Neutral Citation Number [2024] UKUT 00347 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appellant: **Darren Anthony Wilson**	**Tribunal Ref: UT-2023-000090**
Respondent: **The Charity Commission for England and Wales**	

APPEAL AGAINST THE DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL
FOLLOWING THE ORAL HEARING OF THE APPEAL

DETERMINATION

The decision of the First-tier Tribunal (General Regulatory Chamber) (Charities) dated 26 June 2023 (after a video hearing on 17-19 January and 2 February 2023) under file reference CA/2022/0006 involves error on a point of law. The appeal and cross-appeal against that decision are allowed and the decision of the Tribunal is set aside.

The matter is remitted to a differently constituted tribunal for a complete rehearing.

The new tribunal must consider and make relevant findings as to whether or not

(a) one or more of the conditions listed in s.181A(7) of the Charities Act 2011 is satisfied:

(b) the Appellant is unfit to act as a charity trustee;

(c) it is desirable in the public interest to make an order in order to protect public trust and confidence in charities;

(d) the Tribunal should exercise its discretion to make an order and, if so, what that order should encompass and in particular whether it should apply to all charities or only some, the length of any disqualification and whether the order should or should not prevent the Appellant from exercising any senior management function in a charity.

This decision is made under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Representation: Mr Matthew Smith KC, counsel (for the Appellant)
(instructed by Brabners LLP)

Mr Faisel Sadiq, counsel (for the Respondent)
(instructed by the Charity Commission)

REASONS

Introduction

1. This is an appeal and cross-appeal against the decision of the First-tier Tribunal (General Regulatory Chamber) (Charities) (Judge Damien McMahon, Tribunal

Members A'Lsha Khan and Stuart Reynolds) ("the Tribunal") dated 26 June 2023 after a video hearing on 17-19 January and 2 February 2023. In its decision the Tribunal allowed in part the appeal against the disqualification order imposed on the Appellant, Darren Anthony Wilson ("Mr Wilson"), by the Respondent, the Charity Commission ("the Commission"), on 8 February 2022, disqualifying him from being a charity trustee or a trustee of a charity and from holding office or employment in a charity with senior management functions, for a period of 4 years, pursuant to its powers under s.181A and 337(6) of the Charities Act 2011 ("the 2011 Act"). The appeal was allowed to the extent that Mr Wilson was disqualified from being a charity trustee or trustee for a charity in relation to all charities for a period of 4 years with effect from 26 June 2023, but he was not disqualified from holding office or employment in a charity with senior management functions from the date of issue of the First-tier Tribunal's decision.

The Decision of the Tribunal

2. By way of preliminary observations the Tribunal explained that

> "1. The Appellant appealed against, firstly, an Order of the Respondent dated 12 August 2021 ('the Suspension Order') made pursuant to s.181B(4) and s.337(6) of the Charities Act 2011 ('the Act') suspending the Appellant from acting as a trustee of any charity (Appeal No. CA/2021/0024) and, secondly, an Order of the Respondent dated 8 February 2022 ('the Disqualification Order'), pursuant to s.181A of the Act, disqualifying the Appellant from being a charity trustee or trustee for a charity, in relation to all charities, and in addition, from holding office or employment, paid or unpaid, in a charity that involved the exercise of senior management functions, for a period of four years (Appeal No. CA/2022/0006).
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> 2. Power is vested in the Tribunal to determine the appeal pursuant to s.319 and Schedule 6 to the Act. The Tribunal, in determining the appeal, considered afresh the Respondent's decision to make the Orders and made its own determination on the issues raised on the evidence before it.
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> 3. The appeal was determined, following a remote oral hearing, held by CVP, on 17- 19 January and 2 February 2023. An agreed bundle was provided, in accordance with Directions,

that included written submissions of the Respondent, supporting documentary evidence originating with both parties, relevant extracts of the Act and a bundle of authorities. Further documentary evidence was submitted by both parties at the hearing with the permission of the Tribunal. Specifically, Bundle C related to the Appellant's appeal against the Disqualification Order.

4. It was common ca[u]se between the parties that the Tribunal need only determine the appeal against the Disqualification Order since, if that were successful, the Respondent would discharge the Suspension Order or, if it were unsuccessful, the Suspension Order would be otiose. The Tribunal proceeded on that basis.

The Appeal

5. The Appellant, in his said appeal against the Disqualification Order, sought to have the Order quashed on three grounds, namely, that the Respondent could not show a strong *prima facie* case that a Disqualification Order should be made against him; that the case against him was not based on allegations that give rise to an ongoing threat to charities and that the Respondent had not shown any need to act urgently to protect charities without affording the Appellant the benefit of making representations or pursuing an appeal to the Tribunal.

6. The Appellant, through oral and written evidence (including the admission into evidence by the Tribunal of an updating statement of the Appellant dated 9 January 2023), oral and written evidence of various witnesses called on his behalf, including cross-examination of those witnesses who had been requested by the Respondent to attend for that purpose, and written and oral submissions of his counsel elaborated on these assertions. All of this evidence, and submissions, including the evidence, with cross-examination of certain witnesses of the Respondent requested by the Appellant to attend for that purpose, along with the written and oral evidence and submissions of the Respondent, were considered by the Tribunal in making its Decision.

7. The Tribunal was invited, *inter alia,* to consider whether the Appellant should be automatically also disqualified from holding senior management positions for all charities, or otherwise, should the Tribunal decide that the Appellant should be disqualified from being a charity trustee.

> 8. The Tribunal determined the appeal against the Disqualification Order by reference to the statutory imperatives contained in s.181A of the Act, including the discretionary power set out therein (there being no grounds, nor was it asserted by the Respondent, that there existed grounds for automatic disqualification from holding the office of trustee in a registered charity).
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> 9. The Respondent's concerns, that led to the making, ultimately, of the Disqualification Order, were three-fold, namely, the dealing with a transfer of £1,906,760 to the Charity from the Football Association; the way in which the Charity dealt with several properties owned by it in Manchester and London, including questions of there being a lack of formal leases, occupation of those properties, or some of them, by non-charity related entities; no rent being paid to the Charity and the relationship of the Charity to the Professional Footballers' Association ('the Union'), a non-charitable entity (hereafter, collectively, 'the Respondent's concerns').

Factual Background

3. The Tribunal then explained the factual background to the appeal as follows:

> "10. The factual background was, essentially, not in dispute between the parties. However, the import, significance and interpretation of those facts as they might affect the outcome of these proceedings, were very much in dispute.
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> 11. The Appellant was, until 1 July 2022, the Financial Director of the Union. Pursuant to his holding that position, the Appellant was an *ex officio* trustee of the Professional Football Association Charity ('the Charity'), from 8 January 2013, when the Charity was incorporated, until 1 July 2022, when his appointment as trustee was terminated. His employment as Financial Director of the Union was terminated on 30 June 2022. As a matter of law, the Appellant would not have been permitted, unless authorised, from participating in any decision as to the terms of the relationship between the Union and the Charity, as he was an employee of the former and a trustee of the latter, thus raising competing duties of loyalty.
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> 12. In November 2018, the Respondent opened a regulatory compliance case into the Charity following concerns being raised by an anonymous person, described as a 'whistle blower', concerning the Charity's relationship with the Union.

As its regulatory concerns remained, the Respondent opened a statutory inquiry ('the Inquiry') into the Charity on 20 December 2019, pursuant to s.46 of the Act. These appeals did not involve a challenge to the opening of the Inquiry. However, the fact of the opening of the said inquiry was strong evidence of the significant concerns held by the Respondent in respect of the governance of the Charity. In view of the senior role held by the Appellant in the Charity, particularly, his role as a trustee by reason of his particular financial expertise, was a fact of some significance in the determination of this appeal.

13. With the agreement of the Respondent, after the opening of the Inquiry, the Charity commissioned, and received, its own independent review ('the Review') into the management and governance of the Charity, the remit of the Review being agreed by the Respondent and the reviewer being chosen from a panel of persons from whom the Respondent appointed interim managers, if thought necessary, following the opening of a statutory inquiry into a charity by the Respondent.

14. Initially, on 7 June 2019, the Respondent issued each of the trustees of the Charity (including the Appellant) a notice of intention to issue a warning. Following representations from the trustees in July 2019, the Respondent did not, in fact, issue any warnings but, instead, opened the Inquiry and, subsequently, agreed to the commissioning of the Review. However, on 30 August 2022, the Respondent decided that an Official Warning would be issued to the Charity, as a corporate entity, having, therefore, its own legal personality, on the basis of the same concerns the Respondent had identified resulting in it making the said Orders against the Appellant. The Respondent again referred to mismanagement (but not misconduct) on the part of the Charity. There was no appeal before the Tribunal from the Charity in this, or any other, regard.

15. Ultimately, the Appellant was suspended and subsequently disqualified, pursuant to the respective Orders. The Respondent, however, left open the possibility of there having been misconduct, and not merely mismanagement, on the part of the Appellant, a potential that was left open in these proceedings. These matters were the subject of these appeal proceedings.

16. The Appellant opposed the *making* of the Disqualification Order at all – whatever the duration of the disqualification: in other words, the only relief sought by the Appellant was that both Orders be quashed in their entirety.

17. Another person, the former Chief Executive ('the CEO') of the Union, was, likewise, an *ex officio* trustee of the Charity. However, no action was taken against him, or any other trustee, by the Respondent (even though the Review was highly critical of the CEO but not of the Appellant). The reason for that is unknown, but is outside the scope of these proceedings, and, in any event, was not a determinative matter for the purposes of these proceedings.

18. Further, also on 30 August 2022, the Respondent, in its Decision Review, concluded there had been mismanagement (but not misconduct) in the administration of the Charity but only between 2013 and 2019.

19. A renewed application by the trustees of the Charity, including the Appellant, for a negative declaration, pursuant to s.115 of the Act or, alternatively, s.1157 of the Companies Act 2006, that they had not committed any breach of duty or act of misconduct or mismanagement was refused permission by the High Court in July 2022, the High Court, in essence, ruling, in respect of the Appellant, that the concerns of the Respondent against the Appellant should be determined before the Tribunal pursuant to these appeals.

20. The Tribunal was satisfied there was no deliberate negligence or fraudulent behaviour on the part of the Appellant.

21. It was found as a fact by the Tribunal, on the balance of probabilities, having regard to the entirety of the written and oral evidence and submissions of the parties, that the Appellant was unfit to be a charity trustee, even though the Respondent had permitted the Appellant to give financial advice to the Charity in his capacity as Finance Director of the Union.

22. The Tribunal also found as a fact, on the same basis, that it was desirable, in the public interest, to make the Disqualification Order, as varied by the Tribunal, in order to protect public trust and confidence in charities. This is inevitably a heavy burden that must be discharged by anyone, including the Appellant here, who agrees to become a charity trustee.

23. The Tribunal did not accept that the matter of the Disqualification Order not being made for a relatively lengthy time after 2019 was an overarching determinative factor.

24. The effect of the making of the Orders on the Appellant's heath and livelihood is acknowledged.

25. Having complied with necessary statutory procedural requirements, the said Orders in the terms set out in those Orders, as varied, pursuant to s.181 of the Act are decided by the Tribunal

26. The Appellant had a long history, of over ten years of involvement with the Charity holding office by virtue of his financial expertise."

The Legislation

4. The Tribunal then set out the relevant statutory framework

"27. There are circumstances, set out in ss.178-179 of the Act, in which a person is automatically disqualified from being a charity trustee or trustee for a charity. Those circumstances did not apply in this case.

28. In determining these appeals, the Tribunal had regard to, as it was required to have regard, the Respondent's statutory objectives as set out in s.14 of the Act, in summary, the 'Public Confidence' objective; the 'Compliance Objective'; the Charitable Resources Objective' and the 'Accountability Objective'.

29. By virtue of s.181A of the Act, the Respondent may make an Order disqualifying any person from being a charity trustee or a trustee for a charity, whether in relation to all charities or to specific charities or classes of charities as may be specified in the Order, if one or more of the statutory grounds set out in s.181A(6)(a), (b) and (c) and s.181A(7) are satisfied.

30. All of these criteria must be satisfied.

31. In addition, even where the said criteria are satisfied, the Tribunal, standing in the place of the Respondent, having regard to the information before it at the hearing, in determining the appeal against the Disqualification Order, had to consider whether to exercise its discretionary power to make the Order. There was no dispute between the parties as to the questions that fell to be considered in deciding that particular matter, the burden falling upon the Appellant in that regard (but with the burden of proof falling upon the Respondent in respect of

primary facts). The parties took opposing positions in relation to this question of the burden of proof in respect of the matter of the exercise of the discretionary power.

32. The parties properly agreed that, for the purposes of this appeal, as this was the basis upon which the Respondent made the Disqualification Order, only s.181A(7)D was relevant, and in dispute, namely,

> *"…that the person [the Appellant] 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 –*
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> *(a) the person was responsible for the misconduct or mismanagement,*
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> *(b) the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or*
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> *(c) the person's conduct contributed to or facilitated the misconduct or mismanagement".*

33. The terms 'misconduct' or 'mismanagement' are not defined in the Act. However, in Guidance issued by the Respondent, 'misconduct' is taken to include any act or failure to act in the administration of the Charity which the Appellant knew or ought to have known was criminal, unlawful or improper while 'mismanagement' is taken to include any act or failure to act in the administration of the Charity that may result in significant charitable resources being misused or the people who benefit from the Charity being put at risk. (However, as noted in paragraph 17 of this Decision the Respondent, in its Decision Review dated 30 August 2022, concluded that there had been mismanagement - but not misconduct - in the administration of the Charity between 2013 and 2019).

34. Nevertheless, disqualification is a discretionary power. Accordingly, even if the statutory criteria to make the Order are satisfied, it does not necessarily follow that the Order should be made. It should only be made if, in addition, that it is appropriate and proportionate, in all the circumstances of the appeal, having regard to the provisions of s.181A(6) (with specific reference to the public interest test)."

Findings Of Fact and Conclusions

5. In the light of that factual background and the statutory framework which it had set out, the Tribunal made the following findings of fact and reached the following conclusions:

> "35. The Tribunal concluded, on the evidence, on the balance of probabilities, that it, in a de novo hearing would uphold the Disqualification Order against the Appellant, save that, in the exercise of the discretionary power, there should be no automatic disqualification of the Appellant holding senior management positions in any charity.
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> 36. The Tribunal further concluded, on the evidence, that the Appellant, having regard to the matters set out in the Factual Background section of this Decision, was the person primarily responsible for the proven unintentional mismanagement in the administration of the Charity, due to a lack of understanding on his part of the proper management of charities, by reference to the guidance on the meaning of those terms set out in the Respondent's Operational Guidance document and the guidance set out in the Explanatory Statement on the discretionary nature of the power to make a disqualification order.
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> 37. The power to disqualify a charity trustee from acting in that capacity is vital to protect charities.
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> 38. The Tribunal was satisfied that the Appellant was not a fit person to be a charity trustee of any charity. As a qualified accountant, the Appellant was, or should have been, in an even better position than, perhaps, his fellow trustees, to know the proper course of acting as a trustee.
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> 39. The Appellant had a particular responsibility in respect of the Charity, being the very reason he was appointed an ex officio trustee of the Charity, but, nevertheless was also part of the collective group of trustees that relied upon professional advisers. Arguably, there was some culpability on all of the trustees; indeed, in circumstances such as these, the main responsibility for mismanagement such as that found by the Tribunal, should be the Chief Executive Officer or the Financial Director. It was appropriate that the Appellant, due to his

special position, should be held responsible for mismanagement to a higher standard than other, non-specialist trustees of the Charity. Nevertheless, it did seem harsh to the Tribunal that the CEO of the Union, also an ex officio trustee of the Charity, should not have been sanctioned too, but that was not a matter before the Tribunal.

