

Regulatory Case Report

Garfield Weston Foundation

Registered Charity Number 230260



This is a Regulatory Case Report of an investigation by the Charity Commission ('the Commission') concerning Garfield Weston Foundation ('the Charity'). The regulatory concern relates to political donations made by a company, Wittington Investments Ltd ('WIL'), during the period in which the Charity has held a controlling shareholding in WIL.

The investigation focused on the nature and extent of the duties of the trustees of the Charity in relation to WIL's decision to make the donations.

Having regard to the principles of best regulatory practice, the Commission has decided to publish this Regulatory Case Report¹ on its investigation.

This report also identifies relevant issues for the wider sector.

The Charity

1. The Charity was founded in October 1958 and is governed by a Trust Deed. It was entered on the Commission's Register of Charities on 6 May 1964.
2. The Charity has wide general charitable objects. In practice the Charity is a grant maker.
3. The Charity's investment income in the financial year ending 5 April 2009 was £38,508,000². During the same period it made grants totalling £26,183,000.
4. The Charity currently has nine trustees.
5. The Charity has owned 79.2% of the issued shares in WIL since 1994.

¹ More information on Regulatory Case Reports can be found on the Commission's website www.charitycommission.gov.uk under the heading 'Inquiry Reports and Regulatory Case Reports'

² Values stated in this report are rounded.

Wittington Investments Limited

6. WIL acts as a holding company. Its principal asset is a 54.45% shareholding in Associated British Foods plc. Associated British Foods plc is quoted on the London Stock Exchange. WIL also wholly owns Fortnum & Mason plc and is the majority owner of Heal's Holdings plc.
7. WIL's consolidated net profits for the year ending 13 September 2008 were £384,000,000. During the same period it paid dividends of £44,000,000.
8. WIL currently has seven directors, of whom four are also trustees of the Charity. Trustees of the Charity have been directors of WIL during the whole of the period during which the payments referred to below were made. Trustees of the Charity are also directors of certain subsidiaries of WIL.

Source of concern

9. The Commission received information³ that WIL had made donations to the Conservative Party between 1993 and 2005.
10. This information raised concerns about whether the trustees of the Charity had supported a political party by allowing a company in which the Charity had a controlling interest to make donations to a political party.
11. On 22 June 2009 the Commission opened a Regulatory Compliance Investigation. The case was closed with the publication of this report on 1 April 2010.

Relevant legal principles

12. Charities must remain independent from party politics and cannot give support to a political party⁴.
13. Trustees of a charity which owns a controlling interest in a company have a duty to the Charity to exercise that control so as to safeguard the interests of the Charity⁵.
14. Prior to 2000 there were no specific statutory provisions relating to political donations by companies. The Political Parties, Elections and Referendum Act ('PPERA') 2000, the relevant part of which came into force on 16 February 2001, introduced provisions into the Companies Act 1985 which controlled donations by companies to "EU political organisations". EU political organisations, as defined, included parties registered under Part II of PERA 2000, and these included the Conservative Party. These provisions prohibited a company from making a donation to an EU political organisation unless the donation was authorised by a resolution passed by the company in general meeting. Such a resolution had to specify the maximum sum authorised during a period which could not exceed four years from the date of the resolution. The resolution had to be expressed in general terms and could not purport to authorise particular donations.

³ From an article in Charity Finance July 2009

⁴ See the Commission's publication CC9 "Speaking Out – Guidance on Campaigning and Political Activity", especially at section E.

⁵ *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515.

15. These provisions were replaced with effect from 1 October 2007 by new, broadly similar, provisions which are contained in Part 14 of the Companies Act 2006 and which remain in force. These provisions were not in force during the period covered by the Commission's investigation, but trustees of charities holding shares in companies need to be aware of them. Under these provisions, a company may not make a political donation to a political party or other political organisation, or to an independent election candidate, or incur any political expenditure (all as defined in the Companies Act 2006) unless the donation or expenditure is authorised by a resolution passed by the members of the company (and/or in certain circumstances the members of its holding company). The resolution must, again, be expressed in general terms and must not purport to authorise particular donations or expenditure.

