

CLAS CIRCULAR 2021/05 (22 February 2021)

Disclaimer

CLAS is not qualified to advise on the legal and technical problems of members and does not undertake to do so. Though we take every care to provide a service of high quality, neither CLAS, the Secretary nor the Governors undertakes any liability for any error or omission in the information supplied.

It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

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CHARITIES & CHARITY LAW

Call for Evidence - Covid-19: Government support for charities

For information **and possibly for action**

On 8 April 2020, HM Treasury announced [£750 million of funding support to help frontline charities continue to operate during the coronavirus outbreak](#). On 20 May, DCMS and the Office for Civil Society announced that they were working across government to direct funds to voluntary, community and social enterprise organisations supporting government's coronavirus response through activities delivering charitable purposes. DCMS stressed the urgency to distribute funds quickly and prioritise those charities most in need.

The Committee will question senior officials at DCMS and the Charity Commission on how well the funding has been distributed and whether it is achieving its objectives. Evidence should be submitted by 6:00 pm on Monday 08 March 2021.

[Source: Public Accounts Committee, 10 February]

Charity law: directors/trustees of Kids Company exonerated

For information

Keeping Kids Company (more commonly known as "Kids Company") was founded in 1996 by Ms Camila Batmanghelidjh, originally as a drop-in centre under railway arches in Camberwell. It was incorporated as a limited company in September 1997 and registered as a charity in February 1998. It became insolvent in August 2015.

In *The Official Receiver v Atkinson & Ors* [2021] EWHC 175 (Ch), the Official Receiver sought to disqualify each of the directors/trustees who had been in office at or shortly before the charity's collapse, together with Ms Batmanghelidjh as its CEO (who, it was claimed, was a *de facto* director, if not in name). All the trustees except one chose to defend the claim. The defendants were not accused of dishonesty, bad faith, inappropriate personal gain or any other lack of probity – the allegation was that they had knowingly "caused and/or allowed Kids Company to operate an unsustainable business model".

In brief (taken from [the Court's press summary](#)), Falk J concluded that Kids Company's operating model was not "unsustainable" in principle, that its problems had been the result of 'significant cash flow difficulties during the relevant period'. The most significant element of its expenditure had been staff costs relating to the support it provided to young people and its income from donations was heavily seasonal, which increased the risk of cash flow problems.

Kids Company had recognised that it could not continue to increase in scale to meet demand without changing its funding model. A restructuring plan was agreed, and a further grant was secured. However, the charity was forced to close following sexual assault allegations which were publicised on the same day that the grant was received: 30 July 2015: 'The charity was exonerated following a police investigation, but by then it was too late.' Falk J concluded that, had it not been for the unfounded allegations of sexual assault, the restructuring would more likely than not have succeeded and the charity would have survived.

She was 'wholly satisfied' that a disqualification order was not warranted against any of the Trustees or against Ms Batmanghelidjh (who was not, in any event, a *de facto* director).

Falk J ended her (very long) judgment with a series of general observations which she hoped would be of assistance in relation to future investigations and disqualification proceedings [898].

- The allegation had been of central importance, 'and great care should be taken to ensure that they are clearly framed, both so that the defendants can fairly understand and prepare for the case they have to meet, and so that the court can properly address it ... *Central, and real, difficulties with this case have been a lack of clarity about exactly what the allegation or allegations meant, and a tendency for criticisms made of the defendants to expand and alter*' [899: emphasis added].
- '[M]ore emphasis needs to be placed on the requirements of balance and fairness in assembling reports and other evidence. This affects the investigation process – for example the choice of whom to interview and the questions asked – as well as the content of the documentary evidence...' [900].
- The presentation of the case by the Official Receiver had not been done in a balanced way, bearing in mind that, 'for proceedings of this nature with potentially penal consequences, the existence of the proceedings themselves can have extremely significant consequences for defendants' [901] and '[e]ven with assistance from the defendants' advisers, it was frequently a challenge for the court to seek to ensure that, overall, it had a balanced and fair understanding of the overall position in this case' [902] – in short, the Official Receiver had over-egged the pudding.
- The first report [of the Official Receiver and his Deputy] had been unreasonably long [903], bearing in mind that the allegations were of incompetence rather than dishonesty or want of probity against the directors and a manager of a charitable company 'who had made no personal gain from any of the alleged conduct, and who with one exception were all unpaid' [905].
- The remedies sought had been too broad-brush [906].
- The Official Receiver lacked experience in relation to charities: in particular, the failure to give full recognition to the fact that it is common for charities to be heavily dependent on donations, and the apparent difficulties that he and his Deputy had with 'the concept of wholly non-executive boards of directors', which 'contributed to some inappropriate assumptions being made as to what should have been done by the Trustees' [909].

Falk J concluded that, though directors/trustees of incorporated charities were subject to company law the primary means of regulation should be through the Charity Commission [910].