40. The Tribunal concluded that the most significant issue leading to its finding of mismanagement (but not excluding the other two areas giving rise to the Respondent's concerns), was the relationship between the Charity and the Union. There had been a complete disregard for the need to operate as two distinct and legally separate entities over a period of years – in essence, operating the two as one entity to all intents and purposes. This relationship was something that should have been resolved at a much earlier point, a matter in respect of which, responsibility particularly fell to the Appellant. This lack of operational separation, exemplified by there being no contract or arrangements for re-charge of services between the two entities, was clear mismanagement.

41. The Tribunal considered that the Charity was not particularly well-served by professional advisers upon whom too great a reliance was placed by all the trustees. However the Tribunal found that this did not detract from the particular responsibility of the Appellant given his professional training and specific operational responsibilities.

42. The Appellant, on the evidence, on the balance of probabilities, treated the Union and the Charity as, in essence, one entity, albeit with a separation of accounts exercise taking place at the end of a financial year.

43. There was a distinct lack of appreciation shown by the Appellant that he was dealing with a multi-million pound charity or the issues that raised for the proper management of the Charity.

44. The Tribunal concluded that the Appellant, by his conduct, placed the Charity in significant financial and reputational risk; that the Appellant is unfit to discharge the duties of a trustee of any charity, and by his conduct, the Appellant damaged public trust and confidence in charities generally. Consequently, the Tribunal was satisfied that it was desirable in the public interest to make the varied Disqualification Order.

45. Nothing emerged in the course of this hearing to justify the Appellant, particularly since he was so highly qualified, being treated differently than any trustee faced with disqualification from acting as a trustee of a charity where they were personally responsible for the mismanagement which took place.

46. The Tribunal was particularly concerned that the Appellant showed no appreciation of the importance of a declaration, or a need to declare, any conflict of interest when acting in his role as trustee of the Charity. This was a very basic failing on his part in that context. It was not acceptable, but understandable at a certain level, that he should seek to rely on not being advised in respect of such matters, particularly when a solicitor was present at each meeting of the trustees, apparently, to merely take minutes of the meeting.

47. The Appellant should have known, particularly since he had a specialised role within the Charity, and the Charity had access to expertise, [which] sets the Appellant apart, to a great degree, from his fellow trustees.

48. The facts surrounding the issue of the £1.9M transfer to and from the Union by the Charity, one of the Respondent's concerns, were not found by the Tribunal to be evidence of mismanagement in the overall scheme of things. However, the Tribunal did find that the Appellant, as Finance Director of the Union and financially qualified Trustee of the Charity should have had a better grasp of this issue than he displayed in the course of the Respondent's Enquiry or in the hearing. In particular, the Tribunal was concerned that the Appellant did not appear to concern himself with whether a sum of this, or any, magnitude was, in fact, properly Charity money until the accountants were producing year end journals.

49. Similarly, by reason of particular issues of law and the dual loyalties held by the Appellant, together with the facts that emerged in the course of the hearing, the Tribunal, on the balance of probabilities, decided that the concern identified by the Respondent concerning the management and operation of properties of the Charity, was not, in itself, strong evidence of mismanagement by the Appellant in his role as trustee of the Charity. However, taken together with the failure to declare an interest and the deficiencies in the accounting for a significant sum of money by the Charity, there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee.

50. The Tribunal was satisfied that the statutory criteria for making the Disqualification Order were, and are, satisfied. The Tribunal was obliged, however, to also consider whether, as a matter of discretion, it was appropriate for the Order to be made in the circumstances of the case. The Tribunal concluded that it was appropriate to make the Order: the conduct of the Appellant was serious; harm was caused to the Charity for which he was primarily responsible and there was a risk of further harm arising from further mismanagement if the Disqualification Order were not made. Further, the evidence before the Tribunal established a specific link between the Appellant and the stated mismanagement.

51. The Tribunal also considered whether it was proportionate to make the Disqualification Order, including whether it was proportionate to make an Order for four years. For the reasons stated in the preceding paragraphs, the Tribunal was satisfied that to make the Order for a period of four years was proportionate. In considering the question of proportionality, the key issue is the need to increase public trust and confidence in charities and to promote compliance by charities with their legal obligations in the proper administration of charities. The Tribunal considered that any lesser period of disqualification than four years would only serve to pose an unacceptable level of risk to the charity sector by the Appellant. Bearing in mind the seriousness of the Appellant's mismanagement in relation to the Charity over a period of time, it is proportionate, and appropriate, that his disqualification should apply to charities generally.

52. This appeal against the Disqualification Order was unanimously allowed in part in that the Tribunal removed the disqualification of the Appellant holding office or employment, paid or unpaid, in a charity that involved the exercise of senior management functions. This aspect of the Tribunal's Decision does not, on the balance of probabilities, raise any issue for protection of a charity; there was no dishonesty on the part of the Appellant; even when the Suspension Order was made, the Respondent permitted the Appellant to, in effect, continue to operate the Charity and keep it running; there will be no conflict of interest in the Appellant acting as an employee, even in a senior management position and, in any event, he could be supervised in such a role.

53. The appeal against the Suspension Order is otiose in those circumstances from the date of issue of this Decision."

The Application for Permission to Appeal

6. Judge McMahon refused Mr Wilson permission to appeal on 22 August 2023.

7. Mr Wilson applied to the Upper Tribunal for permission to appeal on 21 September 2023. On 28 September 2023 I directed an oral hearing of the application for permission to appeal, which I heard on the morning of 9 November 2023 when both Mr Wilson and the Commission appeared before me by video. The parties were ably represented by, respectively, Mr Matthew Smith of counsel and Mr Faisel Sadiq of counsel, both of whom had appeared below. I reserved my judgment.

The Grant of Permission to Appeal

8. On 6 December 2023, I refused permission to appeal on the grounds 1(2), 1(5) to 1(7) and 3 in Mr Smith's revised grounds of appeal. However, I granted permission to appeal in respect of grounds 1(1), 1(3) to 1(4) and 2 in his revised grounds of appeal. I made further directions for the conduct of the appeal, including for the service of a response and a reply with a view to having an oral hearing of the appeal in a window between 11 March and 31 May 2024.

The Cross-Appeal

9. The Commission put in its response to the appeal on 19 January 2024. In paragraphs 41 to 46 it sought permission to cross-appeal against the decision of the Tribunal. Mr Wilson responded to that application on 14 February 2024, seeking an immediate determination of the application to cross-appeal, an extension of time to file his Reply and revised directions for the hearing of the appeal. The Commission replied to that submission on 4 March 2024.

10. On 8 March 2024 I granted the Commission's application for permission to cross-appeal against the decision of the Tribunal on grounds 1 to 4. I made revised directions for the hearing of the appeal.

The Hearing of The Appeal

11. I heard the appeal on 25 July 2024. Mr Wilson was again represented by Mr Smith, who in the interim had taken silk and now appeared as Mr Matthew Smith KC. The Commission was again represented by Mr Sadiq. I am again indebted to both counsel for their able and succinct oral and written submissions. Indeed they were so succinct that the hearing finished by 3.10pm on the first afternoon, although a second day had been set aside in case the hearing overrran.

The Grounds of Appeal

12. In setting out the grounds of appeal for which permission was granted, I have followed Mr Smith's text, save that for editorial consistency I have inserted the names of Mr Wilson and the Commission in place of "Appellant" and "Respondent" or "Charity Commission" where they appear in the original text. I have done the same when setting out Mr Sadiq's grounds of cross-appeal.

13. The first ground of appeal was that

> "**I. Failure to Address Mr Wilson's Case**
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> The First-tier Tribunal erred in law in that it failed to address Mr Wilson's case in that:
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> (1) it failed to address his case that a failure (by the Charity) to review its relationship with a related trade union, the Professional Footballers' Association ("the Union") did not constitute "mismanagement" within the meaning of Condition D of section 181A of the Charities Act 2011 when the un-challenged evidence showed that the terms of the relationship were objectively favourable to the charity and that the subjective belief of the trustees of the charity was that the relationship was favourable to the charity since, as a matter of law, there is no duty on a charity trustee to review a relationship which he or she honestly believes to be favourable to the charity, and which is in fact favourable to the charity;
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> …
>
> (3) further or alternatively, it failed to address his case that he was precluded as a matter of law from participating in any

decision as to the terms of the relationship between the Charity and the Union;

(4) alternatively, the Tribunal accepted his case that he was precluded as a matter of law from participating in any discussion as to the rent passing between the Charity and the Union but erred in law in rejecting the same case as regards participating in any decision as to the other terms of the relationship between the Charity and the Union;

14. The second ground of appeal was that

> "**II. Unfair Reliance on a New Point without the Opportunity to Answer**
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> 2. Further or alternatively, the Tribunal further erred in law in that it unfairly found against Mr Wilson on a new point which he had had no opportunity to answer. The Tribunal found (at paragraph 46) that he "showed no appreciation of the importance of a declaration, or a need to declare, any conflict of interest when acting in his role as trustee of the Charity." That was a matter of which Mr Wilson had had no prior notice such that he was unable to lead relevant evidence, unable to make submissions on the few relevant documents which were in evidence (including the Charity's Conflict of Interest Policy and his signed declaration of interests – neither of which the Decision mentions), unable to re-examine one of the witnesses (Mr Canty, the solicitor who attended all board meetings and never once offered any comment on the management of conflicts of interest) as he would have chosen to do had the point been raised before the hearing. Moreover, the Tribunal did not hear submissions on the construction of Article 6.2.5 of the Charity's articles (in particular, what was meant by "remuneration" and whether it was apt to mean – or might fairly have been understood as meaning – remuneration of individuals rather than payments to the Union) or receive submissions on the role of the Business Advisory Committee (which, as the evidence showed, was a group of non-conflicted trustees which set the salaries of the senior staff of the Union in order to manage conflicts) or to receive submissions on the effect of section 177(6) of the Companies Act 2006 (which provides that a director of a company, including a charitable company such as the Charity, need not declare an interest when the other board members are all aware of it) and its interaction with Article 6.2.5 of the Charity's articles. All this was pointed out in Mr Wilson's oral closing but is not recorded

or evaluated in the Decision, either in its own right or as an objection why it would be unfair to decide this point against Mr Wilson in circumstances where he had had no prior notice of it. Mr Wilson specifically drew the attention of the Tribunal to the decision of the Court of Appeal in *In re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at 177E ("but the paramount requirement … is that the director facing disqualification must know the charges he has to meet"). The Tribunal did not address this objection in its Decision but proceeded to make findings adverse to Mr Wilson without addressing the unfairness of doing so.

3. Further or in the further alternative, even if it was not unfair of the Tribunal to rely on the (unheralded) allegation that Mr Wilson failed to declare his interest as an employee of the Union at trustee meetings of the Charity, the Tribunal nonetheless erred in law in failing to consider such evidence as there was of his compliance with that duty (there was a declaration of interests form in the Bundle at C/539) or the impact of section 177(6) of the Companies Act 2006 (which provides that a director need not declare an interest where the other directors are all aware of it) or any of the other matters mentioned in the immediately preceding sub-paragraph. Thus, even if it was not unfair to rely on the point without warning, the Decision does not give adequate reasons for rejecting (or address at all) the points briefly outlined in closing (when explaining why it would be unfair to allow the point to be taken).

4. Further or alternatively, even if it was not unfair of the Tribunal to rely on the (unheralded) allegation that Mr Wilson failed to declare his interest as an employee of the Union at trustee meetings of the Charity, it erred in law in that its decision on this issue was perverse in that it was inconsistent with its own finding (at paragraph 40) that he was "particularly responsible" for not addressing the relationship between the Charity and the Union. The Tribunal cannot simultaneously criticise Mr Wilson for (a) failing to participate in a discussion and (b) for not declaring such a conflict and (presumably, although the Decision does not explain what else he should have done) absenting himself from that discussion."

The Grounds of Cross-Appeal

15. Mr Sadiq's grounds of cross-appeal were 4 in number and related to two issues in the Tribunal's decision:

> "At [48] of the Judgment that the transfer of £1.9 million to and from the Union by the Charity was not "mismanagement" for the purposes of the s.181A(7), Charities Act 2011); and
>
> At [49] the Tribunal's seeming decision that the management of the Charity's properties was not "mismanagement" for the purposes of the s.181A(7), Charities Act 2011".

16. The four grounds of cross-appeal in more detail are as follows:

> "(1) The Tribunal had detailed submissions (in particular in written closing submissions) from the Charity Commission as respects why the transfer of the £1.9 million to and from the Union by the Charity constituted mismanagement. The Tribunal in the Judgment does not address the detailed arguments of the Commission as respects why this conduct constitutes mismanagement in the administration of the Charity. Further or in the alternative, the reasons given by the Tribunal are not sufficient to satisfy the requirements of ***Emery***.
>
> (2) In finding the transfer of the £1.9 million to and from the Union did not constitute mismanagement, the Tribunal erred in law:
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> > (a) Mr Wilson (as a trustee of the charity) had a legal duty to act with reasonable care and skill. A careful and competent trustee (especially a trustee with the skills, qualifications, and experience of Mr Wilson) ought to have discovered and addressed these errors and ought to have been able to provide a consistent account for how and why any errors arose. Mr Wilson was the trustee that the others deferred to and relied upon as respects the Charity's finances.
> >
> > (b) Mr Wilson's explanation for why the transfer took place changed over the course of the Commission's investigation.
> >
> > (c) Even if his explanation for the error is correct, then it is evidence of extremely poor financial controls on the part of Mr Wilson – i.e. that he has transferred nearly £2 million pounds from the Charity's bank account but when challenged as respects this transfer, he was unable to give an accurate explanation until the Commission threated proceedings for disqualification.

(d) Mr Wilson's conduct constitutes mismanagement in the administration of the Charity.

(3) The Tribunal had detailed submissions (in particular in written closing submissions) from the Commission as respects why the issues relating to the Charity's properties constituted mismanagement. The Tribunal in the Judgment does not address the detailed mismanagement in the administration of the Charity. Further or in the alternative, the reasons given by the FTT are not sufficient to satisfy the requirements of ***Emery***.

(4) In finding the transfer the issues relating to the Charity's properties did not constitute mismanagement, the Tribunal erred in law:

(a) Mr Wilson (as a trustee of the charity) had a legal duty to act with reasonable care and skill. A careful and competent trustee (especially a trustee with the skills, qualifications, and experience of Mr Wilson) ought to have discovered and addressed these errors and ought to have been able to provide a consistent account for how and why any errors arose. Mr Wilson was the trustee that the others deferred to and relied upon as respects the Charity's finances.

