own admission, the continued registration of the Trust has been disastrous for the reputation of the Commission and the charity sector."

16. The result of the publicity surrounding the affairs of the Cup Trust was the opening of a formal inquiry into the Cup Trust by the Charity Commission on 12 April 2013 pursuant to section 46 of the Charities Act. This in turn led to the appointment by the Charity Commission of Mr. Burchfield as an interim manager in respect of the Cup Trust on 26 April 2013 pursuant to section 76(3)(g) of the Charities Act. The order appointing him as Interim Manager included the following provisions,

> "2. … the interim manager shall have all the powers and duties of the trustee of the Charity to the exclusion of the trustee of the Charity with effect from the date of this Order.
>
> 4. … the interim manager shall, without prejudice to the generality of the functions set out in paragraph 2, discharge the specific functions set out in the schedule hereto and such other specific functions as the Commission may from time to time by further Order determine.
>
> SCHEDULE
>
> The functions of the interim manager shall be:
>
> 1. To take over the management and administration of the Charity and its property and discharge the functions of the trustee of the Charity to the exclusion of the trustee of the Charity and to take any steps necessary to secure and take control of the property of the Charity with effect from the date of this Order. In particular to:
>
>   - assume responsibility for handling the Charity's claims for gift aid with HMRC arising from the Charity's participation in the financial transactions involving the sale of gilts between January and December 2010 ("the Scheme"), and reply to and provide full answers to HMRC's requests for information in a timely fashion, including outstanding requests upon which penalties have been levied against the Charity by HMRC;
>
>   - examine the Charity's options to bring its gift aid claims to resolution, including - if this would be in the best interests of the Charity - options for withdrawal and novation of any future benefit of any claim;"

Similar provisions appeared in the subsequent appointment of Mrs. Phillips as joint Interim Manager in February 2014.

17. As indicated above, on 31 May 2013, Mountstar challenged the appointment of Mr. Burchfield as Interim Manager in an application to the FTT(C). That challenge was

emphatically rejected by the FTT(C) in a lengthy written decision given on 17 October 2013.

18. The decision of the FTT(C) concentrated upon the justification for the view of the Charity Commission that the appointment of the Interim Manager was required to protect the interests of the Cup Trust because of its involvement in the Scheme in circumstances in which (i) there had been an actual or potential conflict between the fiduciary duties which Mr. Jenner owed as director of the trustee of the Cup Trust on the one hand, and his role in relation to HNWTAP and its client taxpayers on the other; (ii) there were similar actual or potential conflicts of interest caused by the various fee arrangements to which HNWTAP and Harry Associates were parties; and (iii) there had been mismanagement of the affairs of the Cup Trust due to the lack of any effective due diligence or independent decision-making by the two other directors of Mountstar (Mr. Mehigan and a Mr. Stone) when the Cup Trust became involved in the Scheme.

19. In summary, the FTT(C) concluded that there had been and were many serious conflicts of interest in Mr. Jenner's and HNWTAP's involvement in the Scheme and in Mr. Jenner's involvement as a director of Mountstar. It also found that there had been serious mismanagement of the affairs of the Cup Trust by Mr. Mehigan and Mr. Stone in failing to require answers to basic questions from Mr. Jenner, and in failing to make any of the inquiries that an ordinary and prudent man of business would have made when agreeing that the Cup Trust should become involved in the Scheme.

20. The FTT(C) also considered the previous business relationship between Mr. Jenner and Mr. Mehigan, which went back to 2005 and included their joint participation in a number of companies and other entities including NT Tax Adviser Limited which marketed various tax avoidance schemes. Apart from being roundly critical of Mr. Mehigan's mismanagement of the affairs of the Cup Trust, the FTT(C) also indicated that Mr. Mehigan should have questioned whether his own long-term association with Mr. Jenner in the promotion of tax avoidance schemes and other business meant that he could not properly discharge his fiduciary duties to Mountstar to investigate rigorously the Scheme proposals and Mr. Jenner's involvement in them.

21. Turning to the justification for the appointment (and continued appointment) of the Interim Managers, the gist of the FTT(C)'s decision appears from the following paragraphs,

> "228. The Charity's present property consists of its reputation, its right to pursue the gift aid claims and its right (if any) to sue Mr. Jenner and HNWTAP to disgorge them of any fees or benefits received and any contingent fees payable if the gift aid claims succeed.
>
> 229. For reasons which by now will be clear, Mountstar is unable or unwilling by its present directors to properly discharge its duties as charity trustee. On the basis of the evidence before us, all roads lead to Mr. Jenner. It is he who advises and coordinates the donors' claim and makes all of the decisions in relation to the Charity's gift aid claims. It is he who controls or is able to sufficiently influence each of the entities

historically and presently involved in the Scheme. Mr. Stones has resigned and there is a risk that Mr. Mehigan is at least potentially conflicted by his personal history or relationship with Mr Jenner.

230. From his evidence before us, Mr. Jenner is either unwilling or unable to fully and frankly identify the manifold and manifest conflicts of interest inherent in the operation of the Scheme he constructed, which in substance rules him out of any involvement as director of Mountstar so long as it is charity trustee. Which leaves Mr. Mehigan who evidently is so dis-engaged from and disinterested in the interests and management of the Charity that he has neither given evidence nor, so far as we are aware, attended court.

231. We observe here that it has been most unhelpful that Mountstar has chosen to rely upon the apparently only conflicted director, Mr. Jenner, to handle these proceedings and give evidence on its behalf. This has put the Tribunal in the somewhat odd position of only hearing evidence from the conflicted director who simply could not shed light upon how the other directors have made their decisions. Whilst Mr. Mehigan and Mr. Stones could not have anticipated the questioning relating to Harry Associates, it would have been very helpful to hear their evidence in relation to the general issue of conflicts of interest and also the HMRC and blank cheques issues.