She also added a warning that the charity sector depends on there being capable individuals with a range of different skills who are prepared to take on trusteeship roles and *it was vital that the actions of public bodies did not have the effect of dissuading able and experienced individuals from becoming or remaining charity trustees*: 'Disqualification proceedings, or the perceived risk of them, based on wide ranging but unclear allegations of incompetence rather than any want of probity, carry a high risk of having just that effect, and great caution is therefore required' [911].

[Source: CLAS, 18 February]

EUROPE

European Commission expected to approve UK-EU data transfers

For information

The European Commission is expected to decide very soon that data protection standards are high enough in the UK to allow personal data transfers between the UK and the EU to continue. The *Financial Times* [reports](#) that it has seen a draft adequacy decision which is expected to be approved by the European Commission this week. It will then be scrutinised by the European Data Protection Board, which does not have veto powers. Data transfers between the UK and the EU are currently governed by an interim data agreement, established during the Brexit process, which expires at the end of June 2021.

The importance of the adequacy assessment cannot be overstated; however, it should be noted that two consecutive EU-US data transfer agreements were struck down by the Court of Justice of the European Union.

[Source: Irish Legal News, 17 February]

Commission proposes extension to EU-UK Trade Agreement

For information

The Commission has [proposed](#) an extension until 30 April 2021 of the provisional application of the EU-UK Trade and Cooperation Agreement. The extension is to allow the time for the completion of the legal-linguistic revision of the Agreement for its scrutiny by the European Parliament and the Council. For the extension to be approved, a joint decision must be made by the EU-UK Partnership Council.

[Source: European Commission, 10 February]

FAITH & SOCIETY

Call for comments on pre-paid funeral plans

For action

We have received the following e-mail from the Financial Conduct Authority:

'In July 2022, the FCA is taking responsibility for regulating the pre-paid funeral plans sector. A pre-paid funeral plan allows a customer to pay upfront or by instalments for a funeral. The aim of these plans is to protect against rising funeral costs and help relieve the financial burden on the customer's family.

The FCA's regulation will aim to achieve good outcomes for consumers in this sector. The FCA wants to make sure that the products offered by firms meet consumer needs and offer fair value. It also wants to make sure that firms look after consumers' money and use it to deliver funeral services.

This may have implications for organisations which provide funeral plans, such as religious establishments. The FCA is seeking better to understand the provision of funeral plans by religious establishments and would be very grateful for any information which could help. Please contact the FCA at funeralplans@fca.org.uk if are happy to speak with them about any knowledge you have of this topic.

So that the FCA has the broadest picture of the sector, it wants to engage with all parties involved in the provision of funeral plan services, for example helping customers put aside monies to help save for a funeral.

The FCA will shortly publish a Consultation Paper which will set out how it proposes to regulate the sector and requires that all firms that wish to continue conducting regulated business apply to be authorised. For more information you can visit the FCA's webpage on [regulating the funeral plans sector](#).'

[Source: FCA, 19 February]

FUNDING

National Lottery Grants for Heritage 2021-22

For information **and possibly for action**

Applications are now open for [National Lottery Grants for Heritage](#) from £3,000 to £5million. The Heritage Fund will prioritise heritage projects that will:

- boost the local economy
- encourage skills development and job creation
- support wellbeing
- create better places to live, work and visit
- improve the resilience of organisations working in heritage

Every project will need to achieve its inclusion outcome, 'a wider range of people will be involved in heritage' and expects all projects to demonstrate that they are building long-term environmental sustainability into their plans, as appropriate.

[Source: Heritage Lottery Fund, 9 February]

ODDS & ENDS

A new survey about volunteers and the heritage sector

For action

CLAS has been asked to share the following e-mail with members, via the Places of Worship Forum:

Dear PoWF members,

This is a request for your help in circulating a new survey to Heritage Sector organisations that need support from volunteers to be sustainable.

Please could you pass this message on your networks and anyone else you think would have interested networks or contacts?

Last April Historic England's national survey on the impact of Coronavirus (Covid-19) on heritage sector organisations (businesses, charities and trusts) provided vital information about how the pandemic had affected the sector. We used that data to help the Government understand the desperate need for financial support, which is still on-going.

This year we're asking for your help to find out about the impact of Covid-19 on heritage organisations that need support from volunteers to keep the organisation sustainable. In order to assist us in this undertaking we would like to invite you to complete a [short survey](#).

We welcome feedback from organisations of all sizes and types so we can understand the support needs of the heritage sector at this challenging time, whether your organisation is entirely volunteer-led or only has a few volunteer roles.

