



NCN: [2022] UKFTT 491 (GRC)

**FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
CHARITIES**

Appeal Reference: CA/2022/0007

**Heard remotely by CVP
On: 15 November 2022**

Before

**Upper Tribunal Judge Rintoul
(sitting as a Judge of the First-tier Tribunal)
Tribunal Member Carter-Shaw
Tribunal Member Elizabeth**

Between

CLEMENT NICHOLLS

Appellant

and

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

Representation:

For the Appellant: in person
For the Respondent: Mr Rechtman, Charity Commission

DECISION AND REASONS

DECISION

The appeal is dismissed. The order disqualifying the appellant from being a charity trustee or from holding any office or employment with senior management functions in a charity for a period of 9 (nine) years is confirmed.

REASONS

Introduction

1. Mr Clement Nicholls appeals against an order (“the Disqualification Order”) of the Charity Commission made under section 181A of the Charities Act 2011 (“the Charities Act”) on 11 November 2021 disqualifying him from being a charity trustee for a period of 9 years. That order also disqualified him from holding any office or employment with senior management functions in a charity.
2. The Disqualification Order is expressed to take effect when, on an appeal such as this, it is finally determined that the order was properly made.
3. The Tribunal’s power to determine this appeal arises from section 319(5) of the Charities Act and from the relevant entries in the table in Schedule 6 to that Act. In determining the appeal, the Tribunal must consider afresh the Charity Commission’s decision to make the Disqualification Order. In doing so, the Tribunal may take into account evidence which was not available to the Commission. If it allows the appeal, the Tribunal may:
 - quash the Disqualification Order in whole or in part and (if appropriate) remit the matter to the Charity Commission;
 - substitute for all or part of the Order any other order which could have been made by the Commission;
 - add to the Order anything which could have been contained in an order made by the Commission.
4. The appeal was heard remotely by video using CVP. Mr Nicholls attended the hearing and gave oral evidence. An agreed hearing bundle was provided as was a skeleton argument from the Charity Commission. In addition, a bundle of relevant authorities was provided.
5. There were no connection issues with video hearing platform and no submissions were made that the hearing had been rendered unfair owing to any difficulties.

Factual Background

6. The appellant was appointed as a charity trustee of The Hadhari Project (“the Charity”) on 4 February 2012 until he resigned in October 2020.
7. On 24 August 2012, the appellant signed an application form to open a community organisation current account with NatWest Bank using the Charity’s registration number.

That account had Mr Nicholls as the sole signatory and the mandate describes him as the chairman of the Charity. The account number for that account ends in 619 and we refer to it as the “Charity Account”. The Charity had other bank accounts at the relevant time with several signatories, including Mr Nicholls, and which required at least two trustees to sign.

8. On 12 January 2016, a sum of £15,654 was received in the Charity’s Account by automated credit. On the same day, two payments totalling £15,780 were transferred from the Charity’s Account using an electronic payment method.
9. On 17 March 2016, a sum of £310,000 was transferred fraudulently from a Lloyds bank account to the Charity Account. We refer to this as ‘the fraudulent transfer’.
10. On 18 March 2016, a total of £309,994 was paid from the Charity Account to various companies and individuals. These payments were authorised by someone who had access to the Charity’s Account using an electronic payment method. The transfers consisted of a payment of £46,500 to the Mr Nicholls and payments totalling £363,496 to three other parties. We refer to these transactions as the “March Payments”.
11. The £46,500 was transferred into Mr Nicholls’ personal bank account with the Co-op Bank on 18 March 2016. £16,500 of this was paid out the same day to Mr S Reid and Mr C Reid and on 21 March 2016 the remaining £30,000 was transferred into another of the appellant’s bank accounts.
12. At the time of the transactions referred to above at [8] to [11], Mr Nicholls was a trustee of the Charity, treasurer, and the sole signatory of the Charity Account. He was also shown as the Chair of Trustees despite the Charity’s governing document prohibiting any trustee from holding more than one post.
13. In 2017, the Charity Commission was contacted by the Metropolitan Police who were investigating the fraudulent transfer. The Commission then in turn began an investigation, requiring information from the Charity’s Trustees and from the banks involved. This involved several exchanges of correspondence between Mr Nicholls and the Charity Commission.
14. The appellant’s initial response to the Charity Commission on 15 July 2019 was that he was not aware of the credit of £310,000 into the Charity’s account, and then on 31 July 2019 he wrote that any money received by him was in repayment of various sums of money he had loaned the Charity over the years.
15. On 5 November 2019, the Charity Commission put its concerns in writing to Mr Nicholls to afford him the opportunity to respond to them. This included a request for any evidence of the loans that he alleges he made to the Charity.
16. On 21 July 2020, the Charity Commission issued notice of its intention to disqualify Mr Nicholls from being a charity trustee or trustee for a charity for a period of 10 years under section 181A of the Charities Act. The notice was accompanied by a Statement of Reasons and pursuant to section 181C (1), (2) and (5) of that Act was sent to Mr Nicholls inviting representations.
17. On 30 August 2020, the Charity Commission received representations from Mr Nicholls in response to the Charity Commission’s notice of intention of disqualification.