(b) Mr Wilson was aware that the Union and related entities were occupying the Charity's properties rent free – at the very least as respects the property at 7-8 Philpot Lane, London - but he took no steps to address this issue until the Commission opened its investigation into the affairs of the Charity.

(c) Trustees have a duty to act in the best interests of their Charity and to manage their resources responsibly. In this case, Mr Wilson failed to do so.

(d) Mr Wilson cannot rely upon any conflict of interest to absolve himself of responsibility as:

(i) he was acting qua trustee in breach of the rules on conflict of interest as respects the Charity's finance in breach of the rules on conflict of interest.

(ii) If he had complied with the rules on conflict of interest – e.g. Article 6.4 of the Charity's Articles - he was obliged to disclose any conflict - thereby flagging the issue of unpaid rents.

(iii) Mr Wilson was not a fiduciary of the Union and was therefore not precluded from flagging the rent issue to his fellow trustees."

The Legislative Framework

17. Although set out in summary form by the Tribunal, it seems to me sensible to set out the relevant provisions of s.181A of the 2011 Act in more detail.

18. The opening subsections of s.181A provide that

> **"Disqualification orders**
> (1) The Commission may by order disqualify a person from being a charity trustee or trustee for a charity.
>
> (2) The order may disqualify a person—
>
> (a) in relation to all charities, or
>
> (b) in relation to such charities or classes of charity as may be specified or described in the order.
>
> (3) While a person is disqualified by virtue of an order under this section in relation to a charity, the person is also disqualified, subject to subsection (5), from holding an office or employment in the charity with senior management functions.
>
> (4) A function of an office or employment held by a person ("A") is a senior management function if—
>
> (a) it relates to the management of the charity, and A is not responsible for it to another officer or employee (other than a charity trustee or trustee for the charity), or
>
> (b) it involves control over money and the only officer or employee (other than a charity trustee or trustee for the charity) to whom A is responsible for it is a person with senior management functions other than ones involving control over money.
>
> (5) An order under this section may provide for subsection (3) not to apply—
>
> (a) generally, or

(b) in relation to a particular office or employment or to any office or employment of a particular description".

19. It is then provided that

"(6) 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".

20. The conditions to which reference is made in subsection (6)(a) are then set out in subsection 7

"(7) These are the conditions—

A that the person has been cautioned for a disqualifying offence against a charity or involving the administration of a charity.

B that—

(a) under the law of a country or territory outside the United Kingdom the person has been convicted in respect of an offence against a charity or involving the administration of a charity, and

(b) the act which constituted the offence would have constituted a disqualifying offence if it had been done in any part of the United Kingdom.

C that the person has been found by Her Majesty's Revenue and Customs not to be a fit and proper person to be a manager of a body or trust, for the purposes of paragraph 4 of Schedule 6 to the Finance Act 2010 (definition of charity for tax purposes), and the finding has not been overturned.

> 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 steps to oppose it, or
>
> (c) the person's conduct contributed to or facilitated the misconduct of mismanagement.
>
> E that the person was an officer or employee of a body corporate at a time when the body was a trustee or charity trustee for a charity and when there was misconduct or mismanagement by it 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.
>
> F that any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order".

21. The questions raised by this appeal and cross-appeal relate to whether or not one of the conditions mentioned in subsection 7 and unfitness in subsection 6(b) are satisfied. It is common ground that the relevant condition is condition D.

Mr Wilson's Submissions

I. Introduction

22. Mr Smith KC submitted that, by the Decision of 26 June 2023, the Tribunal varied, but substantially upheld, the decision of the Commission to disqualify Mr Wilson from acting as a charity trustee for a period of 4 years. By virtue of an Order

suspending Mr Wilson made on 12 August 2021 (when the Commission first gave notice of its intention to disqualify), Mr Wilson will (by the hearing of this appeal) have been *de facto* disqualified for a period of 3 years (bar a fortnight). If the outcome of this hearing is that the matter is to be remitted to the Tribunal for rehearing, it seems likely that Mr Wilson will have been disqualified for a period very close to the 4 years thought appropriate by the Commission by the time of that re-hearing, essentially rendering any victory pyrrhic.

23. Mr Wilson has openly offered on 14 February 2024 to undertake not to act as a charity trustee ever again without obtaining the Commission's prior written consent. He has made that offer with a view to avoiding the need for this appeal (and any future re-hearing), but also because the effect of the disqualification on him personally (as a Chartered Accountant) has been substantial. Although his offer would achieve greater protection for charities (which is the purpose of the disqualification regime) than the dismissal of this appeal, and a potential substantial saving of public funds, the Commission has refused to entertain the suggestion, notwithstanding that it has accepted voluntary undertakings in other cases. On the contrary, the Commission has widened the scope of the present hearing by cross-appealing on certain specific findings (which raise no point of general importance). Mr Wilson does not know what he has done to provoke the Commission into adopting its "win-at-all-costs" approach to this litigation.

II. Summary of Mr Wilson's Case on the Appeal

24. In summary, Mr Wilson's contentions on his appeal are that:

(1) it is not mismanagement for a charity trustee to fail to commission a review of the terms of a relationship between a charity and a contractual counterparty when the relationship is objectively beneficial to the charity and was subjectively thought to be beneficial to the charity by the trustee concerned

(2) it is not mismanagement for a charity trustee to fail to commission such a review where he is precluded as matter of law from participating in any decision as to the terms of that relationship

(3) in its principal finding on unfitness, the Tribunal unfairly relied on a new point against him (namely that he showed no appreciation of the need to declare a conflict of interest) which he was unable to address (and which was patently wrong).

25. In summary, Mr Wilson's contentions on the cross-appeal are that:

(1) the findings of the Tribunal that he was *not* guilty of mismanagement in connection with the other two matters relied on against him was adequately reasoned;

(2) alternatively, they were plainly correct as can be seen (for the purposes of this appeal) by reference to only 2 or 3 key documents.

III. Statutory Criteria for Making of a Disqualification Order

26. The Charities Acts have long contained provision which automatically disqualified persons from acting as charity trustees in certain circumstances. Those automatic disqualification provisions are now found in ss.178-179 of the 2011 Act. The Charities (Protection and Social Investment) Act 2016 gave the Commission a discretionary power to disqualify charity trustees in certain cases. It did so by inserting ss.181A-181C into the 2011 Act. This is believed to be the first appeal to the Upper Tribunal in connection with the Commission's discretionary disqualification power.

27. Ss.181A-181C require (inter alia) that notice should be given to the relevant person before the Commission makes a disqualification order, that the person might make representations and that the Commission should consider those representations before making any such order. The order (if made) takes effect at the end of the period for appealing the order (if no appeal is made) or (subject to the Tribunal's decision on the appeal) when the appeal is withdrawn or concluded.

28. In order to make a discretionary disqualification order pursuant to s.181A, the Commission must be satisfied:

(a) that one or more of the conditions listed in s.181A(7) is satisfied: see s. 181A(6)(a);

(b) that the person is unfit to act as a charity trustee: see s.181A(6)(b); and

(c) that it is desirable in the public interest to make the order in order to protect public trust and confidence in charities: see s.181A(6)(c).

29. If (but only if) all three of those criteria are satisfied, the question then arises whether the Commission should exercise its discretion to make an order. It is common ground that that involves an assessment of the proportionality of making an order, whether it should apply to all charities or only some, the length of any disqualification and whether the order should or should not prevent the person concerned from exercising any senior management function in a charity.

30. The questions raised by this appeal and cross-appeal relate to whether the two matters of the s.181A(7) conditions and unfitness are satisfied.

IV. Powers of Upper Tribunal

31. The powers of the Upper Tribunal in considering an appeal from the Tribunal are set out in the Tribunal, Courts and Enforcement Act 2007 ("the 2007 Act"). S.11 confers a right of appeal on a point of law to the Upper Tribunal from the Tribunal. S.12 provides that, if finding that the Tribunal has made an error of law, the Upper Tribunal may set aside the decision (but does not have to) but, if setting it aside, the Upper Tribunal must either remit the matter or re-make the decision.

32. The task for the Upper Tribunal on this appeal and cross-appeal is therefore to:
(1) decide if the Tribunal made one or more errors of law in the decision;

(2) if so, decide whether to set aside the decision;

(3) if setting aside the decision, decide whether to remit it or re-make it.

V. Adequacy of Reasoning

33. A recurring feature of the appeal and (especially) the cross-appeal is the alleged inadequacy of the reasoning of the Tribunal. The classic statement of the law is set out by Phillips LJ in ***English v Emery Reimbold & Strick*** [2002] 1 WLR 2409 at [19]

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

The Upper Tribunal is invited to note how the Commission characterized the decision at that stage at [16].

VI. Mr Wilson's Appeal

Ground 1 - Overview

34. The first pre-requisite to the making of a disqualification order is that one of the conditions set out in s.181A(7) of the 2011 Act must be satisfied: see s.181A(6)(a). The relevant condition relied by the Commission is Condition D which the Tribunal set out at [32]. In short, it requires misconduct or mismanagement attributable to the person against whom the order is sought.

35. The case against Mr Wilson in this regard rested on three "regulatory concerns" which were said to constitute "mismanagement or misconduct": see the decision at [9]. They were (a) a transfer of £1.9 million (b) the management of certain property and (c) the relationship of the Charity to the Professional Footballers' Association ("the Union"). The Tribunal effectively rejected any suggestion of misconduct and, as Mr Wilson understands it, the cross-appeal is confined to the question of mismanagement (Response paragraph 41).

36. It would be idle to pretend that the decision is as clearly expressed or reasoned as one would like. However, read as a whole, the Tribunal rejected the proposition that concerns (a) or (b) constituted the satisfaction of Condition D in respect of Mr Wilson. Its sole finding against Mr Wilson in respect of Condition D depended on concern (c).

37. As to (a), the Tribunal found that "the facts surrounding the £1.9M transfer … were not … evidence of mismanagement in the overall scheme of things": see the decision at [48]. That is a finding that Condition D was not made out on the facts.

38. As to (b), the Tribunal found at [49] that "on the balance of probabilities … the concern … concerning the management and operation of properties of the Charity was not, in itself, strong evidence of mismanagement." As the Upper Tribunal noted in granting permission to cross-appeal, the paragraph is hard to follow but:

(1) the use of the word "similarly" (immediately following the finding in paragraph 48 that there had *not* been mismanagement in connection with the £1.9M) and the use of the word "However" at the start of the final sentence (which suggests that there was no finding of mismanagement but that the point was relevant to unfitness) both suggest a finding that there was no mismanagement on this limb.

(2) the Commission plainly understood paragraph 49 to contain a finding of no mismanagement when seeking permission to cross-appeal against that finding.

(3) the Tribunal's conclusion was said to stem from (i) "the dual loyalties held" by Mr Wilson and (ii) "the facts that emerged in the course of the hearing." Its conclusion on the "dual loyalties" point was set out at [11] where it held that "as a matter of law [Mr Wilson] would not have been permitted … from participating in any decision as to the terms of the relationship between the Union and the Charity" because of "competing duties of loyalty." It must follow from that legal conclusion that this limb of the complaint (which was concerned entirely with the Union's occupation of property owned by the Charity) could not constitute mismanagement *by Mr Wilson*. Of course, as explained below, the Tribunal seems to have failed to follow through the logic of paragraph 11 when coming to its conclusion on concern (c). However, that failing (which is one of Mr Wilson's grounds of appeal) cannot detract from the principle that, in interpreting the decision, one should try to read it in a way that makes coherent sense as a whole. The principles of construction applicable to the interpretation of a Court judgment or order may not be identical to those in play when construing a contract (see ***Coward v Phaestos Ltd & Ors*** [2021] EWHC 9 (Ch)), but they are not very different. One of those principles is that one should read the document as a whole so that it makes sense as a whole.

(4) although the parenthetic words in the opening sentence of paragraph 40 **[1/7]** might suggest that concerns (a) and (b) did contribute to the Tribunal's finding on Condition D, that sentence can be read consistently with the balance of the decision if one reads it to mean that concerns (a) and (b) would not have been sufficient *on their own* to amount to mismanagement within the meaning of s.181A(7).

39. If that is so, the crucial question on the appeal is whether concern (c) amounted to mismanagement by Mr Wilson. Mr Wilson has permission to appeal against that conclusion on two grounds: Grounds 1(1) and 1(3) of his Revised Grounds of Appeal.

Ground 1(1)

40. The first ground of appeal is that concern (c) does not amount to mismanagement. It is important to see how the case on concern (c) was put against Mr Wilson.

41. In the Provisional Statement of Reasons ("PSoR") which accompanied the Commission's Notice of Intention to Disqualify the Commission said "the Charity failed to review its longstanding financial arrangements with the Union which dates [sic] back to the inception of the Charity. The majority of the Charity's services are/were delivered on its behalf by the Union" [paragraph 21]. Paragraphs 21-25 expanded on the nature of the "re-charge" by which the Charity reimbursed the Union for work done by the Union on behalf of the Charity. The only attempt to attribute blame specifically to Mr Wilson was paragraph 26 where his "financial skills and experience" were said to mark him out from the other trustees as deserving of disqualification.

42. Mr Wilson responded in his Representations: see paragraphs 54 to 76. His witness statement expressly adopted and confirmed the truth of the Representations and he was not cross-examined on much of their content. The points made in the Representations included that:

(1) the recharge was objectively in the best interests of the Charity (see paragraph 68):

(a) the auditors had assessed whether the 80% re-charge was a fair assessment of the time spent and work done by Union staff on Charity business and were satisfied;

(b) HMRC had assessed in 2018 whether the 80% re-charge was appropriate and had been satisfied; and

(c) a timesheet exercise had suggested that 80% was favourable to the Charity; and

(2) the trustees subjectively believed that the re-charge was in the best interests of the Charity (see paragraph 74).

43. Neither point (the objective fact that the re-charge was beneficial to the Charity nor the trustees' subjective belief to that effect) has ever been doubted by the Commission. The Commission's Statement of Reasons when it made the disqualification order did not contest this account. It merely repeated word for word what had been said in its PSoR in connection with concern (c) save for (i) removing the suggestion that the trustees had done nothing before the Commission raised concerns (and replacing it with a complaint that the trustees had done nothing before 2019) and (ii) making fleeting reference to Mr Wilson's representations: see paragraphs 29-36.

44. The Commission's sole concern was therefore one of process: the trustees ought to have conducted a review *just in case* the re-charge did not represent value for money. The Commission's internal "Decision Review" (in effect, its assessment of Mr Wilson's Representations) emphasized the procedural aspects of this concern: what the trustees (all of them) should have done was "review, record and justify the arrangement prior to 2019".

