

Disputes, The Legal Issues and How to Manage Them

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Seminar Handout
Thursday 11 May 2006

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Introduction

Although quite special, in many respects the charity and voluntary sector is like any other – it has people at its heart – and therefore disputes are inevitable.

In addition, it is a sector where people will have strong views, they care deeply and often they have worked to further the cause they believe in either for no pay or for less pay than might be the case in the outside world. Feelings and emotions can run high.

I am not going to go into great detail as to why disputes arise – you may well have better experience of the many and various examples I could quote but I will be examining ways in which disputes might be avoided.

What I also aim to do is to split this huge subject into three main areas and look at some of the legal issues which arise and the ways in which they might be best managed.

Unfortunately there is often no exactly perfect answer and what we will be discussing will be advance preparation and sensible compromise.

I am going to split the subject into three, as I mentioned.

Basically **INTERNAL** disputes, by which I mean amongst Trustees themselves, disputes with staff and disputes between members and trustees.

If anyone needs clarification of the terms I am using please ask as I go along, but broadly speaking by trustees I mean the people with the ultimate responsibility for running the organisation whatever name they are called (they may be referred to as Directors, Committee Members, Council Members as well as trustees) and by members I mean those people who vote at annual general meetings whether it is a company or an unincorporated association, or I&P Society or any other membership organisation.

Then I want to discuss **EXTERNAL** disputes, and in this category I am referring to contractual matters, service users, grant givers, volunteers, landlords, executors of estates or any other third parties the organisation deals with except regulators.

Lastly, I will touch on disputes with **REGULATORS** concentrating on the Charity Commission.

During the Course of the talk you will hear me refer to ADR – this is alternative dispute resolution and includes mediation and arbitration.

I will also make reference to material you may access on the internet and in particular Charity Commission leaflets CC47 and CC60; NCVO/CEDR website; “Good Governance” (A code for the Voluntary Sector) and “Disputes in the Charitable Sector” by Debra Morris of the Charity Law Unit at Liverpool University.

There are matters which are common to all types of disputes from a legal point of view and therefore I will be covering these in a single section of the talk.

Internal

Most internal disputes have as their trigger inadequate governance so, lets start by looking at [Good Governance](#):

I highly recommend a document called "Good Governance" which is a code for the voluntary and community sector – it is not mandatory unfortunately and organisations are invited to comply with it. If they do they are asked to state this in their annual report and on other publications (a bit like a "kite mark").

The chances are that an organisation's [Governing Document](#) is only going to be of limited help, but it will be a good starting point to direct warring parties to so they can see what remedies, if any, are available to help them and also so they can see whether or not they are taking a position which is consistent with that document.

So, lets start by looking at:

Staff

This afternoon you will hear from my colleague Emma Burns who is giving an Employment update so I will try not to steal her thunder.

There is a difference here between dispute with the staff generally and individual members of staff. Charities can be hit by exactly the same disputes as any other employer, but are often constrained by finances and their charity status as to how to deal with those disputes. It is interesting that Liverpool University CL Unit research revealed that charities are twice as likely to be involved in disputes with employees from other employers.

This is an area where it is useful to take a quick look at the common reasons for disputes and to address **them** rather than wait for a problem to arise.

In times of change it is **poor handling** of change which can lead to disputes rather than the change itself. Make sure staff are kept informed and where possible, consulted.

Another problem is **poor employment practices**, such as lack of job descriptions, appraisal mechanisms, grievance procedures; unclear chain of command; poor training of trustees and unclear delegations of responsibility. If this is true of your organisation, address it now rather than wait for the problems to arise.

As with other types of dispute – ADR, (such as mediation), is to be considered as an alternative to more expensive litigation. If an industrial tribunal is involved then the costs and potential damage to the organisation's reputation will increase.

Charities do need to be aware though that in reaching a compromise which involves it in making a payment to an employee it must ensure it has the power to make the payment as this will not automatically be treated as using the charity's funds to further the charitable purposes.

If there is any doubt then consider applying for an authority under Section 26 Charities Act 1993.

One of the most damaging individual staff disputes will be with the Chief Executive and this most commonly arises because of a lack of understanding or clarity in relation to the respective roles of Trustees and the Chief Executive and the matters delegated to that person. This is where clear job descriptions are important and I recommend the ICSA website guidance notes and model job descriptions for trustees including the Chair. The job description for the Chief Executive should be carefully drawn up too and if you do not have one please put this in place soon!