18. The Charity Commission reviewed the decision and upheld the decision to disqualify Mr Nicholls with an amendment to the Statement of Reasons to correct a drafting error and with a reduction of one year to the period of disqualification.
19. The Order to disqualify Mr Nicholls was sent on 11 November 2021, accompanied with a modified Statement of Reasons. This is the decision that is the subject of the current appeal.

Appeal Proceedings

20. Mr Nicholls appealed out of time to the First-tier Tribunal which issued case management directions on 16 May 2022. In accordance with those directions, on 14 July 2022 the Charities Commission served its response.
21. Further case management directions were issued on 15 September 2022.

Statutory criteria for making a disqualification order

22. Section 181A of the Charities Act came into force on 1 October 2016. It provides that the Charity Commission may by order disqualify a person from being a charity trustee or trustee for a charity, either in relation to all charities or in relation to such charities or classes of charity as may be specified or described in the order.

23. Section 181A (6) provides:

The Commission may make an order disqualifying a person under this section only if it is satisfied that—

- (a) one or more of the conditions listed in subsection (7) are met in relation to the person,
- (b) the person is unfit to be a charity trustee or trustee for a charity (either generally or in relation to the charities or classes of charity specified or described in the order), and
- (c) making the order is desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order.

24. The conditions listed in subsection (7) are lettered A to F; we are here concerned with D:

D that the person was a trustee, charity trustee, officer, agent or employee of a charity at a time when there was misconduct or mismanagement in the administration of the charity, and—

- (a) the person was responsible for the misconduct or mismanagement,
- (b) the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or
- (c) the person's conduct contributed to or facilitated the misconduct or mismanagement.

25. If the statutory criteria set out in section 181A (6) of the Charities Act are satisfied (and the procedural requirements in section 181C have been met), then a disqualification order may be made for a specified period not exceeding 15 years. The disqualification period must be proportionate (see section 181B (1) and (2)).

The Charity Commission's case

26. The Charity Commission's case is set out in its decision and in its response to the grounds of appeal
27. In summary, the Charity Commission's case is that although the trustees could not have been expected to know that the deposit of £310,000 was as the result of crime, it was unexpected. They found no evidence to suggest that Mr Nicholls reported the receipt of this sum to the Charity Commission, or to the police, at the time of receipt into the Charity's Account or otherwise nor was the sum included in the Charity's accounts for the year ending 31 March 2016.
28. It is the Charity Commission's position that, on the balance of probabilities, Mr Nicholls knowingly made or knows who made the March Payments from the Charity's Account, and that the March Payments were not in furtherance of the Charity's objects. In the alternative, if, as he asserts, Mr Nicholls was not aware of the March Payments made from the Charity's Account, Mr Nicholls failed to properly monitor and report the March Payments to the police and/ or make a serious incident report to the Commission to advise them of unauthorised payments out of the Charity's Account, either at the time the March Payments were made or subsequently.
29. Further, if as he asserts, the £46,500 payment to Mr Nicholls was in fact a repayment of loans made to the Charity, Mr Nicholls failed to properly document and evidence said loans and/ or failed to follow due process for handling Charity money and properly record the decision(s) taken by the trustees collectively to authorise the March Payments. Further, the March Payments were not included in the Charity's accounts for the year ending 31 March 2016, nor have any loans been recorded in the accounts either prior to or after the March Payments. It is clearly demonstrable from the above that the Charity's accounts were not properly maintained.
30. The Charity Commission noted also that no evidence has been provided to it by Mr Nicholls to substantiate his claim that he had made loans to the Charity, despite his assertion that he could do so.
31. Accordingly, and having had regard to its Explanatory Statement on the Power to disqualify, the Charity Commission was satisfied that Mr Nicholls' misconduct was deliberate and showed deliberate disregard for compliance with the law or regulation and that it was reasonable to conclude that he acted in a way that he knew, or should have known, was wrong. It concluded also that Mr Nicholls had profited personally through his mismanagement and/or misconduct, receiving a substantial unauthorised payment from the Charity.
32. The Charity Commission concluded that, for these reasons, Condition D within section 181A was met, as Mr Nicholls:
 - a. Failed to manage the Charity's resources responsibly;
 - b. Failed to comply with the charity's governing documents, not least when there was a conflict of interest;
 - c. Was unfit to be a Charity Trustee, given his demonstrable failings with regard to competence, honesty and integrity.