232. There is not a commonality of interest between the donors and the Charity except on the superficial level of both benefiting if the Scheme succeeds. Private donors can act as they want – prudently, recklessly, hands-on, hands-off, leaving the management of their affairs to others, influenced or not influenced by another, or otherwise. The Charity can only act consistent with the standards of an ordinary prudent man of business, independent of the influence of anyone interested in the transaction (Mr. Jenner).

233. Having adopted the Scheme and now made the gift aid claims, the Charity has to consider whether to press those claims given that HMRC has challenged them and how to co-operate with HMRC. Whether to pursue the claims and how to handle requests from HMRC for information and also how to deal with inquiries from the press and possibly other regulatory bodies will impact on its reputation, a key asset of any charity. At some stage it may need to consider whether to sue Mr. Jenner/HNWTAP for disgorgement of the benefits already received. Self-evidently, Mountstar at any rate with its present directors can do none of this.

> 234. For those reasons and pending the outcome of the statutory investigation, it in our judgment is both necessary and desirable to appoint an Interim Manager to protect the property of the Charity."

HMRC's rejection of the Gift Aid claims and the appeal

22. As indicated, the Cup Trust's Gift Aid claims were rejected by HMRC in December 2013. In short, HMRC contended that the payments by the taxpayers did not amount to a qualifying donation for the purposes of Gift Aid because they failed to satisfy the requirements set out in section 416 of the Income Tax Act 2007.

23. Following the mandate in his appointment to examine the Cup Trust's options to bring its Gift Aid claims to resolution, in August 2013 the Interim Manager had taken initial advice in consultation from leading counsel specialising in tax matters (Mr. Michael Furness QC). That initial advice was that the likelihood of success of the Gift Aid claims was negligible. It was also apparent that the Cup Trust did not have sufficient funds to pursue an appeal. In light of this, the Interim Manager produced a report as to his options and indicated that he was minded to recommend that the Cup Trust not pursue an appeal against HMRC's rejection of the Gift Aid claims.

24. However, in February 2014 Mountstar obtained partial permission to appeal against the FTT(C)'s decision regarding the appointment of the Interim Manager, and by a letter dated 10 March 2014 Mountstar objected to the Interim Managers abandoning the Gift Aid claims pending determination of its appeal. In the interim, Mountstar offered to indemnify the Interim Managers in relation to the costs of instructing counsel to challenge HMRC's refusal of the Gift Aid claims. That offer, was, however, subject to a number of conditions, including the instruction of named counsel of Mountstar's choosing.

25. The Interim Managers then sought an indication from the Charity Commission whether it would be prepared to sanction the discontinuation of the Gift Aid claims pursuant to its power under section 105 of the Charities Act. The Charity Commission indicated that in light of the likelihood of a challenge from Mountstar, it would not exercise its power under section 105, but instead proposed that the matter should be "dealt with in the neutral forum of a court" under section 78(5)(b) of the Charities Act. In the interim the Commission recommended that a protective appeal be filed with the FTT(T). Such an appeal was duly filed by the Interim Managers on behalf of the Cup Trust on 8 May 2014, and that appeal was then stayed by the FTT(T) pending a decision relating to the steps to be taken by the Interim Managers concerning the appeal.

26. Thereafter the Interim Managers considered the position again at a meeting on 6 August 2014. The Interim Managers considered the background and noted that at least in theory the Cup Trust could benefit to the tune of £46 million if the Gift Aid claims were successful, and that this very large sum of money could be put to good charitable purposes. They also appreciated that "it would be galling" if the Cup Trust were not to pursue its claims, only to find that ultimately the taxpayers succeeded in proving their claims for tax relief as a consequence of the Scheme.

27. The Interim Managers then went on to consider at some length whether they had power to abandon the Gift Aid claims; the advice received from Mr. Furness QC that the claims had a "negligible" chance of success; the likely costs of appealing HMRC's rejection of the claims (which they assessed could amount to hundreds of thousands of pounds, as against the Cup Trust's funds in hand of about £20,000); Mountstar's offer to indemnify the Cup Trust as to the costs of counsel to pursue an appeal; and the possibility of novating or assigning the Gift Aid claims to another charity. Taking all the points together the Interim Managers resolved, subject to receiving the sanction of the court, that it would not be in the interests of the Cup Trust to continue the appeal and that it should be discontinued.

28. At about the same time in August 2014, Mountstar withdrew its appeal against the decision of the FTT(C). Correspondence then ensued between the Charity Commission and solicitors acting for Mountstar, in which the Charity Commission indicated that in light of this change of circumstances it was considering again whether to exercise its own powers under sections 105 and 110 of the Charities Act to give sanction or advice to the Interim Managers as regards the withdrawal of the Gift Aid appeal. This prompted an objection from Mountstar that the matter should be referred to the court and a reiteration of the offer by Mountstar to underwrite the costs of any appeal. Mountstar's solicitors asserted that this meant that there would be no downside to the Cup Trust in pursuing the appeal, and that considerable funds would be made available to it if the appeal succeeded, which could be used for charitable purposes.

The Interim Managers obtain written advice from Michael Furness QC

29. On 27 January 2015, Michael Furness QC advised in writing confirming his previous advice that had been given in conference. He also dealt with Rex Bretten QC's opinion, some arguments as to the effectiveness of the Scheme that had been advanced by Mountstar in a letter dated 14 January 2014, and a number of authorities including Cotter v HMRC [2013] UKSC 69 and Ferguson v HMRC [2014] UKFTT 433 (TC). Mr. Furness also considered the options open to the Interim Managers and the Charity Commission concerning the pursuit of the Gift Aid claims. Since Mr. Furness's opinion is central to the decision of the Interim Managers that I am being asked to sanction, I need to spend some time summarising its contents.