In relation to disputes between the paid staff generally and the trustees I would go back to the issue of the governing document and see whether an examination of this can help. Usually there is a disagreement as to policy and perhaps a timely re-examination of the OBJECTS Clause will help.

There should also be mechanisms in place to enable trustees to deal with complaints concerning the Chief Executive personally.

In some cases it is possible that a member of staff was the founder or one of the founders of the organisation and plays or has played a high profile role. Where that person is not one of the trustees (usually because of problems with registering with the Charity Commission) and the trustees try to change the direction or policy of the organisation there may be a falling out.

This possibility should have been taken into account at the outset and suitable protections put in place - when this hasn't happened and no one explained to the founder about their possible future lack of control it can leave the organisation vulnerable to dispute.

Trustees

A falling out of trustees or dispute as to who the trustees of an organisation should be can be one of the most damaging disputes of all, going to the very heart of the organisation.

Here the [GOVERNING DOCUMENT](#) must be your starting point for an investigation of the matters surrounding the dispute and potential remedies for the organisation.

1. How many trustees should there be?
2. Who has the right to appoint/remove them?
3. Is one trustee trying to exercise more power and influence than the governing document gives them or has been delegated by the trustees generally?

Modern governing documents should be clear on all the above points, but there are many different options and therefore individuals may be making assumptions about what they [think](#) the document says!

Even where proper procedures are followed and for example a dissenting trustee is removed it may well still leave the organisation facing complaints.

So bearing in mind you must refer to your own governing document for the detail – what general advice can I give you?

Trustees:

- A. Trustees - must not be **disqualified** from being a trustee Charities Act 1993 Section 72 (should you do a bankruptcy search?).
- B. Trustees – must be validly appointed. Did the right people vote for them, co-opt them or nominate them? On this point watch out for the two-tier power structure of companies limited by guarantee and unincorporated associations. With the companies in particular problems can occur when membership records are not kept.
- C. A Trustee is a trustee, whoever appoints them “representative trustees” must act in the best interests of the organisation and not the body which appointed them. If a trustee is appointed by say a local authority to a board according to the governing document they are **not** there to represent the local authority. If there is a conflict of interest the trustee concerned **must** not vote and should absent themselves from the meeting.
- D. Is there provision for a casting vote in the event of a tie?
- E. Is a special majority required?

Also check does the governing document require a trustee to sign the minute book or a special declaration before they can vote at meetings?

When can a trustee be removed? Depends!

- Is there a clause in the governing document?
- Is it automatic if they miss a certain number of meetings?
- Does the AGM (or a particular person) have a power to remove?
- Generally in law – 12 months absence from UK; refusal to act; mental incapacity; bankruptcy
- Removal by Charity Commission after a Section 8 Inquiry

Resignation by Trustees

Normally they may not resign unless 2 trustees are left to carry on/dissolve the organisation.

Members

Whilst in danger of becoming boring and repetitive, I have to again make it clear how important it is that members as well as trustees are aware of their position as set out in the [GOVERNING DOCUMENT](#).

Most governing documents will give the trustees a discretion as to who is admitted to membership and those members will form the AGM and usually elect the trustees.

What happens when members and trustees fall out!

It can lead to various situations but as examples:-

- a flood of [applications for membership](#) in order to “pack” an AGM to vote out/in particular people
 - Trustees must then avoid making snap or general decisions about refusals of membership. [In a high profile case the trustee body of the RSPCA went to Court for confirmation that they could refuse membership for any applicant they thought had links to the pro-hunting lobby. The Court held that an individual who was ‘pro hunting’ could be excluded, but only if each individual application was properly considered by the full trustee body!]
- Allegations made in public by members about individual trustees
 - Members must take to avoid being defamatory either towards the individual trustee or indeed the Charity. If the Charity’s reputation is put at risk the Charity may need to bring action against the member and terminate their membership.
- The governing document is likely to include a procedure for [TERMINATION OF MEMBERSHIP](#) which may well include an appeal procedure. This should be carefully followed to avoid further fall out. Be open, be fair.
- An individual trustee who is questioned is likely to be angry, but should try to remain calm and address the issues raised as far as they can!