33. It concluded also that if Mr Nicholls were to become a trustee of another charity there would be (a) a risk of further abuse and failure to comply with legal duties (b) an adverse impact on the integrity of the sector and (c) concerns as to whether the sector is effectively being regulated - all of which would impact negatively on public trust and confidence in charity. It therefore concluded that disqualification provided an additional protection for other charities by prohibiting the individual from becoming a trustee of another charity.
34. It was also of the view that to take no action would be an unacceptable regulatory response in the context of what has transpired in this Charity and the serious implications surrounding the loss of the Charity's funds. The Commission considered Mr Nicholls' conduct, whilst he was a trustee in the Charity, was reckless, negligent or showed deliberate disregard for compliance with the law or regulation.
35. Accordingly, and for these reasons, it concluded that disqualification for a period of 10 years was justified, in the public interest and proportionate. This was reduced to 9 years on internal review. This found the order was justified but reduced the period to take account of the time the process had taken to be resolved.

Mr Nicholls' case

36. Mr Nicholls' grounds were relatively brief. He drew attention to the Charity's financial difficulties, and to NatWest's unexplained closure of the Charity's bank accounts which had put it in difficulty. He states that he paid for the Charity's overheads from his personal account, paying over £30,000 between March 2016 and March 2017, as shown by his bank records.
37. Mr Nicholls denies any mismanagement or misconduct. He denies making the March payments out of the Charity Account and asserts that any monies transferred to his account was used for operational costs when all banking facilities were withdrawn by Nat West.
38. With regard to the payments out of the Charity Account, he says he had not access to the account, and that the Charity had not received any statements from the bank account although he had asked for these.

The law – Tribunal's function

39. An appeal against the Charity Commission's Order under s181A requires the Tribunal to "consider afresh" the Charity Commission's decision (s319 (4) (a) of the 2011 Act). In so doing, it can consider evidence which has become available subsequent to the Charity Commission's Order (s319 (4) (b) of the 2011 Act).
40. In doing so, we give appropriate weight to the Charity Commission's decision as the body tasked by Parliament with making decision to disqualify trustees and we have regard to the Charity Commission's Explanatory Statement as its policy guiding its decision-making in relation to the power to disqualify. In doing so, we remind ourselves that we are conducting a rehearing, not a review: we must use our own judgment and we can vary such a decision where we disagree with it, despite having given it due weight.

41. It is for the Charity Commission to demonstrate that the statutory criteria for disqualifying Mr Nicholls from being a trustee are met. Once it has done so, however, the burden of proof rests with Mr Nicholls (as the party seeking to disturb the status quo) to show that a disqualification order should not be made (or that it should be made on different terms and/or for a shorter period of time). The standard of proof is on the balance of probabilities and the more serious the allegation, the stronger the evidence must be.
42. It follows that the issue for the Tribunal in determining the Charity's appeal is whether the Tribunal would, as at the time of the hearing, disqualify Mr Nicholls from being a charity trustee or a trustee for a charity in relation to all charities and from holding an office or employment with senior management functions in any charity and, if appropriate to make such order, the length that order should last.