30. As to the basic question of the merits of the Cup Trust's claim to Gift Aid, Mr. Furness advised,

> "I remain of the view that the basic obstacle in the way of its success is the requirement in ITA 2007 section 414 that the taxpayer makes a gift to the charity, which (by section 416(2)) must comprise a sum of money. Where the transaction which is said to trigger a relief forms part of a series of pre-ordained transactions the legislation has to be applied realistically having regard to the series of transactions as a whole. When one looks at the series of transactions as a whole, starting with the loan to the charity, and ending with the repayment of the loan, and asks of each taxpayer participant whether they have made a cash gift to the charity in the amount claimed, the answer has to be "no". The only cash which the charity has acquired from the taxpayer

> is the tiny "turn" on the transaction which is built into the scheme. That is the most that can be said to have been given. The vast bulk of the gift is simply money which is circulated from the charity to the taxpayer and back again. Put another way, it is not possible on any sensible use of language to say that A has given £1 million to B, if at the conclusion of the transaction A is no worse off, and B is no better off than before they started.
>
> … This is such an artificial and contrived scheme that no Tribunal or court is going to be willing to declare it a success unless compelled to do so by the prescriptive language of the legislation. This is particularly so due to the fact that the scheme is abusing a relief intended to stimulate genuine charitable giving. In fact, as HMRC's analysis shows, there are a range of reasons which a judge might use to do down the scheme over and above the basic argument which I favour…"

31. Mr. Furness concluded,

> "I therefore remain of the view that the prospects of success for the charity's appeal are very slim indeed, or negligible. One should never rule out an unexpected result from litigation, and it is always possible that a judge would think my take on the basic merits of the scheme is wholly wrong and that the legislation does indeed permit taxpayers and charities to claim gift aid in this way. But I very much doubt it."

32. Mr. Furness also considered whether, despite the very slim prospects of success, it would nevertheless be in the best interests of the Cup Trust to appeal.

33. He advised, first, that the Cup Trust had such a poor reputation that it was unlikely to suffer much relevant additional reputational damage by an appeal. Secondly, he considered the likely exposure for the Cup Trust's own costs of pursuing an appeal would be a minimum of £50,000 for representation at the first stage of the appeal process and £30,000 at each stage thereafter, together with exposure to adverse costs orders in favour of HMRC. On the assumption that HMRC would be motivated to take the matter to the Supreme Court, Mr. Furness indicated that the Cup Trust would therefore be looking at a total costs exposure in the region of £200,000.

34. Mr. Furness indicated that from a purely commercial perspective, the large Gift Aid sum that might be recovered (£46m) compared with the likely costs (£200,000) might make an appeal seem "a good bet, even though the odds are very long". However, he continued,

> "Although a commercial organisation with money to spare might think the claim "worth a punt", charity trustees, with their duty to apply their assets prudently, could legitimately consider it inappropriate to put at risk a substantial amount of charity money on what is really no more than speculation at long odds.

> Of course in the present case the considerations aired in the previous paragraph are academic, because this charity does not have £200,000 to spend on the litigation - its assets total only £20,000. This means that if the appeal is to be pursued it must be financed by a third party."

35. Mr. Furness then considered and dismissed the possibility of commercial third party funding being available given his pessimistic advice as to the prospects of the appeal, and then turned to Mountstar's offer to fund an appeal. He concluded that Mountstar's offer was inadequate because it only offered to pay for counsel; that the likelihood was that Mountstar would insist upon using the same counsel as would be instructed for appeals that had been launched by the donor taxpayers against HMRC's refusal to grant them tax relief in circumstances in which the interests of the donors and the Cup Trust might not coincide; that there was no indication of any willingness to extend the costs indemnity beyond the hearing in the FTT(T); there was no offer to cover the fees of the Interim Managers; and no offer of an indemnity against a potential adverse costs order if the appeal failed in the higher courts.

36. Mr. Furness indicated in his opinion that any satisfactory offer of funding would have to include the following terms and conditions:

    i) that the Interim Managers must be free to instruct solicitors and counsel of their choice;

    ii) that the Interim Managers must have complete freedom to deal with HMRC and pursue or discontinue the Gift Aid claim as they saw fit;

    iii) that funding would have to be available for so long as the litigation continued;

    iv) that funding would have to cover the fees of the Interim Managers themselves;

    v) that an indemnity would have to be provided against any adverse costs orders; and

    vi) that each of the above commitments should be secured on liquid assets in the UK sufficient to cover the maximum liability that might be incurred.

37. Mr. Furness explained that the need for independence from Mountstar in the Cup Trust's dealings with HMRC was important, because Mountstar's and the Cup Trust's interests might not coincide, and the Interim Managers might consider Mountstar's litigation tactics inappropriate. He indicated that these considerations were of particular importance because the FTT(C) had considered that the existence of conflicts of interest was an important reason in support of the Charity Commission's decision to appoint the Interim Managers in the first place.

38. Mr. Furness's view was also that funding would need to extend for the entire length of proceedings, including any appeals, on the basis that even if the Cup Trust were to win at the FTT(T) stage, there would be an inevitable appeal by HMRC to the Upper Tribunal. He suggested that if the Cup Trust did not have funding for the Upper

Tribunal and an indemnity against any adverse costs for that stage, it would then have to concede the appeal, rendering its participation in the FTT(T) hearing pointless.

39. Mr. Furness concluded, however, that if Mountstar were to agree to the terms and conditions that he had outlined, the decision whether to appeal would become "much more difficult". He advised,

> "In these circumstances the only disadvantage to the charity of continuing with the appeal is likely to be some further loss of reputation but, for the reasons given above, it is hard to see why, from the charity's point of view that should outweigh the risk-free chance, albeit a remote one, of acquiring a very large amount of cash with which to pursue its charitable work. At this point the real argument against pursuing the appeal, it seems to me, is the potential damage it would inflict on the charitable sector as a whole. So the question becomes whether it is legitimate either for the Interim Managers, or for the Charity Commission in giving them advice, to take account of these wider considerations when taking a decision in relation to this particular charity."