- Before moving on to “External” disputes it is useful to address some of the [Resolution](#) options as these may be relevant both in Internal and External disputes.

Resolution

Firstly, check whether there are any dispute resolution clauses in your [GOVERNING DOCUMENT](#).

The most likely scenario is that there will be a power for the Board to make rules, regulations and standing orders to govern board procedures, general meeting procedures, the relationships and conduct of members, staff and trustees and for the resolution of disputes.

In the Charity Law Association model governing documents you will find a standard power to this effect.

But how many organisations have adopted such [procedures](#) I don't know. If they have been adopted then they should be publicised to all trustees, staff and members and brought to the attention of beneficiaries and service users as necessary (in advance of disputes arising preferably!).

In addition, some older charities may have provision in their [GOVERNING DOCUMENT](#) for third party resolution of conflicts – by for example intervention of a respected individual (in religious Charities, a bishop perhaps).

Contractual Procedure

Whether we are talking about an internal dispute involving staff where we can refer to the contract of employment or external disputes the relevant documents may contain a grievance procedure or express provision to assist in resolving disputes.

Examples would be rent review clauses in leases incorporating provision for arbitration of dispute resolution clauses in grant agreements and contracts for services.

There are model clauses available from CEDR which I will refer to at the end.

Statutory Provision

Whilst this is still rare, with the growth in services provided by the not-for-profit sector it is possible that an area of dispute may be referred to an "ombudsman". For example in the case of services to housing association tenants.

A common misconception is the position of the Charity Commission which is a statutory regulator but does not have "ombudsman" powers.

In the absence of any agreed mechanism what do organisations and third party, complainants have to turn to?

Negotiation

Experience shows that direct negotiation in this sector is usually impossible because of emotional involvement, though where the dispute is with a third party such as a grant giver or a purchaser of services this may be possible and if appropriate is best dealt with swiftly.

Trustees have a statutory power of compromise under the Trustee Act 1925 and there is any doubt whether a Charity has requisite powers then a Section 26 Order can be applied for.

The Liverpool University Charity Unit paper refers to “self-help” dispute resolution which I would categorise as [first stage](#) resolution. First stage resolution can be helped by Peer support groups and umbrella bodies which may be able to offer informal assistance.

And, whilst my advice today is generally designed to steer you all away from lawyers (!) it can be helpful to have initial correspondence in relation to direct negotiation drafted or sent by a lawyer (but on the basis, please, of seeking an amicable, quick solution, rather than on the “my guy is right” basis!)

More formal resolution (without resorting to Court action) takes the form of [mediation](#) and [arbitration](#).

Mediation

Mediation is a private process where the parties in dispute are helped by a neutral, impartial third party, the mediator, to work out a mutually agreeable solution (a compromise).

To avoid escalation of a dispute, mediation is best used without delay.

Whilst expenditure on mediation is not direct charitable expenditure, it is recommended by the Charity Commission and is likely to avoid much more costly litigation.

CEDR (Centre for Effective Dispute Resolution) run a Scheme through CEDR Solve and the information on this Scheme can be found at www.cedr-solve.com.

The mediators are properly trained and accredited and carry insurance. There is a cost for the service but it can be as little as £250 for a small charity. CEDR is a charity.

WCVA may also be able to refer you to mediators and, in particular in North Wales, there is a "Community Mediation North Wales" a registered Charity based in Rhyl. Contact them by e-mail at cmnw@btconnect.com

It is very important to understand that mediators do not make an award. Any settlement terms are agreed by the parties and then incorporated into a written document and those terms are then to be implemented by the parties to the mediation. If they don't carry them out then the agreement may contain its own next steps, or it will be back to the drawing board. The Liverpool University Research Paper reports NCVO as saying that 85% of mediations settle in one day.

Arbitration

This is a judicial or quasi-judicial form of alternative dispute resolution and again is private.

The arbitrator will hear both sides, consider evidence and make an award which is contractually binding. It can be a significantly more expensive process than mediation but is still likely to be much less expensive than court action.

Today's Court rules encourage use of ADR, and if it has not been attempted before hand then a judge may stay or put on hold a case, to require the parties to attempt to settle it. Failure to adopt ADR "in particular when public money is involved" has been called "indefensible" in the case of R (Cowl & Others) –v- Plymouth City Council [2001] by the Lord Chief Justice Lord Woolf.