Findings of fact

43. We start our analysis of the facts with the March payments, taking into account the submissions made to us. We turn first to the documentary evidence before us.
44. In reaching our decision we have taken into account the bundle provided by the parties, the oral evidence and submissions made during the hearing even if we do not refer specifically to any particular piece of evidence.
45. We start our consideration with the facts surrounding the March Payments. It is not in dispute that on 17 March 2016, £310,000 was transferred from a Lloyd's bank account to the Charity account. Nor is it in dispute that this was done as a part of a fraud. It is not in dispute either that on 18 March 2026, a total of £309,994 was paid out of the accounts to various companies and individuals, including a payment of £46,500 into Mr Nicholls' personal account held at the Co-Op Bank. The statements for that account show payments of £6,000 to Mr S Reid, £10,500 to Mr C Reid were made on the very same day as the £46,500 was paid in, and on 21 March a transfer of £30,000 into what Mr Nicholls says was his savings account.
46. We find that, irrespective of whether the money transferred to the Charity was subject to any resulting or constructive trust in favour of the victim of the fraud or either of the banks involved, it was the property of the Charity subject to that trust. We note that no application has been made to recover that money, either to the Charity or by way of any court action.
47. On any rational view, Mr Nicholls received the proceeds of a substantial fraud yet did not report it and made use of it despite the fact it was the Charity's money. His case is that he was innocent of any wrongdoing and acted properly with respect to money transferred to him from the Charity Account. At best, he has failed to show any documentary evidence to support his case other than annotated bank statements which show expenditure, from his personal account, which he says was made on the Charity's business; he has provided no receipts to substantiate this nor minutes to show that the trustees approved the use of his personal bank account, as a temporary and exceptional measure.
48. Mr Nicholls has not called evidence from any witnesses to support his case that he did not know about the March Payments until much later, and that any use to which he put the funds he received was permitted and properly accounted for. He indicated that he would have wished to call an employee to give evidence and that she was prevented because of ill health. He did not say what evidence she might have provided nor seek an adjournment.

49. We consider next the Charity's accounts that were in operation and for the proper running of which, as treasurer and as a trustee, Mr Nicholls was responsible. We consider also the evidence that the accounts had at times been closed by NatWest.
50. The Charity Account was set up, according to the Bank mandate, in the name of Hadhari Elderly Care Group. There is only one signature, that of Mr Nicholls, which he accepted in evidence is his. The mandate also designates him as chairman. Mr Nicholls asserted that he thought that there would be more than one signatory as there had been on the other accounts. The form very clearly states only one signatory was required and, on that basis, we reject his evidence.
51. The first entry on the statement is a nil balance brought forward on 1 March 2013. There are no transactions in the account until 18 March 2015 and only 12 transactions prior to 8 January 2016. After the March Payments, there is a payment out to Tony Smith on 29 March described as wages. (The payment to Mr Smith on 24 March 2016, also for wages was rejected and re-credited). There are a few smaller transactions, the account being closed or suspended on 2 June 2016.
52. The main account appears to be the account ending 917 which was finally closed on 28 February 2018. This account, we note, has regular transactions during March 2016, and through to April 2016 after which there are few transactions, mainly direct debits, although we do note an entry of 23 November 2017 entitled "Managers Suspense Charges Refund CLU"
53. We do, however, note that PC Ford records in his email of 16 September 2019, that Mr Nicholls told him that they had three accounts with NatWest that were closed in May 2016, Mr Nicholls having been responsible for the transfers between the accounts.
54. There is in the bundle, a letter from Mr Nicholls dated 28 November 2019, referring to the closure of the two accounts in February 2018. It is said that this is the second occasion, this having happened before in April 2017. That is consistent with an earlier letter from Mr Nicholls on 13 September 2017 referring to the closure of the accounts about which he had written on three previous occasions and with an earlier letter, again from Mr Nicholls dated 26 April 2017, referring to accounts having been closed.
55. There are also in the bundle various responses from NatWest consistent with this chronology, but there is nothing to indicate either that the accounts had been closed at any point in 2016, or that there had been more than two periods of closure.
56. We are on this evidence satisfied that the Charity's Accounts were closed on two occasions for unclear reasons and that funds were then transferred to HSBC. We do not, however, accept that the accounts were closed any earlier than April 2016, or on more than two occasions.
57. Turning next to the possible evidence that loans had been made to Mr Nicholls. We have considered the accounts for the Charity for the years ending 2016 to 2021. None of these make any reference to loans save in 2017 of £500 and in 2018 of £8700. The circumstances of these are not explained although this appears to have been partially repaid by 31 March 2019. There is no mention of payments made by Mr Nicholls nor to him defraying any expenses

incurred. There is a mention of a trade debtor in the 2018 accounts and subsequently, but they are not named. Nor is it asserted by Mr Nicholls that it is he.