40. Mr. Furness then advised that so far as he was aware, there was no authority on this point. He indicated that when it came to taking a decision of this sort, he thought that any charity trustee would be entitled to say that his priority had to be the interests of his own charity, and that it was the Charity Commission which had overall responsibility for the well-being of the charity sector as a whole. If such circumstances arose, Mr. Furness advised that a trustee would be well advised to lay the problem before the Charity Commission and ask for advice under section 110 of the Charities Act as to how to proceed. He further expressed his own view that the Charity Commission should be able to take into account its function of increasing public trust and confidence when giving such advice to an individual trustee. He concluded, however, that because this was a novel issue, if the situation arose, the Charity Commission should place the matter before the court under section 78(5)(b) of the Charities Act for the court's directions.

41. Mr. Furness concluded,

> "In my opinion, if the position is that the charity is simply unable to finance the cost of an appeal, including as many onward appeals as it may take to win, then the decision not to pursue the appeal is relatively straightforward. Because it is a very substantial decision having regard to the amount at stake, the Interim Managers would be entitled to expect to take the decision on the basis of Charity Commission advice given under section 110. If there were thought to be any doubt about whether they have power to abandon the appeal, that could be dealt with by an authorisation under section 105. Before getting to that point, it will be necessary for the Interim Managers to satisfy themselves (i) that commercial funding … will not be available and (ii) that Mountstar are not prepared to

> make available the sort of comprehensive funding package I have suggested.
>
> If, contrary to my expectations, it does prove possible for the charity to undertake the appeal with full cover for its costs, and potential cost liabilities, then the Commission may decide to advise the Interim Managers to pursue the appeal in which case they will have to do that. If the Commission decides that it wishes to advise the Interim Managers against appealing, notwithstanding that it appears to be the in the interests of the charity to do so, then I think the matter should be referred to the court for directions."

The question of funding is pursued with Mountstar

42. Following receipt of Mr. Furness's advice, on 19 February 2015 the Interim Managers wrote to Mountstar inviting it to agree to the funding conditions in Mr. Furness's opinion. Mountstar's solicitors responded on 5 March 2015 indicating that "in principle [Mountstar] might be willing" to do so, but stating that it wished to nominate the counsel to be used, and to have an input into the instructions to be given.

43. The Interim Managers replied on 27 April 2015 rejecting Mountstar's counter-proposals. On 6 May 2015 they wrote to the Charity Commission requesting the Commission's or the court's sanction of their proposed decision to withdraw the Gift Aid appeal. That letter was accompanied by a letter from other solicitors (Mishcon de Reya) which indicated that given Mr. Furness's opinion, the firm would not be willing to act in relation to the appeal on a conditional fee agreement basis. The letter also expressed the view that the total costs of taking the case forward (including adverse costs) could be substantially in excess of Mr. Furness's estimate (i.e. in the region of £800,000).

The Charity Commission's Application

44. The Charity Commission's application was issued on 24 July 2015, supported by evidence from Mr. Steve Law, head of the Commission's investigations team. The evidence in response on behalf of Mountstar came from Mr. Mehigan.

45. Mr. Mehigan accepted that the Cup Trust "was established as part of a tax avoidance scheme and that those who established the Scheme (mainly entities related to Mr. Jenner) intended to profit from it through marketing of the Scheme to potential participants." However, Mr. Mehigan said that he had taken on his own role "on an *ex gratia* basis".

46. Mr. Mehigan then argued that the Cup Trust is "a genuine charity" and that the Scheme "was genuine" and not a sham. He disputed Mr. Furness's opinion and asserted that, "on the basis of independent advice from counsel [the Cup Trust] has at least an arguable case that the appeal against HMRC's decision will succeed." Mr. Mehigan also contended that Mountstar had indicated that it would indemnify the Cup Trust in relation to the costs of mounting the appeal, and that Mountstar would place "appropriate funds" into its solicitors' client account to cover the estimated costs of pursuing the appeal.

47. The Charity Commission sought further details of these proposals, and on 12 January 2016 Mountstar's solicitors responded to the effect,

i) that it was not necessary or appropriate to comply with the criteria identified in Mr. Furness's opinion;

ii) that Mr. Gordon should be instructed by the Interim Managers, with instructions being provided to the solicitors for the Interim Managers by Mountstar, through Mr. Mehigan;

iii) that "in principle" Mountstar was willing to provide funding for any further appeals beyond the FTT(T) subject to counsel advising that any such appeals had a reasonable prospect of success;

iv) that on the basis that the Interim Managers would opt out of the costs regime for the purposes of the FTT(T), no adverse costs order should arise at that stage, but that Mountstar was "in principle" willing to provide an indemnity against adverse costs orders thereafter if counsel advised that an appeal had a reasonable prospect of success;

v) that to provide security, Mountstar would make monthly payments of £10,000 into a designated client account over 18 months to cover the Cup Trust's own costs, together with a final balancing payment one month before the hearing before the FTT(T);

vi) that the funds would come from Mr. Mehigan's personal funds. It was asserted that Mr. Mehigan was willing to finance the litigation because "he does not believe it sensible for the Interim Managers to abandon the underlying appeal given its potential to result in substantial benefit to the charitable sector"; and

vii) that Mr. Jenner had "no current involvement" in Mountstar.

48. After the hearing before me had concluded, on 21 January 2016 Mountstar's solicitors wrote to me, "to clarify the commitment Mr. Mehigan is willing to make in relation to funding the substantive proceedings." The letter indicated that Mr. Mehigan, on behalf of Mountstar, was "willing to enhance and reformulate his financial support" to ensure that the proposed litigation should carry no cost risk, at any time, for the Cup Trust. The revised proposals were that Mr. Mehigan would give a personal guarantee to cover any costs exposure incurred by the Cup Trust, up to and including the hearing of the appeal at the FTT(T). The letter reiterated the offer to pay £10,000 into a designated account each month until May 2016, to pay a lump sum of £60,000 into the account on 1 June 2016, bringing the total to £100,000, and to pay an additional £100,000 into the designated account on 1 December 2016, bringing the total to £200,000 to cover costs and adverse costs. The letter repeated that Mr. Mehigan had been acting on an *ex gratia* basis and stated that he had not and was not expecting to receive any fee or remuneration for his role with Mountstar. It concluded that if the appeal proceeded, Mountstar was ready to engage with the Interim Managers to agree terms for funding the proceedings to their satisfaction.

