

# **trustees' liabilities and duty of care**

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## 1 Introduction

A trustee is required to act in the best interests of the charity. Part of this requires the trustees to "exercise the same degree of care in dealing with the administration of their charity as a prudent man of business would exercise in carrying out his own or his business affairs." This means that a trustee can be held liable if he acts without such care and thereby causes a loss to the charity.

## 2 The basic duties

These can be summarised as:

- Keeping within your charitable objects and powers (which means being aware of them).
- Being diligent and sensible in the administration.

## 3 Trustees are jointly and severally responsible

They act collectively (usually by majority decision unless their Trust Deed specifies otherwise) and actions taken and agreements entered into by one or more Trustees affect the others. Therefore, if a minority trustee is particularly unhappy about a certain course of action decided upon by the majority, his ultimate option is to resign. Short of this, he should have his objections recorded in writing in the minutes of any meeting.

## 4 Types of liability

There are **two basic types of liability** that a trustee may incur:

- 4.1 **Liability for breach of trust.** A breach of trust occurs when the trustees act outside their powers, e.g. using funds for the wrong purposes, or without proper care. If a loss to the charity results the trustees can be required to make it up from their own resources.
- 4.2 **Liability to third parties.** This is not a matter of trust law but of contract or tort. If, for example, the trustees enter into a building contract they are liable to pay the contractor the price of the work whether or not there are sufficient funds in the church bank account.

## 5 Trustees indemnity insurance

**Trustees indemnity insurance** can be purchased to protect the trustees in the event of them committing a breach of trust but without any dishonest intent or recklessness (NB such policies do not cover liabilities to third parties, e.g. insufficient funds to pay a contractor). The policy will reimburse the trust for the loss rather than the trustees having to do so. If there is specific power, the trustees can pay for such insurance out of trust funds. Only very recent trust deeds will contain such a power. A general power is to be conferred on all trusts (following the Charities Deregulation Task Force Report of July 1994) to permit this but until then a specific order has to be obtained on application to the Charity Commission.

## 6 Written advice from Charity Commission

If trustees are in doubt about any particular course of action they propose to take, they can ask the Charity Commission to advise in writing. They can rely on any written advice given by the Commissioners. If then a breach of trust is committed, the trustees are protected from liability. It is important to get the advice in writing and not to rely on a telephone conversation.

## 7 Powers of the court

The Court also has power under Section 61 of the Trustee Act 1925 to relieve a trustee from liability, even where a breach of trust has been committed, if satisfied that he acted honestly and reasonably in all the circumstances.

## 8 The charitable company limited by guarantee option

8.1 An increasing number of churches are setting up charitable companies as an alternative to the trust structure. In this structure, the trustees have greater protection from *claims from third parties* against their own assets (i.e. the liability in 4.2 above). Directors/trustees of a charitable company still owe the same duty to the charity itself, not to act in breach of trust (i.e. the liability in 4.1 above).

8.2 In the case of a company, a separate legal entity exists. This means that any debts owed by the company are indeed owed by **the company** and not by the trustees personally. This assumes that the trustees have not given personal guarantees or entered into contracts in a personal capacity.

### 8.3 Summary of main differences between trusts and companies

ASPECT	TRUST	COMPANY
Personal Liabilities	Trustees have potential liability to third parties, and could be liable for breach of trust	Trustees/directors are protected from personal liability to third parties (unless entered contracts, etc, in a personal capacity. Can be liable for breach of trust
Holding legal title to property	In names of trustees - cost of transferring title each time there is a change of trustees	In name of company so unaffected by changes of trustees - avoids costs
Formalities	Simpler to operate	Various Companies Acts requirements - quite onerous
Accounting requirements	<ul style="list-style-type: none"><li>• More onerous at income level below £90,000 pa</li><li>• Less onerous then up to £250,000 pa</li></ul>	<ul style="list-style-type: none"><li>• Less onerous up to £90,000 pa</li><li>• More onerous then up to £250,000 pa</li></ul>
Set-up costs	Cheaper	More expensive