58. The reports by the trustees do not name a chairman and by the time of the report ending 31 March 2018, there are only three trustees. This is in contravention of the Charity's governing document. In the report for the year ending 31 March 2019, a document he signed as treasurer, Mr Nicholls is named as acting chair.
59. We have read with care the minutes of the management committee provided to us for 19 May 2018 and 24 November 2018. We note that in both concerns were raised that Mr Nicholls was acting as chair whilst also serving as treasurer and that this was contrary to the governing document and unacceptable in the view of the Charities Commission.
60. We note in passing that Mr Nicholls had agreed to rent office space from the Charity and - quite properly - left the room when that was discussed and minuted. At no stage, however, is there any mention, even when discussing finances, of any other payments made by or to him. That is despite the concerns about income and how to generate more which are minuted in some detail.
61. We have considered also the enquiries made as to the March Payments and the replies. As noted above, the Charity Commission contacted the Charity's trustees, raising concerns about the NatWest accounts and the March Payments.
62. On 20 February 2019 it wrote raising questions about the NatWest Bank accounts and about the March Payments. In that letter, the following was requested:

Action 7: Please explain and confirm the trustees' understanding as to:

- i) The origin, control (bank mandates/trustees authorised signatories) and current status of each of the accounts above that are associated with the charity and explain exactly what is the purpose and association of each of the accounts to the charity.
 - ii) Provide the name, sort code and account number of any other accounts associated with the charity that are not listed above and also explain the additional accounts association with the charity.
 - iii) Explain in relations to the transactions referred to above in account 3 above – where the payments came from, what they were for and how this was used in furtherance of the charity's objects.
63. The response, signed by the trustees including Mr Nicholls, was that the Charity Account was set up to collect holiday money from service users, collecting about £5000 during 2015/16; that they realised that the Charity was not receiving statements, and that in March 2016, NatWest closed all three of the Charity's accounts without explanation. They also stated that they had absolutely no knowledge of the transactions whatsoever and believed them to be some sort of banking error. We find that this explanation is not entirely consistent with Mr Nicholls actions or various statements with regard to the payments into his account. We turn to that evidence next.
 64. Mr Nicholls was then on 25 June 2019 asked specifically about the payment to him of £46,500 described as repayment of a loan and a number of other questions about the Charity Account and when he first became aware of the £46,500 appearing in his Co-op account.

Unfortunately, that letter misquotes the Co-op Account number but gives the correct Sort Code.

65. Mr Nicholls' response was:

"I am not aware of the money appearing in the Co-op a/c ...619 sort 08 90 05. However, any money I receive is for revenue and capital cost"

66. The Charity Commission appears from an email dated 16 July 2019 to have realised the confusion as to the account number. But it is clear from the initial request which account it is referring to and the question put is unambiguous – Mr Nicholls is being asked about his account at the Co-op. His reply is less than candid.

67. In a further email of 28 July 2019, Mr Nicholls says that the Co op account is a personal account and "A loan with the option of it becoming a grant was made to Hadhari".

68. On 30 July 2019 Mr Nicholls said that he had loaned the Charity varying amounts of moneys informally, and he felt it was perfectly reasonable to 'deduct money owed to him', and that if it needed money in the future he would make an amount available in the form of a grant.

69. On 30 August 2020, Mr Nicholls wrote to the Charity Commission stating:

"Point 15", to the matter regarding £46,500.00 paid into my account on the 18th March 2016, I will reiterate this was monies owed to me by the organisation accrued over a four year period from 2012 to 2016 I will endeavour to provide relevant documentation to support this. Whilst recognising obvious flaws in the accounting procedures can I add that the Hadhari accounts have been meticulously maintained throughout the years. As a Charity moving forward it would seem that a cyber-crime reaches new levels, and we as a Charity must employ a more robust, transparent and secure accounting/banking system

70. The email from PC Ford dated 16 September 2019 records that Mr Nicholls told him he has a contact called Selvin Reed and that he had come to help expanding the business and organised a loan to be obtained to do this. The email records:

Then in MARCH 2016, two amounts of money upward of £100K came into their account. Nicholls states that these were much bigger than anything he was anticipating so when he spoke with REED about it REED told him that the wrong amount of money had been provided to him, which was an accident, so REED subsequently provided him with two bank accounts to forward the money into which NICHOLLS said that he did.