45. In the many years over which this case has run, it has been said on behalf of Mr Wilson that there is no legal duty on a trustee to review something which he believes to be in the best interests of the Charity and which is in fact in the best interests of the Charity. The Commission has not pointed to any statutory provision or reported case to establish the contrary. It seems to regard the alleged duty to be part of the general duty to manage the assets of a charity with prudence. Its refrain has been that the fact that the re-charge proved to be good for the Charity was no more than "dumb luck." That is misconceived. That criticism might be fair of trustees who never once turn their minds to the question whether a particular arrangement is in the best interests of a charity. But where trustees consciously believe that it is in the best interests of the Charity, there is no super-added duty on them to doubt themselves and then incur cost in testing their belief before writing down the outcome of that exercise.

46. For example, if a charity has the benefit of services provided by solicitors or investment advisors whose fees are discounted by more than 50% from market charity rates because the firms in question have a special affinity for the relevant cause, there cannot sensibly be said to be a duty on the trustees periodically to check if there are other professionals who might be prepared to act at even lower rates (if it is obvious to the trustees that there are not) and then to document the outcome of those enquiries. A charity trustee is not duty-bound to look a gift horse in the mouth.

47. To a trustee who knows his charity, some things are obvious. In the present case, the (un-challenged) evidence was of course to the effect that the Union was really the only organisation able to deliver many of the Charity's services because of its connection with football clubs and players [paragraph 59], so there was no question of going elsewhere for most of those services (although third parties were commissioned for specific types of work: see [paragraph 69]). The alternative to paying the Union to do the work was taking on all (not 80%) of the Union's staff under TUPE. Moreover, all of the income used to pay the re-charge was donated by the Union in the first place [paragraph 61] and that arrangement could hardly be expected to continue if the re-charge were challenged. It was obvious to the trustees that a challenge to the re-charge would not be in the Charity's interests. As one of the trustees (Mr Griffiths) put it in his statement in connection with the rents (and on which he was not challenged) [paragraph 11], the Union effectively donated whatever funds it had left to the Charity. So the less money the Union had (including whatever it received by way of the re-charge), the less it could donate to the Charity. In those circumstances, one might go so far as to say that challenging the re-charge in terms would have been inimical to the Charity's interests.

48. It was plainly not mismanagement to omit to carry out the sort of assessment which the Commission suggests should have been done. The Tribunal erred in finding otherwise.

49. Alternatively, these arguments were set out in Mr Wilson's closing submissions [paragraphs 28, 31-32 and 51] and the Tribunal failed to address them in the

decision. That was itself an error of law in that their rejection is not adequately reasoned.

Ground 1(3)

50. The second ground of appeal (and for this purpose Mr Smith KC treated grounds 1(3) and 1(4) as one ground) concerns whether Mr Wilson as Finance Director of the Union and a trustee of the Charity was precluded as a matter of law from taking the sort of action which the Commission says he ought to have taken (assuming, contrary to Ground 1(1), that the Commission is right to suggest that the relevant omission by the trustees was mismanagement).

51. The Decision correctly identified at [11] that "As a matter of law, [Mr Wilson] would not have been permitted, unless authorised, from participating in any decision as to the terms of the relationship between the Union and the Charity, as he was an employee of the former and a trustee of the latter, thus raising competing duties of loyalty."

52. That is an entirely accurate statement of the law. It reflects what is said in *Snell's Equity* at paragraph 7-040 (citing in particular ***Bristol & West BS v Mothew*** [1998] Ch 1 at 19) about circumstances of *actual conflict*:

> "Even if a fiduciary has properly obtained informed consent to his or her double employment, and has not intentionally favoured the interests of one principal over those of the other, the fiduciary 'must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other.' A fiduciary who finds himself in such a position will generally have to cease acting for at least one principal and preferably both."

This passage was read to the Tribunal in closing.

53. In other words, if the question whether the Charity ought to commission some sort of bench-marking exercise to test whether the 80% re-charge to the Union was value for money or otherwise appropriate, Mr Wilson could not have been involved in

that discussion. The Commission's Mr Jarvis accepted that in cross-examination. The gist of his evidence was that the Commission's view was that Mr Wilson could not have taken part in any such discussion on account of his conflict, but he (Mr Jarvis) thought that Mr Wilson could have raised the issue and then absented himself.

54. That suggestion is wrong as a matter of law. If there is a contract between two parties, any suggestion of a review of the terms of that contract gives rise to the possibility that the terms will be altered to the detriment of one of those two parties. This point was made in closing. If an agent owes duties to both of those contractual parties, he cannot continue to act (unless specifically authorized by a principal in the full knowledge of his conflict): see ***Harrods Ltd v Lemon*** [1931] 2 KB 157.

55. So even if the other trustees of the Charity fell short by reason of their failure to commission a review of the re-charge, Mr Wilson could not properly have done what the Commission suggests ought to have been done. Omitting to do that which one could not properly do cannot be mismanagement within meaning of s.181A(7).

56. Alternatively, even if (as the Commission's Mr Jarvis suggested in evidence) Mr Wilson was entitled to raise the question of a review of the terms of the re-charge between his two principals before recusing himself from the discussion, his failure to raise the issue is a lesser failure than that of all the other trustees (who are, on this analysis, guilty of both that failure and the more substantive failure of not in fact commissioning the review). Yet the Commission makes no suggestion that disqualification is appropriate as regards the others whose failure is (on this hypothesis) more serious. It cannot therefore constitute "mismanagement" within the meaning of s.181A(7). In reality, given the obvious difficulties which both the Commission and the Tribunal have had in analysing this aspect of the case, it is wholly unrealistic to expect such a refined analysis from a non-lawyer trustee and to castigate any short-coming as mismanagement.

57. Mr Wilson had first said in his Representations in September 2021 that his "conflicting duties … disabled him (as a matter of law) from raising this issue on

behalf of either party" [paragraph 75]. The Commission claimed to be surprised by the point in closing (in February 2023) and alleged (for the first time after the evidence had closed) that Mr Wilson had not proved that he was a fiduciary since his employment contract was not in evidence. It was therefore said that he owed merely duties of fidelity and good faith to the Union as his employer and was not subject to the rules relating to actual conflict.

58. There are a number of rejoinders:

(1) the point had been fairly raised at an early stage and the Commission should have raised this dispute of fact before the evidence closed;

(2) it is usually thought that senior employees do owe fiduciary duties to their employers, at least in connection with specific functions: *Snell* paragraph 7-006. Mr Wilson was the Finance Director of the Union and thus a member of the senior management team. The Rules of the Union therefore identify him as a member of the "Senior Staff Team".[1] That group was entrusted (Rule 8(3)) with the administration of the Union between meetings of the Management Committee, with instructing professionals, authorising payments and managing Union funds. That all strongly suggests that he owed fiduciary duties to the Union in connection with sums due to it in connection with services it provided.

(3) even if Mr Wilson did not owe fiduciary duties to the Union, he still had an interest in the Union's success (as it was his employer) and a conflict between a duty to a charity and such an interest would still have required him to avoid raising or participating in a debate about whether the Charity should pay more or less under the re-charge: see M. Conaglen *"Fiduciary Regulation of Conflicts Between Duties"* (2009) 125 *Law Quarterly Review* 111 at pages 115-121.

[1] It is erroneously stated in the Reply [paragraph 8] that Mr Wilson was a part of the Management Committee. It should have said "Senior Management Team." Mr Wilson's evidence was clear that he was not a member of the Management Committee [paragraph 9].

(4) Even if Mr Wilson owed fiduciary duties to the Charity and merely contractual duties to his employer, there would still be a conflict of duties which he should seek to avoid: see ***Hilton v Barker Booth & Eastwood (a firm)*** [2005] 1 WLR 567. The Commission's complaint is that Mr Wilson should have run head-long into that situation. Whereas one might choose to prefer one's fiduciary *duty* to one's personal *interest*, one cannot lawfully subjugate one obligation to another. There is no concept of a fiduciary obligation to a charity "trumping" (on this hypothesis) a lesser obligation to an employer. If the law were so, charity trustees would have to breach their contracts of employment if the interests of their charity so required. The law must be that charity trustees should recuse themselves if such an eventuality looks likely to arise.

59. The Tribunal erred in finding that Mr Wilson was guilty of mismanagement for failing to initiate or participate in a process from which he was precluded as a matter of law.

60. Alternatively, it erred in law in failing adequately to explain why its finding as to the law in [11] did not dictate a finding on concern (c) to the same effect as its conclusion on concern (b), namely that it is *not* mismanagement *not* to act where one is precluded by law from acting.

Conclusion on Ground 1

61. If the Upper Tribunal accepts Mr Wilson's submissions on Ground 1(1) or 1(3), the decision should be set aside because it is wrong and (but for any cross-appeal) the disqualification order must be quashed because Condition D has not been made out.

62. If the Upper Tribunal merely finds that the Tribunal did not consider Mr Wilson's case on Ground 1(1) and 1(3), without the Upper Tribunal itself expressing any view as to the merit of those (legal) points, the case would *prima facie* require remittal. However, for the reasons set out more fully below, Mr Wilson would invite the Tribunal to set aside the decision because of the error of law in not considering his

case and to quash the disqualification order as a matter of its discretion since it does not serve its statutory purpose given the passage of time for which Mr Wilson has already been disqualified and his undertaking not to act in future as a charity trustee without the Commission's prior written consent.

63. If the Upper Tribunal rejects Mr Wilson's case on Grounds 1(1) and 1(3), it is necessary to consider Ground 2.

Appeal: Ground 2 – Unfair Reliance on New Point

64. Ground 2 is that the Tribunal unfairly relied on a new point of which Mr Wilson did not have adequate notice, and then proceeded to decide that point against him without considering any of the factual or legal matters which he indicated that he would have wanted to have expounded more fully had he had proper notice of the point.

65. In the context of company directors' disqualification, the Court of Appeal has been very clear that "the paramount requirement … is that the director facing disqualification must know the charges he has to meet": *In re Sevenoaks Stationers Ltd* [1991] Ch 164 at 177B-E. That requirement must apply *a fortiori* to discretionary charity trustee disqualification where (unlike an order under Company Directors Disqualification Act where the Court must be persuaded to make it) the Commission makes the order and the onus then lies on the trustee to challenge it in the Tribunal. In order to bring an effective appeal, a trustee has to know the grounds on which it is said that he is unfit. The paramount requirement was not met in this case.

66. One starts by looking at the allegation made against Mr Wilson with respect to unfitness. The PSoR [paragraphs 27-28] made it clear that the Commission relied only on the three "regulatory concerns" which were said to satisfy Condition D, with a particular emphasis on the £1.9M (which, in the event, the Tribunal found was not mismanagement). Mr Wilson's Representations therefore proceeded on the basis that there were no new matters to address under the heading of unfitness [paragraphs 77-83, especially 79-80]. The Commission's Statement of Reasons

when concluding to make the disqualification order merely repeated the PSoR [paragraphs 37-38] with an additional paragraph addressing the function of professional advice. No new issue was introduced. So the Commission relied only on the three concerns said to satisfy Condition D in finding unfitness. Once the appeal to the Tribunal began, the Commission re-stated its reliance on only the three matters relied on in connection with Condition D: see its Response [paragraphs 62-64]. The Commission's skeleton served one week before the hearing essentially repeated the Response [paragraphs 83-86] and cross-referred to at [37-39] of the decision (which were premised only on the three concerns said to satisfy Condition D).

67. In connection with Condition D, a repeated refrain of the Commission had been that Mr Wilson (and his fellow trustees) had *not* considered whether the re-charge represented value for money or commissioned a review of it. The complaint was one of *omission*.

68. During the course of the hearing, the Commission started to cross-examine Mr Wilson on the basis that he *had* discussed the re-charge, but had failed to declare his interest. This was the very opposite of the factual case which Mr Wilson had come to meet. Counsel for Mr Wilson intervened during the evidence to express this concern). The concern was flagged in Mr Wilson's written closing submissions [paragraph 83] and during his oral closing submissions. Mr Wilson's objection not only pointed out that the Commission was running a new case – but that it was running a new case which appeared factually inconsistent with the case advanced against Mr Wilson before the hearing.

69. Having squarely raised this concern, the Tribunal had to address it and explain why it was fair to Mr Wilson to allow the Commission to rely on a new allegation of unfitness for the first time at the hearing. It failed to do so.

70. In oral closings, reference was made to some of the factual material which might have been explored and some of the legal arguments which might have been run if the new allegation of unfitness had been raised at the proper time. That was

done in order to illustrate the dangers of allowing a new allegation at the last minute, but it also raised issues which were fundamental to the prospects of the allegation succeeding. One document mentioned was the declaration of interest form which Mr Wilson had completed and which happened to be in the bundle but to which no reference had been made (since it was not relevant to the three regulatory concerns on which the Commission's case had appeared to be squarely based).

71. The Tribunal made no attempt to engage with these points when it proceeded to make findings on a point which had not been raised in advance of the hearing and ought not to have been allowed at that stage. But it was an egregious error on the part of the Tribunal to find (at [46]) that Mr Wilson "showed no appreciation of the importance of making a declaration, or a need to declare any conflict of interest when acting in his role as trustee of the Charity" when the inclusion in the bundles of his declaration of interest form had been pointed out to it (but apparently forgotten by the Tribunal).

72. Paragraphs 34 to 38 of the Commission's Response on this appeal purport to address this point. In doing so, they persist in an allegation which was not raised before the hearing below, and which is factually inconsistent with the allegation they did make. Contrary to paragraphs 35(d) to (f) of the Response, the fact that the Commission was allowed to cross-examine on the issue, on the express footing that the point would be dealt with in closings plainly does not mean that the point should then have been allowed to be run in closing simply because there had been cross-examination on it. None of the witnesses addressed the conflicts of interest form (because it was not relevant to any of the three "regulatory concerns") and none were cross-examined about it by the Commission. In its Response, the Commission also seems to suggest that Mr Wilson did not object to this point being raised during closings. The Upper Tribunal is invited to read paragraph 83 of Mr Wilson's closings ("It would plainly be unjust to allow…") and the transcript to assess the merit of this proposition by the Commission.

73. Had the Tribunal squarely addressed Mr Wilson's objection to the unfairness of raising a new factual complaint (*a fortiori* one inconsistent with the case in fact

pleaded), it would have concluded that the matter ought not to be allowed at so late a stage.

74. Alternatively, it ought to have adjourned the hearing to allow relevant evidence to be led and submissions to be made on (inter alia) the effect of conflict of interest form completed in 2016; the fact that a declaration was made at the Charity's inaugural meeting in 2013 (implicit in the question to Mr Crooks); the proper construction of Article 6.2.5 (and, in particular, the word "remuneration": compare the role of the non-conflicted trustees in setting remuneration at the "Business Advisory Committee"); and the effect of s.177(6) of the Companies Act 2006[2]. All this was put to the Tribunal. If (which it should not have done) it was to entertain the point at all, it can only fairly have done so by considering whether the facts alleged amounted to unfitness in light of considering all those points. It did not do so.

75. On any view, it was an error of law to make the findings made at [46].

VII. The Commission's Cross Appeal

Cross-Appeal: Grounds 1 & 2 – Finding of No Mismanagement as to £1.9m transfer

76. The first finding impugned by the Commission is the Tribunal's finding that the transfer by the Charity to the Union of £1.9 million in July 2017 did not constitute "mismanagement" within the meaning of Condition D of s.181A of the 2011 Act. The Commission complains (a) that the Tribunal's conclusion is inadequately reasoned and (b) that it is wrong.