Findings

16. The Commission's findings from its investigation are as follows:
17. Between the years 1993 and 2007 WIL made the following donations:
- In each of the years ended September 1993 to 1999 WIL donated £100,000 per annum to the Conservative Party, except for the year ended September 1995 when WIL donated £200,000. WIL made a further donation of £100,000 to the Conservative Party in the year to September 2005. These donations total £900,000.
 - During the years ended September 2000 to September 2007 WIL made donations totalling £305,000 to the European Foundation.
 - During the years ended September 2001 to September 2007 WIL made donations totalling £70,000 to the Centre for Policy Studies.
 - During the years ended September 2001 to September 2007 WIL made donations totalling £45,000 to the Labour Euro-Safeguards Campaign.
 - In September 2001 WIL made a donation of £500 to Aims for Industry.
18. The Commission ascertained from publicly available sources that:
- The Centre for Policy Studies is a think tank with links to the Conservative Party.
 - The European Foundation and the Labour Euro-Safeguards Campaign promote policies concerning aspects of the relationship between the United Kingdom and Europe.
 - Aims for Industry is a lobbying group with links to the Conservative Party.
19. The Charity informed the Commission that:
- Prior to the coming into force of PPERA 2000 the trustees of the Charity were not asked to consider donations to be made by WIL, and that this was in accordance with company practice at the time.
 - Due to an oversight, prior to 20 January 2006 the board of WIL did not request the authority from shareholders required by PPERA 2000 for the making of EU political donations.
 - A resolution authorising EU political donations in accordance with PPERA 2000 was proposed at an AGM of WIL on 20 January 2006 and the trustees of the Charity voted in favour of the resolution. The authority given by that resolution lasted for a period of three years (ie until 2009) and authorised donations up to £1 million in total.

- The minutes of meetings of the trustees did not record any consideration being given to the exercise of the trustees' votes in connection with the resolution passed at the AGM on 20 January 2006.
- The trustees only gave formal consideration to WIL business if it was of an unusual nature, and that they voted in favour of the resolution passed at the AGM on 20 January 2006 on the basis that the resolution was in the commercial interests of WIL and its subsidiaries and that it was in the interests of the Charity to further the commercial interests of WIL and its subsidiaries.
- Following the Commission's approach to the Charity, WIL undertook a thorough review of its relevant procedures.
- The donation made by WIL to the Conservative Party in 2005 has since been reimbursed to WIL by individuals who were directors of WIL at the relevant time, with interest at the appropriate statutory rate as calculated by WIL's auditors.
- WIL has sought independent advice as to whether any other donations made by WIL between the coming into force of PPERA 2000 and 20 January 2006 were required to be reimbursed to WIL due to the absence of a resolution of shareholders under PPERA 2000, and that advice, when received, will be shared with the Charity.

20. Further points made by WIL in correspondence with the Commission included:

- WIL is a separate legal entity from the Charity and is a non-charitable commercial concern.
- It was for the directors of WIL, acting as such, to decide to make the payments described above having concluded in good faith that it was in the commercial interests of WIL to make them.

21. Further points made by the Charity in correspondence and meetings with the Commission included:

- The trustees regard business decisions of WIL as the responsibility of its directors, not of the trustees of the Charity. This is in accordance with the Articles of Association of WIL.
- The question whether to make the donations described above was a business decision of WIL.
- While the Charity and its advisers accept that it would have been possible for the directors of WIL who were also trustees of the Charity to inform their co-trustees of WIL's intention to make political donations, the Charity and its advisers do not accept that the failure of such trustees to do so was necessarily a breach of duty. The Charity and its advisers take the view that:
 - Once the board of WIL had formed the view that it was in the commercial interests of WIL to make the payments, the trustee directors were entitled to consider that the payments were an aspect of the internal business of WIL on which shareholder consultation was unnecessary;
 - There was no material risk of reputational damage or embarrassment for the Charity as a result of the payments;
 - The fact that the Charity itself could not have made the payments is not relevant as the payments were made by WIL, a company in which the Charity held shares as an investment, and that they were made for the commercial purposes of that company, and not the purpose of promoting the political views of the bodies to whom the payments were made.

22. WIL has informed the Commission that there is no current intention on the part of its board to seek further approval for political donations.