49. The response by the Interim Managers and the Charity Commission was that the revised proposals did not cure the defects that they had previously identified in correspondence and which they had addressed at the hearing before me. Primarily, they focussed on the points (i) that the security offered by Mr. Mehigan's promise to pay a total of £200,000 by 1 December 2016 and an unsecured personal guarantee was inadequate given the sums that might be involved in the litigation through the Upper Tribunal and the higher courts, and (ii) that it was simply inappropriate that Mountstar and Mr. Mehigan should be involved in directing the litigation. In this latter regard, the Interim Managers and the Charity Commission referred to the reasons for the appointment of the Interim Managers, as confirmed by the FTT(C) judgment, to the effect that there had been serious mismanagement by Mr. Mehigan of the affairs of the Cup Trust and concerns that he had been, and remained, potentially conflicted due to his relationship with Mr. Jenner.

The Law

50. The power of the Charity Commission to appoint interim managers derives from sections 76(1) and (3)(g) of the Charities Act. The relevant parts of section 76 are as follows,

> "76. Suspension of trustees etc and appointment of interim managers.
>
> (1) Subsection (3) applies where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied -
>
> (a) that there is or has been any misconduct or mismanagement in the administration of the charity, or
>
> (b) that it is necessary or desirable to act for the purpose of -
>
> (i) protecting the property of the charity, or
>
> (ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity.
>
> …
>
> (3) The Commission may of its own motion do one or more of the following -
>
> …
>
> (g) by order appoint (in accordance with section 78) an interim manager, to act as receiver and manager in respect of the property and affairs of the charity."

51. Section 78 of the Charities Act then provides for the powers and functions of the interim manager, and for applications to be made to the court for directions by the Charity Commission,

> "78. Interim managers: supplementary
>
> (1) The Commission may under section 76(3)(g) appoint to be interim manager in respect of a charity such person (other than a member of its staff) as it thinks fit.
>
> (2) An order made by the Commission under section 76(3)(g) may make provision with respect to the functions to be discharged by the interim manager appointed by the order…
>
> (3) Those functions are to be discharged by the interim manager under the supervision of the Commission.
>
> (4) In connection with the discharge of those functions, an order under section 76(3)(g) may provide -
>
> (a) for the interim manager appointed by the order to have such powers and duties of the charity trustees of the charity concerned (whether arising under this Act or otherwise) as are specified in the order;
>
> (b) for any powers or duties specified by virtue of paragraph (a) to be exercisable or performed by the interim manager to the exclusion of those trustees.
>
> (5) Where a person has been appointed interim manager by any such order—
>
> (a) section 110 (power to give advice and guidance) applies to the interim manager and the interim manager's functions as it applies to a charity trustee of the charity concerned and to the charity trustee's duties as such, and
>
> (b) the Commission may apply to the High Court for directions in relation to any particular matter arising in connection with the discharge of those functions.
>
> (6) The High Court may on an application under subsection (5)(b) –
>
> (a) give such directions, or

(b) make such orders declaring the rights of any persons (whether before the court or not),

as it thinks just."

52. The other relevant provisions of the legislation are sections 105 and 110, which provide for the power of the Charity Commission to give its sanction to proposed actions in the administration of a charity or to give advice to charity trustees. Those sections are (in material part) as follows,

"105. 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.

110. Power to give advice

(1) The Commission may, on the written application of any charity trustee or trustee for a charity, give the applicant its opinion or advice in relation to any matter -

(a) relating to the performance of any duties of the applicant, as such a trustee, in relation to the charity concerned, or

(b) otherwise relating to the proper administration of the charity.

(2) A person ("P") who -

(a) is a charity trustee or trustee for a charity, and

(b) acts in accordance with any opinion or advice given by the Commission under subsection (1) (whether to P or another trustee),

is to be treated, as regards P's responsibility for so acting, as having acted in accordance with P's trust.

> (3) But subsection (2) does not apply to P if, when so acting -
>
> (a) P knows or has reasonable cause to suspect that the opinion or advice was given in ignorance of material facts, or
>
> (b) a decision of the court or the Tribunal has been obtained on the matter or proceedings are pending to obtain one."

53. The parties were agreed that the general duty of care which applies to trustees of a charity, and to interim managers appointed and authorised to exercise the powers of the trustees of the charity to the exclusion of the trustees, is a duty to take the care of "an ordinary prudent man of business … acting in the management of his own affairs": see e.g. Speight v Gaunt (1883) LR 9 App Cas 1 at 19. In addition, there was no dispute that a trustee does not have the same freedom to speculate with the trust assets as a businessman might do with his own assets. In Learoyd v. Whiteley (1887) 12 App Cas 727 at 733 Lord Watson said,

> "[A trustee] is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard".

54. The parties were not, however, agreed as to the function of this court or the approach that this court has to apply when considering an application from the Charity Commission for directions to be given to interim managers under section 78(5)(b) of the Charities Act. I was told that there is no direct authority on the point.

55. The Charity Commission and the Interim Managers contended that the approach of the court under section 78(5)(b) should simply follow the approach of the court to applications by trustees for the determination of questions arising in the execution of a trust. They submitted that I should give a direction sanctioning the decision of the Interim Managers to discontinue the appeal against HMRC's rejection of the Gift Aid claims provided that I was satisfied that it was a decision that a reasonable body of trustees, properly instructed, could reasonably have arrived at. They submitted that I could be so satisfied having regard to the detailed analysis of the options that the Interim Managers had gone through at their meeting on 6 August 2014, the advice given by Mr. Furness QC, and the insufficiency of the funding proposals by Mountstar.