77. Again, one needs to look at the complaint actually made. Paragraphs 7-10 of the PSoR state that Mr Wilson approved Charity accounts for the year ending 31 June 2018 which did not include the sum of £1,906,760 received into the Charity's account on 31 July 2017 from the Football Association. In his Representations, Mr Wilson explained [paragraphs 30-44] that, although the money came into the Charity's

[2] See ***Instant Access Properties Ltd v Rosser*** [2020] 1 BCLC 256 at para 351 and the (obvious) evidence from all the other trustees who were cross-examined (that they were well aware of Mr Wilson's Union role).

account, it was in fact contractually due from the Football Association to the Union (like payments received from the Premier League and the English Football League); that the Union typically donated sums left after it had met its own expenses to the Charity; that the Union only finally decided not to donate the £1.9 million or any part of it when it (by its Management Committee which Mr Wilson did not attend) approved its accounts for the year ending 30 June 2018 (which was in late 2018). The Charity's accounts for the year ending 30 June 2018 were approved around the same time. The accounts preparation team from Beevers & Struthers (who were the Charity's auditors) requested certain journal entries be made to reflect the fact that the £1.9 million belonged to the Union. Mr Wilson (along with another bank signatory) then transferred the balance due from the Charity to the Union by bank transfer. Mr Wilson also explained this in his witness statement (which was prepared for his appeal against the suspension order and thus pre-dated the start of the appeal against the disqualification order) at paragraphs 62 to 65. There was no real challenge to that account.

78. Unfortunately, when the Commission saw the apparent failure to include the £1.9 million in the Charity's accounts, it assumed an improper transfer from the Charity to the Union. It had already impugned the ability of the auditors (by reference to a technical failure on their part relating to compliance with the Statement of Recommended Practice in the accounts) and Mr Wilson (and the other trustees) assumed that the auditors must have made another mistake. They were able to procure the return of the money from the Union to the Charity. It was only in the course of preparing his Representations, once the Commission proposed to disqualify him, that Mr Wilson and his advisors investigated in more detail why Beevers & Struthers had suggested the book entries which they did. It was only in the course of his appeal that Mr Wilson obtained the Commission's disclosure, which included documents which it had obtained from (amongst others) the Football Association. Although they had had that material for months, the Commission had failed properly to analyse it. It clearly showed that Mr Wilson was right that the £1.9 million had always been the Union's money. For the purposes of this appeal, it is sufficient to point to two documents (although the point could be reinforced by

reference to others). These documents were not seen by Mr Wilson until disclosed in the appeal:

(1) in the document bundle is a draft (headed “Subject to Contract”) letter agreement from the Football Association to the Union with an Effective Date of 1 August 2017 (the day after the payment of the £1.9 million). The Union is defined as “the Award Recipient.” By clause 3.2, the Football Association agreed that *the Union* could use the funds subject to the agreement “as it sees fit” subject to certain constraints. A list of intended payments was scheduled to the agreement and included the figure of £1.9 million which had already been paid and the receipt of which was to be acknowledged by *the Union*. This letter is a draft, but it reflects the understanding of the Football Association and the Union at the time that the £1.9 million was money at the free disposal of the Union (*not* the Charity), even though it was in fact paid into the Charity’s bank account.

(2) there are also the internal notes dated 20 August 2018 of the audit team at Beevers & Struthers in connection with the audit for the year ending 30 June 2018 (in which the £1.9 million payment fell). They record that the vast majority of the Charity’s income is from “TV money” from the Premier League; Football League and Football Association. They note that the Union “can split the TV money how they see fit across Accident and PFA Charity.” (The “Accident Fund” was a non-charitable benevolent fund of the Union). That is also consistent with the £1.9 million from the Football Association being Union money (not Charity money, unless or until it was donated by the Union).

79. The Commission therefore changed tack and ran its case on the basis that, even if the £1.9 million had been dealt with properly (since it was Union money, not Charity money), it was mismanagement for Mr Wilson not to have been able to give the complete account he was finally able to give when he was first asked about this by the Commission (which was itself a year after the transfer in question). The Commission seemed unconcerned that it was alleging that the failure of a trustee to explain this without access to the materials from the Football Association should be

regarded as mismanagement even though the Commission's own Senior Accountant advising the case officer, and the Commission's own Assistant Director of Legal Accountancy Services, who together spent "a lot" of hours on the case, had failed correctly to interpret the documents they had procured from third parties using the Commission's compulsory powers to identify this themselves. There is a strong sense in this case that the Commission is expecting considerably higher standards from charity trustees than from its own senior staff.

80. It having thus become crystal clear during the hearing that the £1.9 million which the Football Association had paid into the Charity's bank account was money which was contractually due to *the Union*, the Tribunal made the findings it did at [48]. In essence, it implicitly accepted that the money was the Union's, but felt that Mr Wilson should have had a "better grasp" of the issue when confronted about it by the Commission. But his shortcomings were not "mismanagement." That reasoning is more than adequate for the purposes of ***Emery.*** The Commission once appeared to endorse the adequacy of the reasoning in the decision. Since the Commission did not raise its cross-appeal until service of its Response, the Tribunal was not given the opportunity to supplement its reasoning. However, it is clear enough what it meant: Mr Wilson should have had a better grasp of the reasons why the transfer was made when asked about it, but that shortcoming did not amount to mismanagement.

81. Not only was the Tribunal entitled to come to that view, it was plainly right to do so: accidentally agreeing that one has made a mistake when a regulator tells you that a mistake has been made, but then realizing that one has not in fact made a mistake after all is not "mismanagement" in the ordinary sense of the word. It is just embarrassing.

82. The following points are also highly material in the present case to the suggestion that a failure to be able immediately to rebut an allegation is mismanagement:

(1) Mr Wilson explained to the Tribunal that he was expecting the Union to donate the £1.9m to the Charity (as it had sometimes done in the past); he was excluded from meetings of the Union's management committee at the relevant time, so he did not know if the Union had decided to donate the £1.9 million (which could have obviated the need to transfer the money to the Union) and that he could not himself transfer any sums of money, unless the transfer was authorised by others (including the Chief Executive of the Union who did attend Union management committee meetings and who was also a trustee of the Charity).

(2) the Commission has never explained why it did not ask (i) (at the opening of the statutory inquiry) the charity accounts team employed by the Charity's auditors (Beevers & Struthers) as to why they had recommended the book entries transferring the £1.9m from the Charity to the Union or (ii) (subsequently) to corroborate Mr Wilson's explanation which was based on the book entries suggested by Beevers & Struthers. It is plainly not mismanagement to follow a recommendation made by external professional advisors and then be unable to recall the reasons for that recommendation without further investigation.

83. Thus even if the Tribunal was too sparse in its reasoning so as to amount to an error of law, the Upper Tribunal ought to re-make the decision that the facts alleged (i.e. accidentally admitting to a mistake one has not made) is not "mismanagement."

Cross-Appeal: Grounds 3 & 4 - Finding of No Mismanagement as regards Property

84. The second finding of the Tribunal impugned by the Commission is the refusal to find that "the issues relating to the Charity's properties" constituted mismanagement. This lack of precision in this ground of appeal is emblematic of the unfair way in which the Commission has run these proceedings: making generalised complaints without specifying what Mr Wilson is supposed to have done wrong or to have omitted to have done or with what (if any) consequence. It is not clear from the Response which paragraph of the decision of the Tribunal is wrong or precisely what "issues relating to the Charity's properties" are said to constitute mismanagement.

85. Ground (3) is that the decision is inadequately reasoned. That is unfair on the Tribunal. It held at [49] that its decision was in part based on its conclusions as a matter of law (as set out in [11]) on Mr Wilson's competing duties of loyalty. If that conclusion was right, its decision on this limb cannot be impugned: it was adequately reasoned and obviously right.

86. The reference in [49] to "the facts that emerged in the course of the hearing" are plainly those summarised at paragraphs 35-37 of Mr Wilson's written closings. That summary was prepared by reference to the un-challenged witness evidence and the few underlying documents there cited.

87. The key point is that the Commission does not acknowledge that the Tribunal properly could (and seemingly did) consider the proportionality of this complaint which was that about £20,000 per annum of rent went un-collected for a comparatively short period out of a turnover of tens of millions and that it was all repaid with interest once the mistake was spotted. The Tribunal was entitled to find that, on its own, this was not "mismanagement" so as to found a disqualification order.

88. The Commission is not entitled on this appeal (as it seeks to do in its Response paragraph 45(b)) to introduce contentious propositions of fact (e.g. that Mr Wilson "was aware" that the Union was occupying Charity property rent-free: his actual evidence makes it plain, when read as a whole, that he was agreeing that he knew that the properties were occupied and with the fact that rent was not paid. His constant use of the word "missed" make it plain that he was *not* aware at the time that rent was going un-paid). It is a telling mark of its "win-at-all-costs" approach to the defence of its decision-making in this case that the Commission chooses to present its cross-appeal in this way.

VIII. Disposal of Appeal

89. If satisfied that the Tribunal has made an error of law such that the decision cannot stand, the Upper Tribunal may set aside the decision (but does not have to)

but, if setting it aside, it must remit the matter or re-make the decision: s.12 of the 2007 Act.

90. If his appeal succeeds, and the Commission's cross-appeal fails, Mr Wilson will ask the Upper Tribunal to set aside the decision and to re-make it by quashing the disqualification order. That will be the only logical course to take if the Upper Tribunal is satisfied that (for example) s.181A(6)(a) and/or (b) has not been satisfied.

91. If the Upper Tribunal merely finds that the decision is inadequately reasoned in some or all respects, Mr Wilson will invite the Upper Tribunal to exercise its discretion to set aside the decision and to re-make it. In those circumstances, Mr Wilson will invite the Upper Tribunal to quash the disqualification order made by the Commission. In that regard, the following chronology is relevant:

7 Jun 2019	Commission gives notice of intention to issue Official Warning to each of the Charity's trustees personally (later withdrawn)
12 Aug 2021	Commission gives notice of intention to disqualify Mr Wilson and suspends him from acting as a trustee in the interim
8 Feb 2022	Commission makes order disqualifying Mr Wilson from acting as a charity trustee or performing a senior management function in a charity. (Appeal against suspension order, due to be heard in March 2022, rendered academic as a result and vacated)
Jan 2023	Hearing of Mr Wilson's appeal against disqualification order
26 Jun 2023	Tribunal varies order (so as to permit senior management function), but otherwise upholds disqualification order (which starts to run for 4 years from 26 Jun 2023)

9 Nov 2023 Hearing of Mr Wilson's application to the Upper Tribunal for permission to appeal

8 Mar 2024 Grant of permission for the Commission to cross-appeal

25 Jul 2024 Hearing of Mr Wilson's appeal

92. By the time of judgment on this appeal, Mr Wilson will have endured 5 years of regulatory "threats." He will have been suspended or disqualified from acting as a charity for 3 years already, compared to the 4-year disqualification order regarded as appropriate by the Commission.

93. Mr Wilson will therefore invite the Upper Tribunal to quash the disqualification order because the alternative course (of remitting the matter to the Tribunal) will occasion substantial prejudice to him; will confer no advantage on the Commission or the public and will only add to the already substantial costs, including the costs to the public purse, of this case. As to the Commission and the public, Mr Wilson offers to undertake not ever to act as a charity trustee without the prior written consent of the Commission. Given the mischief at which s.181A is aimed (i.e. protecting charities from "rogue" trustees), there will be no public interest in further prolonging these proceedings. The Commission does not consider that Mr Wilson poses a threat to charities beyond 4 years.[3] (Indeed, as soon as he was suspended the Commission agreed to him continuing to discharge the role of *de facto* Finance Director of the Charity pending his appeal since he was not considered a threat to the Charity at all). As to prejudice to Mr Wilson, the proceedings impede Mr Wilson's ability to practise as a chartered accountant and provide for his family. In those circumstances, the discretion of the Upper Tribunal ought to be exercised in such a way as avoids that (unnecessary) prejudice.

IX. Conclusion

[3] The Commission first proposed 6 years, but reduced this to 4 years when it made the order.

94. There is no suggestion, and there never has been any suggestion, that anything done or not done by Mr Wilson has occasioned loss to the Charity, harm to any beneficiary or any private benefit to him or any other person.

95. There has been no suggestion of any dishonesty or conscious impropriety at [20]. Even the Tribunal found no more than "unintentional mismanagement" at [36].

96. In short, this is not - and never has been - a disqualification case.

The Commission's Submissions

97. For the Commission, Mr Sadiq contended in summary that

(a) the appeal:
(i) the appeal should be dismissed for the reasons and on the grounds set out by the Tribunal in its decision, and as amplified by its decision to refuse permission to appeal.

(ii) the Tribunal's decision should be upheld for reasons other than those given by it pursuant to r.24(1B)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "2008 Rules") – see further below.

(b) the cross-appeal:
(i) the Tribunal's decision failed to give adequate reasons/did not address the Commission's arguments on the two following issues.

(ii) the Tribunal erred in law in concluding that the facts surrounding the transfer of £1.9 million to and from the Union by the Charity was not "mismanagement" for the purposes of s.181A(7) of the 2011 Act; and

(iii) the Tribunal erred in law in seemingly concluding that the management of the Charity's properties was not "mismanagement" for the purposes of s.181A(7) of the 2011 Act.

98. The Commission accepted my observations when granting the Commission permission to cross-appeal, viz. that in the event that either the appeal or the cross-appeal were successful, the appropriate disposal was remittal for a retrial.

Relevant Factual Background

99. Mr Wilson was a Trustee of the Charity as well as an employee of the Union. His role as a Trustee was ex officio as a result of his being the Union's finance director. He was a non-statutory director – i.e. he was not a director for the purposes of the Companies Act 2006, but rather an employee with a title which included the word "director".

100. At all material times, the Charity did not have its own staff. Instead, from 2013 until 2019 it had an arrangement with the Union whereby staff employed by the Union would spend time on the Charity's activities and the Charity would be recharged for the Union's expenses (including staff salaries) for this. From the inception of the Charity the Union's recharge (the "Recharge") amounted to 80% of the Union's operating costs.

101. The Recharge was the Charity's largest single item of expenditure. In the financial year end 2018, the Charity's total gross income was approx. £26.39 million. The administrative recharge for the financial year end 2018 was approx. £3.652 million and the total recharge was £5,735,853 - so 1/5 or approximately 21% of the Charity's income was spent on the recharge.

102. It is understood that the Charity was in this way recharged for 80% of the costs of Mr Wilson's employment as well as that of the Union's CEO. The total cost of the CEO's employment at the Union for the financial year end 2018 was £1,965,948, of which the Charity paid £1,563,395. It is common ground that, whilst there had been discussions about placing the relationship between the Union and the Charity on a contractual footing, at all times material to this appeal there was no contract and no other agreement in place between the Charity and the Union governing or regulating the recharge.

103. The Charity's Articles of Association contained provisions dealing with conflicts of interest on the part of its trustees when it came to the trustee decisions making at Section 6. The Articles provide that:

(a) Clause 6.2.1 to 6.2.6: Trustees of the Charity who are employees of the Union must not be present when payments to the Union are discussed by the remaining unconflicted Trustees.