71. We consider that REED is a reference to Mr Reid; Mr Nicholls did not say that it was a different person.

72. In the grounds of appeal, Mr Nicholls states that his bank records show that as a trustee he has paid over £30,000 in wages and other overheads between March 2016 to March 2017 after the charity's bank accounts were closed by NatWest.

73. Under cross-examination, Mr Nicholls said that he had not previously seen the bank statement which covered the March Payments, he said that he had no knowledge of the transactions and had not been aware of the money appear in his account as at his email of 25 June 2019. He said also, when asked why he had said in his letter of 30 August 2019 that money had been owed to him, that money was always owed to him. He did not deny accepting the £46,500

into his account, or that he had treated it as the Charity's money. He said that he used the £46,500 to pay for the Charity's overheads.

74. Asked if it was normal for large amounts to appear in his account, he said that they did not until then but at the time the Charity had lost its income source and they were looking to fund raise, then accepted it would have been unusual at the time. He explained that the payments out of his account of £16,500 were to Mr and Mrs Reid as they had been supporting them to raise funds. He said he had not been surprised to see the sum, nor was he concerned about it. He said he had no knowledge of how it had been paid.
75. Mr Nicholls said he had not reported the March Payments to the police when told about them, and did not recall what he was recorded as having said to PC Ford. He said that he had not been chairman of the Charity, and when asked about what was recorded in the minutes and on the charities register that he had just been chairing the meetings.
76. We asked Mr Nicholls who he thought had authorised the payment into his account. He said he had not really examined it in terms of the money transfer.
77. In evaluating this evidence, we do so on the basis that it is now several years since most of the relevant events took place. We also bear in mind that Mr Nicholls says he has difficulty in recall, following treatment for a medical condition, although we have not been provided with any medical evidence to that effect.
78. We find that Mr Nicholls has been inconsistent in his explanations about the March Payments. We find it improbable that those who stole £310,000 from the Lloyds account would have transferred at least £30,000 to Mr Nicholls had he had no involvement with the fraud. If, as he appears to suggest, he had no control over the account, there is no plausible explanation for those who did (and were dissipating the profits of their fraud) transferring £46,500 to him.
79. We do not accept the explanations given for the transfers out of the Co-op account to Mr C and Mrs S Reid. There is no evidence from them. If, as claimed, they were raising money for the charity, there was no apparent need for them to pay the money into Mr Nicholls' account as there is insufficient evidence to show the accounts were closed or suspended at that point. Further, we were shown no evidence that a contract had been entered into with Messrs C and Mrs S Reid to raise funds for the Charity.
80. This explanation is also inconsistent with what was recorded by PC Ford. We have no reason to consider that he recorded what he had been told incorrectly, and we note that Mr Nicholls said he had transferred the money out of his account to Mrs Reed's accounts. Those transfers took place on the same day that the £46,500 arrived in the account. And, Mr Nicholls volunteered the information that he had asked Mrs Reed about it before doing so. Thus, Mr Nicholls must have known about the money transferred into his account as early as 18 March 2016 yet none of this exculpatory evidence was put to the Charity Commission in response to their queries, and there is insufficient evidence to show that Mr Nicholls took any action with respect to his bank or the Charity Account to find out what had happened. It is clear from the Co-Op bank statement that the £46,500 came from the Charity Account.
81. Mr Nicholls seeks to explain the transfer to him of £46,500 as repayment of money he had loaned informally. There is, however, no documentary evidence of him doing so, and his evidence on this is also inconsistent. He said on 30 August 2020 that this was money owed to him over the period of 2012 to 2016, yet in his grounds of appeal that it was to cover the

period from March 2016 to March 2017 in respect of wages and overheads. Mr Nicholls has not, however, drawn our attention to verified entries in his bank statements which would confirm that. It is also of note that there is no confirmation of either version of events from the other trustees or in the minutes of meetings other than an email from Ms Walker which refers to loans. No detail is given in that email which stands in isolation of other evidence such as minutes, nor did Ms Walker attend to give evidence. In the circumstances, we attach limited weight to that evidence.