56. For Mountstar, Mr. Gordon did not accept that the approach of the court should be limited in this way. He submitted that the role of the court was not simply to check the rationality or reasonableness of the decision of the Interim Managers, but that the wide words of section 78(6) of the Charities Act indicated that the court could make any order that the justice of the case required. He then went on to submit that the

decision of the Interim Managers was irrational, and that it was not in the interests of justice for them to deprive the Cup Trust of the opportunity of litigating its Gift Aid claims, rather than pursuing the appeal and having the FTT(T) decide the matter in the ordinary way. He submitted that the analysis of Mr. Furness was incorrect, or at the very least that the case "could accommodate an alternative solution", and that litigating the rejection of the Gift Aid claims provided the Cup Trust with the opportunity to recover a very large sum of money which could be put to charitable purposes, at minimal or no risk as to costs.

Analysis

57. In deciding what approach the court should adopt to applications by the Charity Commission under section 78(5)(b) it is first necessary to have regard to the structure of the relevant provisions of the Charities Act. In my view, that structure plainly envisages that in most cases in which interim managers are in any doubt as to what they should do, or where they do not have any doubt but wish to have protection from subsequent complaint, it is the Charity Commission and not the court that should be asked to deal with the question.

58. I say that, first, because the Charities Act makes it clear that interim managers have the functions that are defined by the order of the Charity Commission that appoints them, and they operate under the supervision of the Charity Commission and not the court: see sections 78(2) and (3).

59. Secondly, the statute provides that the interim managers are entitled to seek advice from the Charity Commission under section 78(5)(a), and further provides that if they act in accordance with that advice, and do not fall foul of section 110(3), the interim managers will be able to rely upon section 110(2) so as to be treated, as regards their responsibility for so acting, as having acted in accordance with their trust. This doubtless reflects an assumption that persons appointed by the Charity Commission to perform the role of interim managers will themselves be experienced in the proper conduct of the affairs of a charity and hence well able to take most decisions for themselves; but that if additional expertise or experience is called for, or if the interim managers wish to have the reassurance or protection of a second view of the matter, that can be supplied by the Charity Commission drawing on its expertise and experience in dealing with charities as part of its regulatory functions.

60. As such, in many cases where issues arise in the conduct of the affairs of a charity by interim managers, there should be no need or justification for involving the court. That point is reinforced by the fact that section 78(5)(b) limits the ability to apply to the court for directions to the Charity Commission and does not give it to the interim managers themselves.

61. That said, there will plainly be some situations in which the court does need to become involved. In analysing what they might be, it is convenient to adopt the now well-established classification of applications to court by trustees discussed by Mr. Justice Hart in Public Trustee v Cooper [2001] WTLR 901 at 922–924. In that case, Mr. Justice Hart referred to an unreported judgment given in chambers by Mr. Justice Robert Walker in 1995, and set out a passage from that judgment which sought to classify the different situations in which the court might be called upon to adjudicate upon an actual or proposed course of conduct taken or to be taken by trustees,

> "(1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both….
>
> (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 … 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 …"

This classification is not, of course, exhaustive or inflexible. An application may straddle more than one category. But it is a helpful tool for analysis.

62. Applications by the Charity Commission which are analogous to cases in the first category could include a situation where there was doubt whether a proposed course of action fell within the scope of the interim managers' powers (either under the charity's trust deed itself or under the order appointing them). Or it might be

necessary for there to be a binding determination of the legal rights of third parties as a part of a decision being made as to what the interim managers should do. That would obviously be a job for the court and is expressly catered for by the terms of section 78(6)(b).

63. Another example of the first type of case might be if the issue arose as to whether it was legitimate as a matter of law for the interim managers to take a particular factor into account in the exercise of their discretion. This type of situation was alluded to by Mr. Furness in the section of his written opinion to which I referred at the end of paragraph 40 above. In the end, however, that situation has not arisen in the instant case, because the Interim Managers did not in fact base their decision upon considerations of the reputation or interests of the charity sector more widely, and the Charity Commission also did not ask me to take any such issues into account in my decision.

64. Turning to the third category, it would seem to me very unlikely that a court faced with an application under section 78(5)(b) would accept a surrender of discretion. Even in the case of applications by ordinary trustees, the court is not bound to accept a surrender of discretion and is generally very wary of doing so. That must be all the more so in the case of a charity. The examples referred to in Public Trustee v Cooper of trustees being deadlocked or unable to act by reason of a conflict are very unlikely to necessitate an application to the court under section 78(5)(b), because the Charity Commission is likely to be able to act to overcome such difficulties in the first instance.

65. I have made those observations because although Mr. Gordon did not put his submissions to me in terms of a surrender of discretion, I think that the very broad approach that he urged upon me was tantamount to asking me to accept a surrender of discretion, albeit in circumstances in which neither the Interim Managers (whose discretion it is), nor the Charity Commission (whose application it is), have asked me to approach matters on that basis. Mr. Gordon's approach would involve me forming my own view of the merits of the Gift Aid claims, deciding who should have conduct of the appeal to the FTT(T) and beyond, and dictating (or worse still, acting as an intermediary for negotiation of) the detailed terms upon which appropriate funding and indemnities should be provided to the Cup Trust by Mountstar or Mr. Mehigan. I think that there are very considerable practical as well as conceptual objections to such a course, and although section 78(6) is couched in wide terms, for reasons that I have given, I do not think that the statute envisages that the court should generally be willing to accept a surrender of discretion and simply impose its own view of such matters on an application under section 78(5)(b).

66. The fourth category of cases identified in Public Trustee v Cooper is obviously not analogous to an application under section 78(5)(b). Instead, it seems to me that the instant application has a good deal in common with applications by trustees of the second type referred to in Public Trustee v Cooper. It is a case in which the Interim Managers have decided what they want to do, but the sanction of the court is sought because the decision is recognised as being a "momentous" one for the Cup Trust.