(b) Clause 6.4: Trustees who are conflicted must declare the conflict and withdraw from any meeting of the Trustees.

(c) Clause 6.5: The unconflicted trustees can by resolution relieve a conflicted Trustee of the disability imposed by Clause 6.4.

104. The effect of Clause 6.2.5 is that the Trustees were obliged to ensure that any payments to the Union for goods or services it supplied to the Charity were "reasonable" and that when the Trustees considered the reasonableness of such payments, inter alios, Mr Wilson had to absent himself from those discussions.

105. The effect of Clauses 6.4 and 6.5 was that where the trustees considered any other matter in respect of which Mr Wilson was conflicted, inter alios, he had to declare not just the fact of the conflict but the extent of the conflict and then absent himself from the deliberations unless the non-conflicted trustees resolved to allow him to continue to take part. The reason why Clause 6.4 required disclosure of the extent of any conflict is obvious – it is so that the non-conflicted trustees could make a proper and informed decision as to whether to allow Mr Wilson to participate in decision-making despite the conflict.

106. The Commission opened a Regulatory Compliance Case into the Charity in November 2018 to explore concerns that had been raised with it by a whistle blower regarding the Charity's relationship with the Union. Despite extensive engagement

the Commission continued to have several serious regulatory concerns and so on 20 December 2019 it opened a statutory inquiry into the administration of the Charity pursuant to s.46 of the 2011 Act.

107. After opening the inquiry, the Commission agreed that the Charity could commission its own independent review (the "Independent Review") which would investigate the Charity's management and governance.

108. The Trustees instructed a firm of solicitors (Higgs & Sons) to carry out an independent review of the operation of the Charity. As part of the review, Higgs & Sons commissioned a financial review of the Charity. The review commenced on 14 April 2020 and reported on 27 November 2020.

109. As respects Mr Wilson, the Commission's inquiry uncovered the following three issues of concern:

(a) Transfer of £1,906,760

109.1. On 31 July 2017, the Charity received a payment of £1,906,760 from the FA. That payment was not recorded in the Charity's accounts for 2017/2018. On 29 March 2018, Mr Wilson authorised the transfer of £1,000,000 of these monies from the Charity to the Union. On 6 February 2019 (nearly a year later), he authorised the transfer of the balance (i.e. £906,760) from the Charity to the Union.

109.2. The movement of these monies (seemingly without reason) were raised with the Charity's trustees by the Charity Commission in a letter dated 20 December 2019, which notified the Charity's trustees that the Commission had opened the inquiry into the Charity. The Commission asked the trustees to explain the absence of any record of these monies in the Charity accounts and to explain the payment of these monies to the Union.

109.3. The Charity's solicitor (Mr Stephen Claus, Head of Charity Law at Brabners LLP, who has also been acting as solicitor for Mr Wilson throughout this appeal)

replied to the Commission's letter on 28 January 2020. Mr Claus blamed the failure to record the £1.9 million in the Charity's accounts on the Charity's auditors, accepted that there was no "charitable explanation" for the transfer of the £1.9 million to the Union, and explained that urgent steps were being taken to repatriate this £1.9 million from the Union to the Charity.

109.4. On 6 February 2020, Mr Wilson (in his capacity as Director of Finance for the Union) directed the transfer of the £1,906,760 back to the Charity from the Union.

109.5. The payment of the £1.9 million was discussed by the Commission's staff with the Trustees (including Mr Wilson) at a meeting (attended by Mr Claus) on 14 February 2020. A transcript of that meeting as well as the correspondence referred to above was included in the hearing bundle before the Tribunal. Mr Wilson has at no point queried the accuracy of the transcript. He was present at that meeting as was Mr Claus (who was also the charity law advisor to the Charity). At that meeting:

(i) it was put to Mr Wilson by the Commission that the £1.9 million was the Charity's money and an explanation was sought for the transfer of the £1.9 million to the Union.

(ii) Mr Claus (in Mr Wilson's presence) accepted that the £1.9 million was the Charity's money and sought to blame the Charity trustees' reliance on their accountants for the error and indicated that Mr Wilson would ensure that this sort of wrongful transfer did not happen again.

(iii) Mr Wilson accepted that the £1.9 million was the Charity's and that the transfer to the Union should not have happened. Further, he did not contradict Mr Claus as he accepted that the £1.9 million was the Charity's money and that he would ensure that no such error took place going forward.

109.6. Subsequently, in representations to the Commission Mr Wilson asserted that the £1.9 million was actually never the Charity's money and belonged to the Union all along. Crucially no proper explanation was given as to:

(i) why Mr Claus accepted the money was the Charity's money and had wrongfully been transferred in the letter dated 28 January 2020.

(ii) why Mr Claus accepted the money was the Charity's money and had wrongfully been transferred at the meeting on 14 February 2020.

(iii) why Mr Wilson appeared to accept Mr Claus' narrative at the meeting on 14 February 2020 and echo it himself.

(iv) why the £1.9 million was transferred to the Charity if it was not the Charity's money.

109.7. In his oral evidence given at the appeal Mr Wilson's evidence seeks to adopt the position made by his legal team in representations, but he is unable to properly explain why he gave/allowed Mr Claus to give a different explanation (given he was the trustee tasked with financial issues) for the transfers up until and including at the meeting on 14 February 2020.

(b) The Recharge

109.8. In his oral evidence Mr Wilson accepted that the recharge was germane to the Charity's annual budget. He, however, never absented himself from any discussions regarding the annual budget.

109.9. As part of the Independent Review, the Trustees were each interviewed by the Independent Reviewer and spoken to about the recharge. In the report produced by Higgs & Co it was noted that:

> "…the Reviewer would have expected the Trustees, in order to comply with their duties under charity law and governance best practice, to keep the arrangement under regular review and conduct a value for money assessment."

109.10. Having interviewed the Trustees (including Mr Wilson) were interviewed by the Independent Reviewer as to whether the recharge was ever challenged or questioned or whether consideration was given as to how it gave the Charity value for money. The Independent Reviewer noted that:

> "The Reviewer asked the Trustees whether they could remember challenging or questioning this arrangement and how it provided value for money for the Charity. None of the Trustees could recall it ever having been challenged, reviewed or analysed."

109.11. All of the minutes of the meetings of the Charity's trustees from the creation of the Charity until the Commission launched its investigation were before the Tribunal. There is no record in the minutes of the trustees having applied their minds to whether the recharge was value for money.

109.12. That the recharge was not reviewed or considered by the trustees was made clear by Mr Claus at a meeting with the Commission (crucially attended by Mr Wilson) on 10 April 2019. In so far as it is relevant the notes to that meeting state:

> "Has it been reviewed in terms of value for money, activities undertaken, is there a better way to deliver. SC – that is not how it is viewed because of the symbiotic relationship, operates in a unique way. It is not therefore considered appropriate to review as much is peculiar to the game of football. This type of discussion did not take place as it would be counterproductive. It has not been a consideration until this point."

Mr Wilson has never queried the accuracy of these notes.

109.13. It was not suggested anywhere in Mr Wilson's Grounds of Appeal before the

Tribunal that the trustees engaged in considering whether the Recharge was value for money. Nor did he suggest this was done anywhere in his witness statement.

109.14. In cross-examination, for the first time he contended that there had in fact been an annual consideration by the trustees of whether the Recharge was value for money. He accepted that he had not said this anywhere in his witness statement. When the aforementioned extract from the report of the Independent Reviewer was put to him in cross-examination, he was unable to proffer an explanation for why the Independent Reviewer thought otherwise nor give any good reason for the omission to mention this earlier – his response when he was asked whether the Independent Reviewer was wrong was to say:

> "I wouldn't know how to answer that. I wouldn't know how to answer that at all."

109.15. Mr Canty (a solicitor) gave evidence before the Tribunal on behalf of Mr Wilson. He attended every meeting of the trustees and produced the minutes. He accepted that Mr Wilson was the trustee who took the lead on financial, that the minutes would have captured the main items of discussion and that both he and the trustees had the opportunity to review the minutes and correct them.

109.16. In cross-examination, Mr Wilson accepted that there was no mention in the minutes of the recharge being value for money in any of the minutes, but was unable to provide any explanation as to why this discussion was not recorded if it happened.

109.17. In his witness statement at paragraph 44, he conceded that he made no expressed declarations of interest and accepted that he did not absent himself from discussions where he was conflicted. In cross-examination, he accepted that he generally did not declare the conflict of interest and he accepted that there was no declaration of a conflict when there was discussion as respect the annual budget - which would have included discussion of the amount of the recharge being paid to the Union by the Charity.

109.18. The foregoing was in all in evidence before the Tribunal. Importantly, a summary was included in the Commission's written closing submissions (and expanded upon in oral submissions).

(c) The Charity's Properties

109.19. The Charity owned several properties in London and Manchester. Several of these were occupied by non-charitable related entities (i.e. commercial entities connected to the Union) either rent free or at below market rent. None had a lease in place regularising the occupation of the non-charitable related entities such that the Charity had certainty as to its rights and obligations (e.g. did security of tenure under the Landlord and Tenant Act 1954 apply, what provisions were in place for rent increases, etc).

109.20. A schedule (understood to have been prepared by or on behalf of the Charity) showing the level of non-payments/underpayments to the Charity was before the Tribunal. When interest was factored in, the loss of income (rent plus interest) to the Charity was approximately £627,000. It is accepted that some of this is rental income that was potentially statute barred and some pre-dated the existence of the Charity dating back to the period when the properties were owned by the Charity's predecessors. After the Independent Review identified the underpayments the Union/related companies made good the loss to the Charity.

109.21. In his witness statement at paragraph 38, Mr Wilson suggested that this underpayment/non-payment of rent was spotted before being raised by the Commission.

109.22. In his letter dated 28 January 2020 to the Commission, Mr Claus accepted that the unpaid/underpaid rent was identified as a result of the Commission's regulatory action.

110. In the proceedings before the Tribunal, the Commission relied upon these three issues of concern as respects its allegation of misconduct and mismanagement in the administration of the Charity, Mr Wilson's unfitness, and the public interest.

111. As respects issues (b) and (c), the Commission accepted that under the Charity's Articles Mr Wilson had a conflict which ought to have been declared. It did not accept that he had any fiduciary or other duty to the Union which conflicted with his duty to the Charity. As he acted despite the conflict, the Commission contended that the Tribunal was entitled to look at what he actually did as a trustee when so acting. For example, as respects the recharge Mr Wilson took part in discussions vis-a-vis the Charity's annual budget, but at no point raised the question of whether the recharge was value for money – despite his being the Trustee on whom the other Trustees expressly relied upon as respects financial issues (other than those pertaining to the Charity's investments).

The Law

(a) Adequacy of Reasons

112. The leading case on adequacy of reasons is the decision of the Court of Appeal in ***English v Emery Reimbold & Strick Ltd*** [2002] 1 WLR 2409. At [19] Phillips LJ set out the rationale for courts and tribunals to give adequate reasons as part of their judgments in a passage which I have already set out in paragraph 33 above.

113. It is clear from Phillips LJ's dicta in ***Emery*** that a judgment does not need to be lengthy or deal with every issue or argument, but simply identify and record those matters which were essential to the tribunal's decision.

114. Further, as was made clear in ***Emery*** at [24-25], where a ground of appeal consists of a challenge to the adequacy of reasons in a judgment, the tribunal is entitled to provide supplementary reasons, and having done so, refuse permission to appeal.

115. Further, per ***Emery*** at [17] and HHJ Matthews at [18] in ***James v Scudamore*** [2023] EWHC 996 (Ch), a judge is not obliged to deal with every argument presented by counsel. What the court needs to do is give sufficient reasons for the appeal court to understand the basis on which the court acted.

(b) Statutory Test for Disqualification of a Trustee

116. The statutory test for disqualification is contained at s.181A(6) and (7)D of the 2011 Act. In so far as was relevant to the appeal before the Tribunal, the test for disqualification is as follows:

(a) s.181A(6)(a): the Tribunal be satisfied that Mr Wilson was a trustee of a charity at the time there was misconduct or mismanagement in the administration of the charity;

(b) s.181A(7)D ("Condition D"): he was either:

(i) responsible for the misconduct or mismanagement;

(ii) knew of the misconduct or mismanagement and failed to take reasonable steps to oppose it; or

(iii) his conduct contributed to or facilitated the misconduct or mismanagement.

(c) s.181A(6)(b): he is unfit to be a charity trustee or in the alternative a trustee either generally or for a specific charities/class of charities.

(d) s.181A(6)(c): the making of the order is desirable in the public interest in order to protect public trust and confidence in charities either generally or classes of charity specified or described in the order.

(c) What constitutes "misconduct or mismanagement"?

117. There is no definition of “misconduct” or “mismanagement” in the 2011 Act. In ***Scargill v Charity Commissioners*** (unreported, 4 September 1998), Neuberger J said at p.123 that these words are ordinary English words, and he was reluctant to add any judicial gloss to them.

118. The Commission has produced an Explanatory Statement which seeks to set out its approach to the exercise of its power to disqualify. At page 4, it defines “misconduct or mismanagement” thus:

> “Misconduct includes any act (or failure to act) in the administration of the charity where the person committing it knew (or ought to have known) that it was criminal, unlawful or improper. Mismanagement includes any act (or failure to act) in the administration of the charity that may result in charitable resources being misused or the people who benefit from the charity being put at risk. A charity’s reputation may be regarded as the property of the charity.”

119. Mr Sadiq submitted that, in considering what might amount to misconduct or mismanagement, regard ought to be had to the nature of the duties imposed on a charitable trustee.

120. A charitable trustee is a fiduciary. The nature of a charitable trustee’s duties was considered by Briggs J in ***White v Williams*** [2011] EWHC 494 (Ch). At [36], he said:

> “At its most general level the duty of trustees of a charity is well defined by the following passage *in Picarda's Law and Practice Relating to Charities* (4th edition) at page 629, under the heading 'Duty to protect trust property':
>
> > "In performing this duty of safe custody he is not bound to look with more prudence to the affairs of the charity than to the management of his own affairs. But this assertion requires a gloss. Much more is in fact expected from trustees acting for a permanent charity than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for

> himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as what is strictly prudent, and his prudent motive cannot afterwards be separated from the others which may have governed him. Trustees of a charity, within the limits of their authority, whatever they may be, should be guided only by desire to promote the lasting interest of the charity."

Under the heading 'Duty of loyalty', the author continues at page 633 as follows:

> "A private trustee must be loyal to the interests of the beneficiaries. The charity trustee owes his duty of loyalty to the public."

121. The meaning of the words “misconduct” and “mismanagement” was further considered by the Tribunal in ***Mountstar (PCT) Limited v Charity Commission***. Whilst that decision is not binding on the Upper Tribunal, the decision of the Tribunal (chaired by HHJ Gerald) gave valuable guidance as to the meaning of the phrase “mismanagement” or “misconduct”. There, the Tribunal said at [139]:

> “It is a question of fact and degree to be viewed in the overall context of each case whether the act(s) or omission(s) complained of constitute “mismanagement” or “misconduct”. In our view it would encompass a failure by the charity trustee to act as an ordinary prudent man of business both in terms of process (how decisions are made, including declaring and managing conflicts of interest) and substance (what decisions are reached and why they have been reached). If the process is adequate and the decision reasoned it may be rare for the Commission to challenge the decision per se.”