Conclusions

23. The Commission focused its investigation on the donations made by WIL to the Conservative Party. In view of its conclusions on those donations, the Commission did not consider it necessary to deal separately with the other donations.
24. The Commission concluded that it would have been a breach of trust for the Charity to have made those donations out of the Charity's own funds. The payments would have been made for political purposes, and the making of them would not have furthered a charitable purpose.
25. The Commission accepted that the donations were made by WIL, not the Charity, and that WIL is a separate non-charitable commercial concern. The Commission also accepted that WIL's directors, acting as such, decided to make the donations having concluded in good faith that it was in the commercial interests of WIL to do so.
26. The Commission further accepted that in general the trustees of the Charity were entitled to regard day-to-day business decisions of WIL as matters for the board of WIL.
27. However, the Commission also applied the principle that trustees of a charity that owns a controlling interest in a company have a duty to the charity to exercise that control so as to safeguard the interests of the charity. The Commission considered that the trustees of the Charity who were directors of WIL owed duties both to WIL and to the Charity. Their duties to the Charity included a duty to consider whether to bring to the attention of the Charity's trustees, acting as such, matters materially affecting the Charity's interests arising in the course of WIL's activities.
28. The Commission considered that the duty of a trustee director, as described above, extended both to day-to-day business decisions of WIL and to matters which could not be so described. In any event, the Commission considered that the making of the donations, by virtue of their size, their voluntary nature, and the identity of the recipient, could not be regarded merely as day-to-day business decisions.
29. Against this background, the Commission considered separately the periods prior to and subsequent to the coming into force of PPERA 2000.
30. In respect of the position prior to the coming into force of PPERA 2000, the Commission considered that it was the duty of the trustees of the Charity who were directors of WIL to cause the trustees of the Charity, acting as such, to consider any proposal that WIL should make donations to a UK political party. The making of such a donation by a company in which a charity has a controlling interest is in practical terms very similar to the making of such a donation by the charity itself. Even if the directors of WIL had concluded in good faith that the making of the donations was in the best commercial interests of WIL, the directors who were trustees of the Charity should have appreciated that it was necessary for the trustees of the Charity, acting as such, to consider whether, notwithstanding the directors' conclusion, the making of the donations would be in the interests of the Charity.

Conclusions

31. The Charity informed the Commission that prior to the coming into force of PPERA 2000 the trustees of the Charity were not asked to consider donations made by WIL, and that this was in accordance with company practice. The Commission did not regard company practice as being relevant to the duties owed to the Charity by its trustees. Accordingly, the Commission considered that there was evidence that directors of WIL who were trustees of the Charity had breached their duties to the Charity by failing to cause the trustees of the Charity, acting as such, to consider the donations to the Conservative Party made or proposed to be made by WIL.
32. In respect of the position following the coming into force of PPERA 2000, the Commission noted that the donation made to the Conservative Party in 2005 had been reimbursed to WIL and that independent advice was being obtained in respect of other donations made prior to 20 January 2006. The Commission further noted that on 20 January 2006 the trustees of the Charity had voted in favour of a resolution authorising the making of donations. The Commission noted that the resolution did not authorise the making of particular donations and that it would have been unlawful for the resolution to do so. Nevertheless, applying the principle that the trustees of a charity that owns a controlling interest in a company have a duty to the charity to exercise that control so as to safeguard the interests of the charity, the Commission considered that it was the duty of the trustees of the Charity to ascertain what donations or kinds of donations the directors proposed to make pursuant to the authority being sought, and to consider, in the light of that information, whether it was in the interests of the Charity for the authority to be granted.
33. The Charity informed the Commission that there was no reference to the resolution in the minutes of the trustees' meetings and that the trustees only gave formal consideration to WIL's business if it was of an unusual nature. The Commission considered that the trustees ought to have regarded the conferring of the authorities as a matter requiring formal consideration by them. No such consideration having occurred, the Commission concluded that there was evidence that the trustees had breached their duties to the Charity by failing to give proper consideration to whether or not to confer on the directors of WIL the requested authority to make EU political donations.

Outcome

34. Notwithstanding that the payments listed above were made by WIL and not the Charity, the Commission concluded that there was evidence that:
 - Before the passing of the resolution dated 20 January 2006, the trustees of the Charity who were directors of WIL had breached their duties to the Charity by failing to cause the trustees of the Charity, acting as such, to consider the donations made or proposed to be made by WIL to the Conservative Party.
 - In voting in favour of the resolution dated 20 January 2006, the trustees of the Charity had breached their duties to the Charity by failing to give proper consideration to whether or not to confer on the directors of WIL the requested authority to make EU political donations.