82. Mr Nicholls now says he transferred £30,000 out of his personal account on 21 March. As the bank statements show balances usually well below that sum, we find he must have known about the transfer into the account to make the transfer out. That evidence directly contradicts what he told the Charity Commission. Nor is he consistent about what he thought it was for.
83. Viewing the evidence as a whole, we find that Mr Nicholls is not a reliable witness, nor can we put weight on his testimony unless confirmed by another source. The Charity Commission has satisfied us on the balance of probabilities that Mr Nicholls knowingly made or knows who made the March Payments from the Charity's Account. On the balance of probabilities, we reject Mr Nicholls' claim that he had lent money to the Charity, informally or otherwise. We are, however, satisfied that the Charity's bank accounts were closed from 2016 to 2017 as is evident from the bank statements and correspondence with NatWest. We accept that caused cashflow problems. [It may well be that in that period Mr Nicholls did pay some of the Charity's overheads, but, given the serious inconsistency identified at [81] above and the total lack of documentary evidence regarding any loans or grants that may have been made, we cannot be satisfied that he had made a loan as opposed to a donation.
84. We find further that we are satisfied his misconduct was deliberate and showed deliberate disregard for compliance with the law or regulation and that he acted in a way that he knew, or should have known, was wrong. We find that he has profited personally through his mismanagement and/or misconduct, receiving a substantial unauthorised payment from the Charity.
85. Mr Nicholls was the treasurer as well as being a trustee. He failed to ensure that proper account was made of the March payments or that proper records were kept of transactions, or that the trustees were properly informed.
86. We do not accept Mr Nicholls' evidence that he only chaired meetings. He was clearly described as chairman, a position he should not have held at the same time as being treasurer. The other trustees were as the minutes show aware of the problem, and we find that accordingly Mr Nicholls acted in disregard of the Charity's governing document, and in further disregard for proper standards.
87. Having made these findings, we turn next as to whether the statutory test for disqualification is met. That test asks us to ask:
 - a. Is Mr Nicholls unfit to be a charity trustee?
 - b. Would disqualifying him from being a trustee in the public interest
 - c. From what should be disqualified from doing?
 - d. What is the appropriate and proportionate disqualification period?

Is Mr Nicholls unfit to be a charity trustee?

88. Given our findings set out above, we are satisfied that Mr Nicholls:
- a. Failed to manage the Charity’s resources responsibly;
 - b. Failed to comply with the charity’s governing documents, not least when there was a conflict of interest;
 - c. Was unfit to be a Charity Trustee, given his demonstrable failings with regard to competence, honesty and integrity.
89. The Charity Commission’s Explanatory Statement says that there will normally be some causal link or connection between the identified conduct and its actual or likely impact on the person’s ability to be a trustee. It also states:

“Conduct falling within conditions A-F may make a person unfit to be a trustee even where that conduct does not call into question a person’s honesty, integrity or competence. Such conduct may be otherwise sufficiently serious that it calls into question a person’s fitness to be a trustee because it impacts or is likely to impact on public trust and confidence.”

90. On the facts of this case, Mr Nicholls’ conduct is clearly connected to the administration of the charity, and manifestly calls into account his integrity and honesty. We find in light of that, his continued involvement as a trustee presents a risk to public trust and confidence in the charity sector and this makes him unfit to be a trustee, whether in relation to the Charity or charities generally.

Is disqualifying Mr Nicholls from being a trustee desirable in the public interest?

91. Given our findings above, we have no doubt that it is in the public interest to disqualify Mr Nicholls. To do otherwise would have the effect of undermining public trust and confidence in the regulation of charities even although, as we accept, Mr Nicholls is no longer a trustee.

What should Mr Nicholls be disqualified from doing?

92. The finding set out above lead to the conclusion that a disqualification order should be made against Mr Nicholls under section 181A of the Charities Act. We must therefore go on to determine the terms in which the order should be made – both as to the extent of the disqualification and as to its duration.
93. The essential feature of a disqualification order is that it disqualifies a person from being a charity trustee or trustee for a charity. However, subsections (3) and (5) of section 181A effectively give rise to a statutory presumption that the disqualified person should also be disqualified from holding an office or employment with senior management functions in the charity or charities to which the order relates. We find no reason, given the nature of Mr Nicholls’ misconduct and the positions he held within the charity, why a disqualification order should be restricted. The overarching consideration in this regard should be the protection of public trust and confidence in charities.

What is the proportionate disqualification period?

94. We turn finally to the question of the Disqualification Order’s duration. We note that section 319 of the Charities Act permits us to vary the term of a disqualification order only

downwards; it does not permit us to fix a longer period – see Mustafa Musa v Charity Commission (CA/2020/00006).