The Appeal

(a) Overarching observation

122. Mr Wilson complains in his grounds as respects the adequacy of the reasons given by the Tribunal in its judgment.

123. It is clear from Phillips LJ’s dicta in ***Emery*** that a judgment does not need to be lengthy or deal with every issue or argument, but simply identify and record those

matters which were essential to the tribunal's decision. The Commission submits that this is precisely what the judgment of the Tribunal did and that Mr Wilson's attempts to impugn the decision on this ground are of no substance.

124. Further, as was made clear in ***Emery*** at [24-25], where a ground of appeal consists of a challenge to the adequacy of reasons in a judgment, the tribunal is entitled to provide supplementary reasons, and having done so, refuse permission to appeal.

125. The Commission invited the Tribunal to do so, and it did so and in so doing by endorsing the submissions of the Commission at [11] of its decision. Accordingly, the submissions of the Commission concerning permission to appeal can be read as part of the Tribunal's supplementary reasons when it refused permission to appeal.

126. The Commission submits that the Tribunal's reasoning was adequate, albeit very short and it allowed the parties (who had the benefit of hearing the parties' respective arguments and reading their skeleton arguments) to understand the conclusions which it had reached on the core issues in the appeal.

127. Further, the reasoning was amplified by the decision to refuse permission to appeal and these further reasons allowed the parties (who had the benefit of the skeleton arguments) to understand the conclusions which it had reached on the core issues in the appeal.

(b) Response to Ground 1(1)

128. The Tribunal dealt with the issue of whether the failure to deal with the relationship between the Union and Charity was "mismanagement" at [40] of the judgment. There it said:

> "The Tribunal concluded that the most significant issue leading to its finding of mismanagement (but not excluding the other two areas giving rise to the Respondent's concerns), was the relationship between the Charity and the Union. There had

> been a complete disregard for the need to operate as two distinct and legally separate entities over a period of years – in essence, operating the two as one entity to all intents and purposes. This relationship was something that should have been resolved at a much earlier point, a matter in respect of which, responsibility particularly fell to the Appellant. This lack of operational separation, exemplified by there being no contract or arrangements for re-charge of services between the two entities, was clear mismanagement"

129. As per ***Emery***, the Tribunal was not obliged to deal with every point which Mr Wilson raised under this head. Its judgment makes clear that it had concluded that a failure to ensure that the Union and Charity were to operate as two separate and distinct entities was "mismanagement" and that he bore some responsibility for this. The Tribunal's reasoning on this issue is clear.

130. Further, the Upper Tribunal is invited to have regard to paragraphs 109.8 to 109.17 above. Given this evidence, it was open to the Tribunal to find that the arrangements regarding the recharge constituted clear mismanagement and it did precisely this. In the alternative, the Upper Tribunal is invited to uphold the decision pursuant to r.24(1B)(a) of the 2008 Rules.

(c) Response to Ground 1(3) and Ground 1(4)

131. Both of these grounds relate to adequacy of reasons. The Commission repeats its overarching observation that the reasoning of the Tribunal was adequate and satisfied the requirements of ***Emery***.

132. In the alternative, in the event that the Upper Tribunal finds that the reasoning of the Tribunal on this issue was inadequate, it is again invited to uphold the decision pursuant to r.24(1B)(a) on the basis that:

(a) Mr Wilson was not precluded as a matter of law (as distinct from the Charity's articles) from participating in any decision as to the terms of the relationship between the Charity and the Union as he did not owe fiduciary duties to the Union. He was not a statutory director of the Union. His own oral evidence was that he had no

meaningful power and authority at the Union – power was vested in the CEO/management committee of which he was not a member. Accordingly, per ***Ranson v Customer Services Plc*** [2012] EWCA Civ 841 he was not a fiduciary and therefore was not conflicted from acting as a trustee as a matter of law.

(b) where he chose to act without declaring his conflict of interest, his actions when so acting are relevant to the issue of mismanagement, public confidence and unfitness when considering whether he ought to be disqualified from acting as a director, and ought to be taken into account when determining the issue of disqualification.

(d) Response to Ground 2

133. The first limb of this ground is that the issue of Mr Wilson's conflict of duty was "unheralded" and that he did not have an opportunity to address this argument.

134. The Commission notes the following:

(a) the question of Mr Wilson's conflict of interest was first raised by him/his legal team in representations to the Commission before his suspension/disqualification: see paragraph 50 of that submission.

(b) that he was subject to a conflict of interest was a feature of both parties' statements of case (see paragraphs 65 and §67 of Mr Wilson's Grounds of Appeal, 75 of the Commission's Grounds of Opposition to the Appeal and 12 of his Reply.

(c) the conflict of interest issue was canvassed by the Commission in its skeleton argument dated 10 January 2023 (i.e. a week before the trial).

(d) Mr Wilson and his witnesses (including Mr Canty) were extensively cross-examined and re-examined on this topic.

(e) both parties made extensive written and oral closing submissions on the issues – e.g. paragraph 30 of Mr Wilson's written closing and his oral submissions.

(f) the Commission's submission made direct reference to Clauses 6.2, 6.4 and 6.5 of the Charity's articles and the conflict issue both in cross-examination of Mr Wilson (see the transcript for 17 January 2023 and in its oral and written closing submissions: see paragraphs 28 to 34 of the Commission's written closing and the transcript of 2 February 2023.

(g) Mr Wilson states that the conflict issue (and in particular the issue of the Charity's articles of association) now complains to this "new issue", but at page 41B of the transcript of 2 February 2023, his counsel indicates that he will wait until seeing how the Commission puts its case before raising any formal objection. Subsequently, having heard how counsel for the Commission put its case (which made extensive reference to the conflict of interest issue and the Charity's articles), counsel for Mr Wilson made submissions in response, but crucially he made no objection to the Tribunal being able to consider the conflict of interest point which he described as the "new issue".

135. Even if (which is not admitted) the issue of the conflict of interest per the Charity's articles of association was not rendered a live issue or (to paraphrase Mr Wilson) a heralded issue before the commencement of trial, it became a feature of the trial on the very first day. The trial of the appeal was not a dress rehearsal. If Mr Wilson had an objection to this issue being considered by the Tribunal, it was incumbent on him to make plain that he was formally objecting to this course prior to judgment being given. In the context of the parties making submissions, asking questions of witnesses, and making closing submissions traversing this issue the Tribunal, and in particular counsel for Mr Wilson essentially not pressing the point in closing submissions, the Tribunal cannot be accused of an error or law/procedural unfairness in considering an issue where no actual objection was made by counsel to their doing so.

136. The second limb of this ground it that the Tribunal's decision does not address or give adequate reasons for rejecting, inter alia, Mr Wilson's submissions on s.177(6) of the Companies Act 2006, or the fact that he completed a declaration of interests form on 22 June 2016. The Commission repeats its overarching submission, but in the event that the Upper Tribunal finds that the reasoning of the Tribunal on this issue was inadequate or that it had not addressed these issues and it ought to have done, the Upper Tribunal is invited to uphold the appeal pursuant to r.24(1B)(a) of the 2008 Rules on the basis that Mr Wilson was duty bound (pursuant to the Charity's articles) to declare a conflict of interest and (on his own evidence) that he participated in discussions about payments to the Union, and letting properties to the Union without declaring that conflict.

137. The third limb of this ground is that the Tribunal's decision was flawed/perverse as at [40] of the judgment it concluded that Mr Wilson was "particularly responsible" for not addressing the relationship between the Charity and the Union, yet at [46] it criticised him for not appreciating the need to declare a conflict of interest. The Commission submits that there is no inconsistency or perversity between the two paragraphs of the judgment. Mr Wilson was conflicted per the Charity's articles. That said, he did participate in the decisions of the Trustees notwithstanding the conflict. The other Trustees deferred to him on matters of finance (save as respects investments). The Tribunal was entitled to have regard to how he acted when he acted in breach of the Charity's articles of association.

The Cross-Appeal

(a) Ground 1

138. The Tribunal had detailed submissions (in particular in written closing submissions) from the Commission as respects why the transfer of the £1.9 million to and from the Union by the Charity constituted "mismanagement" (see paragraphs 47 to 53 and 80).

139. The Tribunal deals with this issue at [48] of its judgment as follows:

> "The facts surrounding the issue of the £1.9M transfer to and from the Union by the Charity, one of the Respondent's concerns, were not found by the Tribunal to be evidence of mismanagement in the overall scheme of things. However, the Tribunal did find that the Appellant, as Finance Director of the Union and financially qualified Trustee of the Charity should have had a better grasp of this issue than he displayed in the course of the Respondent's Enquiry or in the hearing. In particular, the Tribunal was concerned that the Appellant did not appear to concern himself with whether a sum of this, or any, magnitude was, in fact, properly Charity money until the accountants were producing year end journals."

140. The judgment does not address the detailed arguments of the Commission as respects why this conduct constitutes mismanagement in the administration of the Charity. Further or in the alternative, the reasons given by the Tribunal are not sufficient to satisfy the requirements of ***Emery***.

(b) Ground 2

141. In any event, the finding the transfer of the £1.9 million to and from the Union did not constitute mismanagement, the Tribunal erred in law:

(a) Mr Wilson (as a trustee of the Charity) had a legal duty to act with reasonable care and skill. A careful and competent trustee (especially a trustee with the skills, qualifications and experience of Mr Wilson) ought to have discovered and addressed these errors and ought to have been able to provide a consistent account for how and why any errors arose. He was the trustee to whom the others deferred to and relied upon as respects the Charity's finances.

(b) his explanation for why the transfer took place changed over the course of the Commission's investigation – this further indicated a want of care in dealing with the Charity's money.

(c) even if his explanation for the error is correct, then it is evidence of extremely poor financial controls on his part – i.e. that he has transferred nearly £2 million pounds from the Charity's bank account, but when challenged as respects this

transfer, he was unable to give an accurate explanation until the Commission threatened proceedings for disqualification.

(d) his conduct constitutes mismanagement in the administration of the Charity.

(c) Ground 3

142. The Tribunal had detailed submissions (in particular in written closing submissions) from the Commission as respects why the issues relating to the management of the Charity's properties constituted mismanagement: see paragraphs 54 to 58 and 81.

143. The Tribunal deals with this issue at [48] of its judgment which reads:

> "Similarly, by reason of particular issues of law and the dual loyalties held by the Appellant, together with the facts that emerged in the course of the hearing, the Tribunal, on the balance of probabilities, decided that the concern identified by the Respondent concerning the management and operation of properties of the Charity, was not, in itself, strong evidence of mismanagement by the Appellant in his role as trustee of the Charity. However, taken together with the failure to declare an interest and the deficiencies in the accounting for a significant sum of money by the Charity, there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee."

144. It is not clear whether the Tribunal has accepted the Commission's case that this conduct constituted "mismanagement". It if has not done so, the judgment does not address the detailed arguments of the Commission as respects why this conduct constitutes mismanagement in the administration of the Charity. Further or in the alternative, the reasons given by the Tribunal are not sufficient to satisfy the requirements of ***Emery***.

(d) Ground 4

145. If the Tribunal found that the transfer the issues relating to the Charity's properties did not constitute mismanagement, it erred in law:

(a) Mr Wilson (as a trustee of the Charity) had a legal duty to act with reasonable care and skill. A careful and competent trustee (especially a trustee with his skills, qualifications and experience) ought to have discovered and addressed these errors and ought to have been able to provide a consistent account as to how and why any errors arose. He was the trustee to whom the others deferred and relied upon as respects the Charity's finances.

(b) he was aware that the Union and related entities were occupying the Charity's properties rent free – at the very least as respects the property at 7-8 Philpot Lane, London, but he took no steps to address this issue until the Commission opened its investigation into the affairs of the Charity.

(c) trustees have a duty to act in the best interests of their Charity and to manage their resources responsibly. In this case, Mr Wilson failed to do so.

(d) he cannot rely upon any conflict of interest to absolve himself of responsibility as:

(i) he was acting qua trustee in breach of the rules on conflict of interest as respects the Charity's finance in breach of the rules on conflict of interest.

(ii) if he had complied with the rules on conflict of interest – e.g. Article 6.4 of the Charity's Articles - he was obliged to disclose any conflict, thereby flagging the issue of unpaid rents.

(iii) he was not a fiduciary of the Union and was therefore not precluded from flagging the rent issue to his fellow trustees.

Discussion

Summary

146. I should say at the outset that I am satisfied that the decision of the Tribunal involves errors on a point of law and that both the appeal and the cross-appeal should be allowed.

147. As I foreshadowed in my directions of 8 March 2024, I was bound to say that I saw formidable obstacles in the suggestion that, should I allow the cross-appeal on some or all grounds, I should remake a decision in such circumstances as these, as opposed to remitting the matter to be reheard before a differently constituted panel. Such a course of action would be even more problematic in the event that both the appeal and the cross-appeal were to be successful (or partially successful). In that event the Upper Tribunal could hardly remake the decision to some extent, but ship back whatever was left for rehearing. I repeated that observation at the beginning of the hearing in July. Having concluded that the Tribunal's decision contains errors of law and that both the appeal and the cross-appeal should be allowed, I remain satisfied that the correct course is to remit the matter for a complete rehearing before a differently-constituted Tribunal.

148. Given the parties' respective positions on the appeal and the cross-appeal, both counsel were faced with the difficult forensic pirouette of both seeking to undermine the Tribunal's findings in some respects, yet simultaneously trying to uphold others of them in other respects. It is, if I may say so, a tribute to their respective forensic abilities that they executed that difficult manoeuvre with considerable aplomb, but the combined effect of their submissions that the decision under appeal and cross-appeal did not pass muster only served to reinforce my original view that the decision did indeed not pass muster and must be reheard in its entirety.

149. The vice of the decision of the Tribunal below is that it is wholly inadequately reasoned. For an appellate tribunal to make positive findings, in the absence of any by the fact-finding tribunal, on the basis of evidence which it has not heard from witnesses whom it has not seen, seems to me to be inviting the appellate tribunal to indulge in what Lewison LJ has called "island hopping", see his judgment in ***Volpi v Volpi*** [2022] EWCA Civ 464 at [65]):

> “ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").
>
> iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
>
> iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.”

150. Notwithstanding the blandishments of counsel, I decline to engage in such island hopping.

151. I have considered at some length (and listened again to the recording of the hearing) to decide whether it would be appropriate to make findings on Mr Sadiq’s submissions on the appeal and Mr Smith KC’s submissions on the cross-appeal, where they respectively sought to uphold those aspects of the conclusions of the Tribunal which supported their cases, but have decided that it would be inappropriate to do so.