35. Where the Commission considers that there is clear evidence that charity trustees have acted in breach of trust in a matter concerning the making of donations to a UK political party, the Commission will consider whether it is appropriate to seek restitution from the trustees. In the circumstances of this case the Commission concluded that it was not appropriate to do so for the following reasons:
- The Charity's Trust Deed contains a provision exempting the trustees from liability for breaches of trust committed negligently. In view of this provision, in a claim for restitution it would have to be proved not only that a breach of trust had been committed but also that a trustee sought to be made liable had committed the breach knowing, or being reckless as to whether, it constituted a breach of his duty as a trustee. The information obtained by the Commission did not establish that the trustees had committed breaches of trust knowingly or recklessly. The Commission acknowledges that the trustees acted in good faith in respect of the donations made by WIL.
 - The donation made by WIL to the Conservative Party in 2005 has been reimbursed to WIL with interest.
 - WIL has sought independent advice on whether any other donation made by WIL between the coming into force of PPERA 2000 and 20 January 2006 was required to be reimbursed to WIL due to the absence of a resolution of shareholders under PPERA 2000, and that advice, when received, will be shared with the Charity.

Issues for the wider sector

36. Where a charity's trustees are also directors of a company in which the charity owns shares, the trustee directors owe duties both to the company and the charity. Their duties to the charity include considering whether to bring to the attention of the charity's trustees, acting as such, matters materially affecting the charity's interests which arise in the course of the company's business.
37. Charity trustees have a duty to act in the charity's best interests. Although the charity's best interests will often be its best financial interests, this will not always be the case. Where a course of action is presented to charity trustees as being in the charity's best financial interests but may harm the charity, or charities generally, in other ways, the charity trustees must balance all the relevant considerations and act in the best interests of the charity taking all such considerations into account.
38. It is a fundamental principle that charities must remain independent from party politics and cannot give support to a political party.
39. Trustees of charities holding shares in companies need to be aware of the legislation relating to political donations and political expenditure by companies contained in the Companies Act 2006 Part 14. The general effect of these provisions is that a company may not make a political donation to a political party or other political organisation, or to an independent election candidate, or incur any political expenditure unless the donation or expenditure is authorised by a resolution passed by the members of the company (and/or in certain circumstances the members of its holding company). The resolution must be expressed in general terms and must not purport to authorise particular donations or expenditure.

40. The Commission does not think it is possible to lay down an inflexible rule that charity trustees as shareholders can never vote in favour of a resolution conferring authority for the making of political donations or for the incurring of political expenditure⁶ under those provisions.
41. However, the Commission considers that the trustees of a charity with a controlling or other significant interest in a company cannot properly vote in favour of a resolution authorising the company to make political donations or incur political expenditure if the trustees know that the directors will act on the resolution to make donations to or incur expenditure for the benefit of a UK political party. The effect of such a resolution would for practical purposes be the same as if the charity itself makes a donation to or incurs expenditure for the benefit of the political party. A charity which takes a step which for practical purposes has the same effect as if the charity itself makes a donation to or incurs expenditure for the benefit of a political party infringes the rule that charities must remain independent from party politics and cannot give support to a political party.
42. The trustees of a charity which owns a controlling or other significant interest in a company whose directors seek an authority from its shareholders for the making of political donations or for the incurring of political expenditure should ascertain what donations, or kinds of donations, the directors propose to make in exercise of that authority, and should consider whether to vote for or against the resolution in the light of that information.
43. The guiding principle is that the trustees' decision must be made in the best interests of the charity. The trustees must balance the directors' views as to what is in the best interests of the company against the wider interests of the charity. The wider interests of the charity include the need to adhere to the rule that charities must remain independent from party politics and cannot give support to a political party.
44. Charity trustees should ensure that adequate records are kept of their decisions so that they can demonstrate that they have acted in accordance with the governing document and with best practice. From time to time, trustees may have to take decisions with which others may disagree and which may come under very close scrutiny. In these circumstances, trustees should be able to demonstrate clearly that they acted honestly and reasonably in what they judged to be the best interests of the charity.

⁶ It is important for charity trustees to be aware that the definitions of political donations and political expenditure under the Companies Act 2006 are wider than donations and expenditure made to **political parties**; for these see paragraph 41

**You can obtain large-print versions
of this publication from the Charity
Commission on 0845 300 0218**

Charity Commission

Telephone: **0845 300 0218**

Typetalk: **0845 300 0219**

Website: **www.charitycommission.gov.uk**