Arbitration can be used in many different types of dispute and has publicly been reported as being used in the Joseph Rowntree Foundation defamation (libel) dispute with The Sunday Times.

The Charity Commission will not generally mediate or arbitrate in disputes but may intervene if a dispute threatens a charity with harm under its powers to protect charity property. It will not be interested in taking sides (see leaflet CC47) but putting the charity on a sound and effective footing.

"Proportionality" will determine the Charity Commission's response to a request for intervention, so it is much more likely they will be prepared to do something in the case of a large charity than a small one.

Cases may also be referred to ACAS (The Advisory, Conciliation and Arbitration Service) which is commonly used in employment cases. There will be a cost involved.

Litigation

This has to be regarded as the very last resort in dispute resolution. It will be hugely expensive and no organisation could possibly see this expenditure as sensible use of charity or voluntary sector money.

Famously, in the case of *British Diabetics Association –v- Diabetic Society Ltd* [1995] Walker J said "charities solicit donations from the public ... in expectation that donations will be well spent on furtherance of the charity's purposes. Even for a lawyer it is a difficult mental feat to recognise this very expensive litigation as helping the diabetics whose subscriptions and gifts will be the ultimate source of repayment of the lawyer's bills."

Section 33 Charities Act 1993

This requires the Charity Commission or the court to give consent before litigation is commenced in the case of what are defined as "charity proceedings".

Charity Proceedings are ones which the Court is to exercise jurisdiction "in relation to a trust for charitable purposes", and includes internal disputes relating to the administration of charitable trusts. The Attorney-General will always need to be a party in the case of charity proceedings.

It should also be noted that proceedings brought under S.459 Companies Act 1985 will be charity proceedings.

I will also briefly be mentioning judicial review proceedings and it is possible that these rare cases will be treated as requiring S.33 consent.

Other proceedings can be commenced without that consent and include enforcing rights against third parties.

Costs

What can I say? Lawyers are expensive!! Clearly trustees should not pursue a case to litigation unless they have been advised by their lawyers they are likely to succeed. The individuals who are the trustees must be aware to the very real possibility that they may be liable personally for some (or all) of the costs of the action, especially if unsuccessful.

Protection can be obtained by a "Beddoe" application. This is a special type of application where the court is asked to approve trustees taking or defending legal proceedings. It is very important to note that this application itself requires consent under S.33 Charities Act 1993 as "charity proceedings". S.61 Trustee Act 1925 will also give trustees protection and also S.727 Companies Act 1925 in the case of director trustees. In addition, if the trustees are acting on formal advice given by the Charity Commission under S.29 Charities Act 1993 they will be protected from personal liability.

Generally if S.33 consent has been given for the proceedings then costs (although at the discretion of the Judge) will normally be ordered to be paid from the charity's funds for all parties.

Not all solicitors and barristers will be used to and familiar with the special matters which need to be taken into account when representing a charity in legal proceedings. The Charity Commission have recently started to hold services for lawyers designed to give special training for those types of cases.

Even if court proceedings are commenced, the majority of cases will settle before the day. However, the particular problems of charity cases can mean the parties are more determined to have their day in court.

In relation to settlement it is important to remember to consider whether the trustees have suitable powers but this is likely to be covered by s.15 (f) Trustee Act 1925 and the Trustee Act 2000 duty of care is likely to be satisfied if the compromise is recommended by the lawyers acting for the trustees.

External Disputes

Having had a little respite from types of disputes whilst we've looked at Resolution types I am now going to turn your attention back to opportunities for argument!

Contractual Disputes

Contracts purchasing or selling services, from your photocopier hire agreement through to your service level agreement with the local authority will have the potential for dispute. After the coffee break one of today's workshops will cover the essential law relating to contracts. Something to watch out for which I will just mention is contracts with unincorporated associations (non-company bodies) as these will be a contract between the trustees (jointly and severally) and the third party. An unincorporated association is not a legal person.

Form model ADR clauses in contracts see www.cedr.co.uk publications.

Intellectual Property Disputes

Your name and logo are valuable – use of these should be clearly covered in suitable documents such as advertising, fundraising, contracts and licence agreements – even with your trading subsidiary. Protect your copyright in publications too – they may have been written by employees as part of their employment.