95. The statutory regime for disqualifying trustees does not permit a disqualification order to have indefinite or permanent effect. Instead, section 181B of the Charities Act provides that any disqualification order must be made for a specified period not exceeding 15 years. The disqualification period must also be proportionate.
96. The Charity Commission’s Explanatory Statement sets out the approach which the Commission should take when deciding the appropriate length of a disqualification. It states that:

“... the commission will consider the seriousness of the conduct which gives rise to the disqualification and of the risk to and its impact on a charity or charities. To determine this, the commission will look at all relevant information received, the facts of each case that led to the criteria for disqualification being met and the consequences to the charity in question.”

97. In doing so, the Charity Commission should take account of a range of relevant factors, including: the gravity of the conduct; the nature and extent of the risk the person poses; their level of knowledge or culpability; the extent of any loss or damage; and any equalities or human rights considerations.

98. The Explanatory Statement goes on to say that:

“... the commission will use as a reference point 3 disqualification ‘bands’ as an aid to inform its decision on the length of disqualification. The bands are not provided for by statute and will be applied on a case by case basis.”

99. The three disqualification bands are as follows:

- Upper (over 10 years and up to 15 years);
- Middle (5 – 10 years); and
- Lower (less than 5 years)

100. The Explanatory Statement says that the upper band will be reserved for particularly serious cases. The middle band will apply to serious cases which do not merit consideration in the upper band; and the lower band will apply where the Commission has decided that, whilst the circumstances are sufficiently serious to warrant the making of a disqualification order, a relatively short period of disqualification would be proportionate.

101. The Explanatory Statement does not explain in detail how the positioning within a given disqualification band should be decided, but it does go on to say that:

“When deciding on the proportionate period of disqualification, the commission may take account of (where relevant) the existence of any aggravating or mitigating features to determine whether the banding is correct and, if so, at what point in the band the period of disqualification should sit.”

102. In its statement of reasons for making the Disqualification Order, the Charity Commission stated:

The reasons for the Commission’s intention to set the disqualification period at 9 years are:

(1) Mr Nicholls engaged in conduct which constituted misconduct and/or mismanagement in breach of his legal duties as trustee and which resulted in a significant loss to the Charity;

(2) Mr Nicholl's conduct was deliberate. Mr Nicholls made considerable gain by taking the money. His actions constituted a significant abuse of his position of trust in the Charity;

(3) The Commission is concerned that Mr Nicholls' pattern of behaviour is likely to be replicated if he were to become a trustee or senior manager of another charity. The Commission therefore considers that Mr Nicholls poses a sufficiently serious risk to charities generally, which poses a serious threat to public trust and confidence.

103. We are satisfied that the present case is sufficiently serious that a disqualification for a period within the lower disqualification band would be wholly inadequate (and would not be proportionate).
104. Cases which merit disqualification for a period falling within the middle band, on the other hand, whilst still being 'serious' and involving some culpability on the part of the person concerned, are likely to involve conduct which poses a moderate risk to public trust and confidence in charities; moderate loss or damage; a disregard for charity law and the duties of trustees; or other reckless, negligent or incompetent conduct. That is the band in which the Charity Commission has placed Mr Nicholls in fixing a term of 9 years.
105. Reflecting on our findings of fact, but bearing in mind the limits on our powers, we consider that Mr Nicholls does fall within the middle band rather than the upper band, and that there are, as the Charity Commission notes, some mitigating factors in the form of the length of time that has elapsed since the events in question. Aggravating factors include the deliberate nature of the misconduct, the failure to accept any responsibility and the inconsistency in the explanation, as well as the concealment of the funds in question from the Charity's records and accounts. Mr Nicholls has shown no insight into his behaviour
106. The conduct which has given rise to the Disqualification Order is undoubtedly serious and the wider risks it poses to trust and confidence in charities generally are very significant indeed.

Proportionality

107. It therefore just remains for us to consider whether the resulting disqualification period of nine years is proportionate in the circumstances of this case. Given everything we have said above about the seriousness of the conduct in question and about the likelihood of it damaging public trust and confidence in charities generally, we are satisfied that it is indeed proportionate.

Disposal

108. For all of these reasons, we are satisfied that the statutory criteria are met for disqualifying Mr Nicholls from being a charity trustee or trustee for a charity and we agree with the Charity Commission's decision to make a disqualification order against him in respect of charities generally and that the appropriate period of disqualification is 9 years.

Signed

Date: 8 December 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

(Sitting as a judge of the First-tier Tribunal)