The survey closes at **midnight on 3 March 2021'**

[Source: Historic England, 17 February]

Consultation on designing a new UK subsidy control regime

For information and possibly for action

Members may be interested to know that BEIS has [published](#) a consultation – closing **31 March 2021** – on its proposed approach for establishing a UK-wide subsidy control regime, replacing the EU state aid rules that applied until 31 December 2020. According the consultation, the Government aims to deliver a regime that:

- facilitates strategic interventions to support government priorities, including supporting the economy's recovery from COVID-19;
- takes account of the economic needs of the UK's individual nations and strengthens the economic bonds of the Union;
- protects the UK's 'competitive and dynamic' market economy; and
- ensures that subsidies in the UK are given in line with our international commitments, including those in the UK-EU Trade and Cooperation Agreement.

The potential importance of this for CLAS members is that when the UK was a member of the EU Government initiatives to provide help for the voluntary sector sometimes fell foul of the EU state aid rules. Whether a UK-wide subsidy control regime will make any great difference remains to be seen: in any event, it is not an appropriate consultation for a response from CLAS.

[Source: BEIS, 3 February]

COVID-19 - Where do we go from here?

For action

The Historic Religious Buildings Alliance (HRBA) is one of several supporters of a major action-focused project called 'Where do we go from here? Churches, communities, and buildings during Covid and beyond.' Late last year, a survey was circulated by HRBA and others as part of the project. To capture current developments, [there is now a second survey, available here](#) that will take around five to seven minutes that HRBA has asked CLAS members to complete.

[Source: HRBA, 17 February]

Time limit to COVID support grants

For information

Grahame Morris MP [asked](#) the Chancellor of the Exchequer, pursuant to the Answer of 21 January 2021 to Question 138922 on Charities: Finance, what the deadline is by which charities must have used grant funding. In response, Kemi Badenoch MP, said the following:

"The latest that grants must be spent is 31 March 2021 [emphasis added]. The £750m funding package was made available to address the immediate impacts of the pandemic, so that charities and other civil society organisations, including those at risk of financial hardship, can continue their vital work during the Covid-19 outbreak. The government keeps all sector support packages under review."

[Source: Commons *Hansard*, 25 January]

PROPERTY & PLANNING

Ban on bailiff evictions extended

For information

MHCLG has [announced](#) that the ban on bailiff evictions has been extended for another 6 weeks – until **31 March** – with measures kept under review in line with the latest public health advice.

Exemptions remain in place for the most serious circumstances that cause the greatest strain on landlords as well as other residents and neighbours, such as illegal occupation, anti-social behaviour and arrears of 6 months' rent or more.

[Source: MHCLG, 14 February]

SCOTLAND

Business rates relief to be extended for full year

For information

The Scottish Government has [announced](#) that retail, hospitality, leisure and aviation businesses will pay no rates during 2021-22. Charitable rates relief will also not be removed from mainstream independent schools until 1 April 2022, due to the ongoing impact of the pandemic.

[Source: Scottish Government, 16 February]

OSCR: 'virtual' meetings of charities and SCIOs

For information

[The Corporate Insolvency and Governance Act 2020 \(Meetings of Scottish Charitable Incorporated Organisations\) \(Coronavirus\) \(No. 2\) Regulations 2020](#) extended until 30 March 2021 the provision under which SCIOs may hold member's meetings using 'virtual' methods, whether or not their governing documents permit this.

OSCR says that this is likely to be the last extension to these provisions and emphasises that "it is very important to make sure that your charity is 'future proofed' in terms of being able to conduct meetings virtually by allowing them in your governing document". OSCR has also updated its guidance on [Charity meetings and governance](#).

[Source: OSCR, 12 February]

Updates to the Disclosure (Scotland) Act 2020

For information

OSCR has [published](#) a recording from a recent webinar where OSCR staff and Duncan Steele from Volunteer Scotland Disclosure Services discussed changes to the law around disclosure checks for volunteers.

[Source: OSCR, 4 February]

TAX

Budget 2021 and the "Tax Day"

For information

The Financial Secretary to the Treasury has announced that there will be a "Tax Day" on **23 March** on which the Government will make a number of additional announcements relating to tax policy, including on consultation updates. This will follow other fiscal announcements made in the usual way on Budget Day (on 3 March) which have immediate effect or relate to provisions for the Finance Bill. This new approach was confirmed in a [letter the Treasury Committee](#).

As with the Budget, we will be monitoring "Tax Day" for developments and announcements of relevance to members.

[Source: HM Treasury, 18 February]

Paying VAT deferred due to coronavirus

For information

HMRC has [updated](#) its guidance on how to pay VAT deferred due to coronavirus. The update has added information about how to join the VAT deferral new payment scheme – the online service is open between 23 February and 21 June 2021.

[Source: HMRC, 9 February]

Proposal allowing Northern Ireland to apply special measures on VAT

For information

The European Commission has [submitted](#) a proposal for a council decision to apply a special scheme on VAT in Northern Ireland to avoid a hard border between Ireland and Northern Ireland.

[Source: European Commission, 11 February]