67. To what extent should the considerations that apply to cases involving ordinary trustees in the second category apply to such cases?

68. The first point to make is that there must be a real question as to whether the court should ordinarily be prepared to give directions to interim managers, "blessing" what are essentially business decisions. I have already set out the legislative structure that empowers the Charity Commission to act and to provide the necessary protection for interim managers. To borrow a familiar phrase from the situation where administrators of companies seek directions from the court on what are essentially commercial matters, (Re T&D Industries plc [2000] 1 WLR 646 at 657 per Mr. Justice Neuberger), "the court is not there to act as a sort of bomb shelter" for interim managers operating under the supervision of the Charity Commission.

69. That is not, however, an immutable rule, and I think that there are plainly exceptional circumstances in the instant case that justify the Charity Commission having referred this matter to the court. The facts are highly unusual in the context of a charity and the potential amounts at stake are large. Moreover, given the controversy surrounding the Cup Trust and the challenge to the appointment of the Interim Managers in the first place, coupled with Mountstar's views that the matter should be referred to the court, I think that the Charity Commission was justified in seeking an independent review of the decision that its appointees wish to take.

70. The approach of the court in an ordinary case involving trustees under category two was considered by Mr. Justice Hart in Public Trustee v. Cooper at page 925, in a passage subsequently summarised by Mr. Justice Henderson in Hughes v Bourne [2012] EWHC 2232 (Ch) at para 16 as follows,

> "First, the court must be satisfied that the trustees have in fact formed the opinion, or made the decision, for which approval is sought. Secondly, the opinion must be "one at which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived". Thirdly, the opinion must not be vitiated by any conflict of interest under which any of the trustees had been labouring."

71. This approach was further considered by Mr. Justice David Richards in Re MF Global UK Limited [2014] EWHC 2222 (Ch) at para 32, where he cited with approval the following paragraph 29-299 from *Lewin on Trusts* (18th ed, 2008),

> "The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to

> complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

Similar (albeit expanded) observations appear in the current (19th) edition of *Lewin on Trusts* at paras 27-078 to 27-081.

72. Subject to the points that I have already made about the differences between applications under section 78(5)(b) and those by ordinary trustees, I consider that if the court is willing to entertain an application by the Charity Commission for court sanction of a "momentous" decision by interim managers, this is an appropriate approach for the court to take. Whilst the court will act with caution, I see no obvious reason why it should be required to adopt a more interventionist approach than would be the case with a similar application by ordinary trustees.

73. Approaching matters in this way, I am first satisfied that the Charity Commission and the Interim Managers have placed all of the relevant information before me, including, in particular, the detailed minutes of the meeting of the Interim Managers at which a decision was taken to discontinue the Gift Aid claims, together with the very detailed advice of Mr. Furness QC. Indeed, the only potentially relevant material that either side suggested that I did not have before me, was a note of the advice said to have been given in conference by counsel instructed by Mountstar, to which Mr. Mehigan referred in his witness statement. Disclosure of a note of such advice was sought by the Charity Commission, but refused by Mountstar.

74. Secondly, I am also satisfied that the Interim Managers have indeed made the decision to discontinue the Gift Aid claims for which the court's approval is sought. Thirdly, I also find that in so doing the Interim Managers were not labouring under any conflict of interest.

75. I therefore turn to the key question of whether the decision to discontinue the Gift Aid claims is one that a reasonable body of trustees, properly instructed, and ignoring irrelevant factors, could properly have reached.

76. In answering this question, the first and central issue is obviously the advice that has been given as to the merits (or otherwise) of the Gift Aid claims. I have set out at some length the advice that the Interim Managers received from Mr. Furness QC. I do not think that I have to reach any conclusion as to whether such advice is, or is not, correct. Nor do I see how, or why, I should attempt on this application to pre-empt the decision of the FTT(T), the Upper Tribunal or any of the higher courts in that

respect. It is sufficient for present purposes that the advice should appear to be competent advice upon which the Interim Managers can properly rely. In the case of Mr. Furness's advice, that test is passed with considerable ease. The analysis to the effect that the Gift Aid claims have negligible prospects of success is persuasive, and I do not think that there is anything in the submissions that I have heard from Mr. Gordon that materially undermines it, or indicates that the Interim Managers should require it to be revisited.

77. Secondly, I also agree with the point made by Mr. Furness in his opinion, as summarised in paragraph 34 above, that in fulfilling the role of charity trustees, the Interim Managers do not have the freedom to "take a punt" on speculative litigation, even if the charity has the funds to finance it. In fact the Cup Trust has minimal assets to play with, so that although the amounts potentially recoverable are large, given the advice that the Gift Aid claims have negligible prospects of success, it seems to me to be an entirely sensible requirement of the Interim Managers that the claims could only be pursued if there is no financial risk whatever to the charity in doing so.

78. That, of course, places the spotlight on the offer of funding and an indemnity against adverse costs that has been made by Mr. Mehigan. The background to this issue are the rules as to costs orders in the FTT(T), the Upper Tribunal and the higher courts. In the FTT(T), the appeal is likely to be handled as a complex case. Accordingly, the ordinary 'loser pays' costs principles will apply unless the Cup Trust opts out of those rules by a notice served under Rule 10(1)(c)(ii) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273). There is no dispute between the parties that given the very limited prospects for success, the Cup Trust should certainly opt-out, and it has indeed done so. However, even though the Cup Trust has opted out, the Tribunal may make an order for costs if "a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings": see Rule 10(1)(b). The protection against an adverse costs order is therefore not absolute, and given the advice as to the very low prospects for success, the making of an adverse costs order against the Cup Trust cannot be discounted.

79. In the Upper Tribunal, ordinary costs principles apply in tax cases heard on appeal from the First-Tier Tribunal: see Rule 10(1)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). Accordingly, if the Cup Trust lost an appeal in the Upper Tribunal, it would be likely to be ordered to pay HMRC's costs. In the Court of Appeal or above, the ordinary rules as to costs will also apply.