Some of the most expensive litigation has involved “passing off” disputes between charities. Worldwide Fund for Nature –v- World Wrestling Federation [2002]' and the British Diabetic Association case referred to above.

The other case that should not be forgotten in relation to intellectual property disputes is the dispute between The Diana, Princess of Wales Memorial Fund and Franklin Mint.

Property

Disputes do commonly arise in relation to property ownership, property use and lease clauses.

Really there is no excuse as it is usually clear that the matters in dispute should have been sorted out before hand.

Examples include where a founder has allowed a charity to use their property free of charge and later wants to change arrangements; where someone has generously given their property to the charity (but retaining rights to use part of it); where a charity has repairing clauses in a lease and can't afford to do the repairs.

Often the disputes arise because the parties were not properly advised at the outset or where they ignored the advice they were given.

Estate & Legacy (Inheritance) Disputes

Two types of disputes arise in this category. One is in relation to the manner in which the administration of the estate is conducted (including estate accounting and payment of tax); the other is where family members or dependents challenge the charity's entitlement under the will.

In either case early legal advice as to the charity's rights from a specialist is important.

Funding

When disputes arise with a funder the likely outcome is that the funding will cease. It is therefore vital that these disputes do not get out of hand – look at the grant agreement (if there is one) and try to be open and helpful to your funder. However, watch out for recovery issues because if you just blithely agree to your funder cutting your grant back or putting limitations on what you do then you may be facing financial problems anyway.

Grievance procedures in funding contracts may help but what about next year?

If funding is refused – what can you do? Truthfully, very little. It is unlikely that a [judicial review](#) will succeed.

On the subject of [Judicial Review](#) there are some not-for-profit organisations and charities which are quasi-public bodies and who may be at risk of having their trustee decisions made subject to judicial review. These would include bodies like the National Trust, major grant givers and providers of public services.

The courts have held, though this does not include the governors of an independent school, a charity running homes for the disabled or the RSPCA.

Regulators

Charity Commission

If your organisation comes to the attention of the Charity Commission it will usually be for one of two reasons:

- either a complaint has been made or
- your own conduct with the Charity Commission has caused them concern (for example you have failed to deliver your annual report and accounts on time or they contain something which worries the Commission.

Leaflet CC47 gives general advice in relation to the Commission's approach and powers.

Usually the first step will be an evaluation and if this gives rise for continued concern and it is considered a [proportionate](#) use of the Commission's resources then a Section 8 Inquiry will be opened. Following the opening of a Section 8 Inquiry the Commission has powers to:

- suspend trustees and employees;
- appoint new trustees;
- freeze bank accounts;

- prohibit fund raising;
- stop/restrict dealings with assets;
- appoint a receiver and manager.

The Commission can also take legal proceedings against trustees or others.

HMRC, Companies House, Pensions

Finally, I am not going to go into detail relating to other regulators' powers of inquiry but just want to ensure that you realise the extent of the possibility for dispute with other external bodies and the necessity for ensuring that the organisations affairs generally are reviewed and kept in order.

With that in mind, for my conclusion I am going to draw your attention to my top tips!

Conclusion and Top Tips – Disputes Session

1. Review your documentation to include express provision for dispute resolution:
 - Governing Document
 - Employment Contracts
 - Leases
2. Make sure it is clear who owns intellectual property and put in place agreements if necessary. *Who devised the name and logo?*
3. Clarify ownership and use of property if necessary:
 - has someone given their home/land to the Charity?
 - Do they continue to use part of it?
4. Trustee Induction Packs and Trustee Training
5. Address disputes EARLY don't let them fester
6. **PAY** for help as soon as possible it will be money well spent www.cedr-solve.com
7. Consider available guidance – “Good Governance”; “Hallmarks of a well run Charity”; Self Checklist for Charities; ICSA Guidance Notes
8. Put this matter on a Board Agenda **SOON**
9. When setting up an organisation try to consider all the possible pitfalls and plan for them in advance!

10. Keep accurate records:

- minutes of meetings
- register of trustees/directors
- register of members (don't confuse these with the trustees)
- decisions of the trustees

11. Make sure contracting parties are correctly named.

12. Consider using the CEDR model ADR contract clauses:-

- www.cedr.co.uk/library/documents/contract_clauses.pdf