80. Against this background, it seems to me that the Interim Managers are right to require, as a minimum at the first stage, an unconditional undertaking, backed by security, both to fund the Cup Trust's own costs and to indemnify it against any adverse costs order that might be made at the FTT(T) level. Although Mr. Mehigan has expressed his willingness in general terms to provide such funding and an indemnity, no concrete terms to that effect have been put forward, and the only security that has been offered for such undertaking is Mr. Mehigan's personal promise to pay a total of £200,000 in instalments by December 2016. There is no assurance that the amount promised to be provided in this way would at any particular point in time provide sufficient protection for the Cup Trust in respect of its own costs and the costs for which it might become liable on a summary determination of the appeal. Further, although Mountstar's solicitors have expressed a view in correspondence that the Cup

Trust's total exposure to costs at the end of the FTT(T) stage would be less than £200,000, there is no assurance that this would be so.

81. My one reservation as to the approach of the Interim Managers in this regard concerns the analysis of whether it would be necessary for an undertaking given at the outset to cover the costs of any possible further appeals beyond the FTT(T). It seems to me that if the costs risk at the FTT(T) stage is fully covered, it ought to be possible for the position to be reassessed in light of the judgment of the FTT(T). If the FTT(T)'s decision is adverse to the Cup Trust, the Interim Managers would manifestly not be obliged to incur further costs initiating an appeal to the Upper Tribunal unless and until further costs protection was in place, and a decision not to pursue a further appeal would not expose the Cup Trust to further risk.

82. On the other hand, if the Cup Trust had won before the FTT(T), the whole landscape would have changed dramatically. The Gift Aid claims would have been seen not only to be reasonably arguable, but capable of succeeding, and hence the prospects for the availability of third party litigation funding and/or solicitors prepared to operate on a contingency basis would be likely to be very different. Even if, having won, the Cup Trust was not to resist an appeal by HMRC, it would still be covered for any possible adverse costs arising from the proceedings at the FTT(T) stage. It would only be potentially exposed in relation to the limited adverse costs of an uncontested appeal.

83. Although there is a difference in view between myself and the Interim Managers and their advisers on this point, it is not the only issue arising on Mountstar's funding proposals and I do not think that it is sufficiently serious to invalidate the approach of the Interim Managers or to require me to exercise the discretion for myself.

84. In addition to the other points made above, it is also the case that Mountstar has never deviated from its requirement that as a condition of it funding the pursuit of the Gift Aid claims, the case should be argued by counsel of Mountstar's choosing. Mountstar's most recent iteration of its proposal would also have instructions being provided to counsel via the current solicitors for the Interim Managers by Mountstar, acting through Mr. Mehigan.

85. The Interim Managers have consistently opposed such conditions, and have been advised by Mr. Furness that they are inappropriate. In short, the Interim Managers have taken the view that the FTT(C) approved the appointment of the Interim Managers to exercise the powers of the trustee of the Cup Trust to the exclusion of Mountstar, primarily because of serious concerns as to the conflicts or potential conflicts of interest and duty that existed between the interests of the Cup Trust on the one hand, and Mountstar, Mr. Jenner and Mr. Mehigan on the other. There is, for example, concern that the interests of Mr. Jenner and his associates in preserving their reputation with the intermediaries who introduced the donors to the Scheme, and in pursuing an appeal in conjunction with an appeal by the donors, may not coincide with those of the Cup Trust. The Interim Managers consider that such factors indicate that it is not appropriate to give Mountstar any part in directing how the Gift Aid claims should be pursued.

86. When such points were put to Mr. Gordon in argument, his response was that given the pessimism of Mr. Furness and the Interim Managers as to the prospects for the

Gift Aid claims, Mountstar and Mr. Mehigan wished to have the assurance that the Cup Trust's case would be taken with sufficient vigour to ensure that its chances of success were maximised. He indicated that this required the instruction of counsel who believed in the merits of the case. He also said that this was something that could be the subject of negotiations with the Interim Managers.

87. I do not accept Mr. Gordon's submissions. It seems to me to be entirely reasonable, and in accordance with the reasons for, and terms of, the appointment of the Interim Managers, that they should take the view that Mountstar or those connected with it should not be involved in directing how the Gift Aid claims should be pursued. Further, even though the Interim Managers have received pessimistic advice from Mr. Furness, I see no reason why, as professionals, they could not be relied upon to make a genuine attempt to find and instruct other counsel to argue as persuasively as possible in favour of the Gift Aid claims. There is no need for Mountstar to be involved.

88. I also think that some scepticism as regards the motives behind the offer of funding from Mr. Mehigan is justified. Mr. Mehigan has stated that he is prepared to spend large sums of his own money because he wishes to help the Cup Trust recover money so that it can then apply those monies for charitable purposes. But Mr. Mehigan's evidence makes no mention of the interests of the other persons who would claim to be entitled to share in such recoveries, and the solicitors for Mountstar pointedly refused to answer in correspondence the question whether there have been any discussions between Mr. Mehigan and Mr. Jenner concerning the affairs of the Cup Trust since Mr. Jenner's resignation. I think that it is reasonable for the Interim Managers to be concerned that Mountstar's requirement for involvement in the conduct of the case may reflect a continuing desire by Mr. Jenner to exert indirect influence over the affairs of the Cup Trust.

89. In conclusion, taking all of the points into account, and even having regard to the very large amount of the Gift Aid claims, I do not think that the Interim Managers are obliged to accept funding and pursue an appeal against HMRC on the terms offered by Mr. Mehigan and Mountstar. In my judgment, the decision of the Interim Managers not to accept such funding and to discontinue the Gift Aid claims is within the range of decisions to which rational charity trustees could properly come.

Direction

90. I therefore propose to give a direction, as sought by the Charity Commission, that the Interim Managers should be at liberty to discontinue the Gift Aid claims, and sanctioning their decision to do so.