152. Although the questions of mismanagement, unfitness to be a charity trustee and whether the making of a disqualification order is desirable in the public interest in order to protect public trust and confidence are logically distinct questions, they cannot be answered in isolation and the question of mismanagement (or not) clearly feeds into and influences the question of unfitness and the question of the public interest. In a matter such as this, where those questions very much run together and much would rest on a fact-finding tribunal’s proper reasoned assessment of Mr Wilson’s evidence and its adequately reasoned conclusion on the basis of that evidence as to whether he was a fit and proper person to be a charity trustee, the atmosphere of the courtroom or tribunal room cannot be recreated by reference to documents (including transcripts of evidence).

153. It would be one thing if the Tribunal had made detailed findings of fact in the light of the written and oral evidence put before it and provided adequate reasons for that conclusion, but that is precisely the sort of evaluative conclusion which our system entrusts to the trial judge or the fact-finding tribunal. It is not the function of the appellate court or tribunal to trawl through cherry picked parts of the evidence in order to reach its own independent conclusion on the basis of what it has neither seen nor heard (see ***Clydesdale Bank Plc v Duffy*** [2014] EWCA Civ 1260 at [14]), particularly in the light of what I have said in the preceding paragraph.

154. There is also the point that, if the entire matter is to be sent back for a full re-hearing, there is risk that observations by the appellate tribunal, however couched, may have the effect of prejudicing a line of argument sought to be deployed by one side or the other at that re-hearing. That is all the more so if the argument on the second occasion proceeds on a somewhat different basis from that taken first time around, as may well be the case, for example, in the light of the production of Mr Wilson's contract of employment and the duties (whether fiduciary or not) which may flow therefrom. The more prudent course is therefore not to trespass into such waters, although in deference to the arguments of both counsel I am bound to say that they both made formidable points in support of their respective cases which the new tribunal would do well to engage with and consider explicitly,

155. I should say that I do not accept Mr Sadiq's argument that the decision of the Tribunal was clarified by the reasons given by it when refusing permission to appeal. In the first place I do not consider that what was said on that occasion does sufficiently cover the deficiencies in the original decision (indeed it might be said that it mirrors the shortcomings of the original decision in simply accepting one submission rather than another). Secondly, and more fundamentally, the decision under appeal is the decision of a panel of 3 members, but the remarks in refusing permission to appeal were only those of the judicial member and not the full panel and were not therefore clarification by the Tribunal.

156. I should also say at the outset that I did not accept Mr Smith KC's submission that, by virtue of the order suspending Mr Wilson made on 12 August 2021 (when the Commission first gave notice of intention to disqualify), he would by the time of the hearing of the appeal have been de facto disqualified for a period of 3 years bar a fortnight and that, if the matter were remitted to the Tribunal for rehearing, it seemed likely that Mr Wilson would have been disqualified for a period very close to the 4 years thought appropriate by the Commission by the time of that rehearing, essentially rendering any victory pyrrhic. As I pointed out during the hearing, the Tribunal's order was that the period of disqualification should run for 4 years from 26 June 2023, that is until 25 July 2027, which even now is nearly 3 years away. I do not therefore accept that, if the Commission were to succeed in its case at the re-hearing, any victory (if that is the right word) would be at all pyrrhic.

157. Having said that, I do take Mr Smith KC's point that Mr Wilson was warned of the Commission's intention to disqualify him from acting as a trustee of the Charity and that it suspended him in the interim as long ago as 12 August 2021 and actually disqualified him on 8 February 2022. He has therefore been subject to the Commission's sanctions for more than 3 years and has suffered prejudice in an inability to earn a living and provide for his family. Whilst I do not intend to micro-manage the listing of First-tier Tribunal hearings, no doubt the Tribunal Judge who is seised with making the directions for the relisting of the hearing of this matter will ensure that it is given the appropriate degree of priority.

The Proffered Undertaking

158. As I have mentioned in paragraph 23 above, Mr Smith KC drew my attention to the fact that Mr Wilson had openly offered on 14 February 2024 to undertake not to act as a charity trustee ever again without obtaining the Commission's prior written consent. He had made that offer with a view to avoiding the need for this appeal (and any future re-hearing), but also because the effect of the disqualification on him personally (as a chartered accountant) had been substantial. Although his offer, he said, would achieve greater protection for charities (which is the purpose of the disqualification regime) than the dismissal of the appeal, and a potential substantial

saving of public funds, the Commission had refused to entertain the suggestion, notwithstanding that it has accepted voluntary undertakings in other cases. On the contrary, the Commission had widened the scope of the present hearing by cross-appealing on certain specific findings (which raise no point of general importance). Mr Wilson, said his counsel, did not know what he had done to provoke the Commission into adopting its “win-at-all-costs” approach to this litigation.

159. In response, Mr Sadiq explained that, whilst the Commission had until 2020 accepted undertakings not to act in a charitable role, it had not done so since 2021 and that what had been done in the past was not a guide to what it should do in the future. I asked him whether there was anything in print from the Commission to that effect, but he said that there was not, but that that was the Commission’s practice with effect from 2021.

160. He explained that the jurisdiction of the Commission under s.181A was purely statutory and that there was no inherent jurisdiction to make a disqualification order. There was nothing in s.181A to allow the Commission to accept undertakings in lieu of a disqualification order.

161. Were the Commission to accept an undertaking, but the person who had given the undertaking then to act in breach of it, the question arose as to how the undertaking could be enforced. Conditions A to E of subsection 6 were obviously inapplicable and the only condition which might be applicable was condition F, but that would require separate proceedings under the Act to enforce the undertaking. There was no summary procedure to enforce such an undertaking. It was for that reason, said Mr Sadiq, that the Commission had not accepted the proffered undertaking by Mr Wilson. This, he said, was in marked contradistinction to the regime which applied under the Company Directors Disqualification Act 1996, which specifically provided for the giving of undertakings. In that case s.7 of the statute specifically provides that

> "(2A) If it appears to the Secretary of State that the conditions mentioned in section 6(1) are satisfied as respects any person who has offered to give him a disqualification undertaking, he may accept the undertaking if it appears to him that it is expedient in the public interest that he should do so (instead of applying, or proceeding with an application, for a disqualification order)".

162. I raised with counsel in argument whether the Upper Tribunal would have power to enforce such an undertaking under s.25(1)(a) and (2)(c) of the 2007 Act, although I rather sprang that on them and neither of them was able to do any significant research on the point over the lunch adjournment. For his part Mr Smith KC said that it was by no means clear that the Commission was right about its inability to accept an undertaking, but he submitted that s.25(2)(c) could include the power to take an undertaking. For his part Mr Sadiq doubted that the provision had such an ambit, but in any event he pointed out that the First-tier Tribunal had no such power and that it would be necessary in future cases to appeal to the Upper Tribunal to obtain such an undertaking.

163. I take Mr Sadiq's last point, but I do not think that I need to decide the ambit of s.25(2)(c) in the present circumstances, particularly because it was not the subject of detailed argument. For present purposes it suffices to say that Mr Wilson has proffered such an undertaking, but that the Commission has not accepted it on the basis that it believes that it has no jurisdiction to accept it. Again I do not need to determine whether the Commission does have any such jurisdiction, although I take Mr Sadiq's point about how any such undertaking might be enforced, if not through the mechanism of condition F.

164. I would, however, make 2 observations about the present situation. In the first place, it seems to me to be unsatisfactory that the position of the Commission is not anywhere set out in print such that it can be read and understood by third parties. The Commission should take early steps to explain its position in print and the basis on which it has adopted that position since 2021.

165. Secondly, if it is indeed the case that the Commission has no such jurisdiction, consideration might well be given by the appropriate authorities to the creation of such a jurisdiction by amendment to s.181A, particularly since the Commission obviously found it a useful tool prior to its change of practice in 2021. There is an obvious form for such jurisdiction to be conferred, if thought appropriate, in the light of s.7(2A) of the 1996 Act.

The Appeal

Ground 1(1)

166. In the light of what I have said above about the correct disposal of the appeal and the cross-appeal being remittal for complete re-hearing, I can deal with the grounds of appeal relatively quickly. What the Tribunal found in paragraph [40] of its decision was that

> "40. The Tribunal concluded that the most significant issue leading to its finding of mismanagement … was the relationship between the Charity and the Union. There had been a complete disregard for the need to operate as two distinct and legally separate entities over a period of years – in essence, operating the two as one entity to all intents and purposes. This relationship was something that should have been resolved at a much earlier point, a matter in respect of which, responsibility particularly fell to the Appellant. This lack of operational separation, exemplified by there being no contract or arrangements for re-charge of services between the two entities, was clear mismanagement."

167. Mr Wilson's essential case was that the recharge was objectively in the best interests of the Charity and that the trustees subjectively believed that the recharge was in the best interests of the Charity. In such circumstances he argued that there was no legal duty on a trues to review something which he believed to be in the best interests of the Charity and which was in fact in the best interests of the Charity and that on that basis there was no mismanagement on his part. Any challenge to the recharge would not have been in the Charity's best interests and would in fact have been inimical to the interests of the Charity because there was no other organisation apart from the Union which was able to deliver many of the Charity's services because of is connection with football clubs and players and the arrangement could

hardly be expected to continue on such advantageous terms if the recharge were challenged.

168. I entirely accept the proposition that there is no duty on a tribunal, in giving its reasons, to deal with every argument presented by counsel in support of his case nor need the tribunal refer to every point of the evidence, but what the tribunal must do is to identify and analyse the key features of the written and oral evidence. It should certainly record each party's case on the core issues and explain with reasons what it made of each party's case on those core issues. It was a core part of Mr Wilson's case that the arrangements for the recharge were objectively in the best interests of the Charity and that the trustees subjectively believed that the recharge was in the best interests of the Charity. The Tribunal should have set out that issue and explained what it made of that issue and why it rejected it. It did not do so. The arguments were set out in some detail in Mr Wilson's closing submissions, but the Tribunal simply failed to address them and the appellate tribunal is left in the dark as to whether and to what extent the Tribunal considered that aspect of Mr Wilson's case, how it assessed his evidence in that regard and the submissions made on his behalf on that core issue and thus how it reached its conclusions on that core issue and the potentially very serious consequences of so doing.

169. If the matter had been a simple as deciding whether on a particular point it was A or B who had been telling the truth, it would usually be enough for the tribunal, having summarised the evidence, to indicate simply that it believed A rather than B, but where the dispute (as here) involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the tribunal really must enter into the issues canvassed before it and explain why it prefers one case over the other. That is likely to apply particularly in litigation where, as here, there was a significant amount of documentary and oral evidence over several days and a significant argument as to the nature and effect of that evidence.

170. In his written submissions, Mr Sadiq for his part sought to uphold the conclusion of the Tribunal on the basis that, as Mr Wilson's evidence was that he did act,

despite the conflict, so that the Tribunal was entitled to look at what he actually did as a trustee when so acting. According to his evidence, with regard to the recharge Mr Wilson took part in discussions vis-à-vis the Charity's annual budget, but at no point did he actually raise the question of whether the recharge was value for money, although he was the trustee on whom the other trustees expressly relied concerning financial issues. The point, said Mr Sadiq, was that it was not germane whether the recharge was value for money. Moreover, the evidence was not that Mr Wilson had not taken part in the discussion; rather his own evidence as that he did take part in such discussions.

171. The problem with that approach, however, is that the Tribunal made no findings as to either of those matters. It simply did not address Mr Wilson's case, as I have explained above, nor did it make any findings on his evidence that he had taken part in discussions (indeed, if anything, it seems not to have accepted that evidence in paragraphs [40], [42] and [43]).

172. Moreover, in the light of the considerations which I set out in paragraphs 146 to 155 above, I am satisfied that it would be inappropriate to usurp the function of the fact-finding tribunal and I therefore decline to take the path of upholding that part of the Tribunal's decision pursuant to r.24(1B)(a) of the 2008 Rules, although to be fair to Mr Sadiq he did not press the point that I should remake the decision or uphold it in the light of my observations at the beginning of the hearing.

173. I therefore allow the appeal on ground 1(1).

Ground 1(3)-(4)

174. It is convenient to take ground 1(3) and 1(4) together (as indeed did Mr Smith KC) and I can deal with this ground relatively briefly.

175. In paragraph [11] the Tribunal stated (with emphasis added) that

> "11. The Appellant was, until 1 July 2022, the Financial Director of the Union. Pursuant to his holding that position, the Appellant was an *ex officio* trustee of the Professional Football Association Charity ('the Charity'), from 8 January 2013, when the Charity was incorporated, until 1 July 2022, when his appointment as trustee was terminated. His employment as Financial Director of the Union was terminated on 30 June 2022. *As a matter of law, the Appellant would not have been permitted, unless authorised, from participating in any decision as to the terms of the relationship between the Union and the Charity, as he was an employee of the former and a trustee of the latter, thus raising competing duties of loyalty*."

176. In paragraph 49 it held (again with emphasis added) that

> "49. Similarly, *by reason of particular issues of law and the dual loyalties held by the Appellant, together with the facts that emerged in the course of the hearing, the Tribunal, on the balance of probabilities, decided that the concern identified by the Respondent concerning the management and operation of properties of the Charity, was not, in itself, strong evidence of mismanagement by the Appellant in his role as trustee of the Charity.* However, taken together with the failure to declare an interest and the deficiencies in the accounting for a significant sum of money by the Charity, there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee."

177. On any reading of those two paragraphs (and particularly paragraph [11], which admits of no ambiguity – I shall deal below with the question of the internal consistency of paragraph [49]), the Tribunal appeared to have *accepted* Mr Wilson's case that he was precluded as a matter of law from participating in any discussion as to the rent passing between the Charity and the Union.

178. By contrast, in the middle paragraph, [40], it held (again with emphasis added)

> "40. The Tribunal concluded that the most significant issue leading to its finding of mismanagement (but not excluding the other two areas giving rise to the Respondent's concerns), was the relationship between the Charity and the Union. There had been a complete disregard for the need to operate as two distinct and legally separate entities over a period of years – in

> essence, operating the two as one entity to all intents and purposes. This relationship was something that should have been resolved at a much earlier point, a matter in respect of which, responsibility particularly fell to the Appellant. This lack of operational separation, exemplified by there being no contract or arrangements for re-charge of services between the two entities, was clear mismanagement."

179. In that latter paragraph, by contrast with what it has said in the other two paragraphs, it appeared to have *rejected* the same case with regard to participation in any decision as to the other terms of the relationship between the Charity and the Union.

180. The wholly unsatisfactory position therefore appears to be that, on the one hand, the Tribunal accepted Mr Wilson's case that he was precluded as a matter of law from participating in any discussion as to the rent passing between the Charity and the Union, but on the other not to have accepted his case that he was precluded as a matter of law from participating in any decision as to the other terms of the relationship between the Charity and the Union.

181. The Tribunal should have made clear in its decision whether it did, or did not, accept Mr Wilson's case that he was precluded as a matter of law from participating in any discussion as to matters between the Charity and the Union, whether in relation to rent and any other terms of that relationship and to have applied that conclusion consistently throughout its judgment. It did not do so and the inconsistency in its application of the conclusion which it had reached in paragraph [11] renders its decision erroneous in law.

182. Moreover, given the inconsistency between paragraphs [11] and [49] on the one hand and paragraph [40] on the other, it is questionable whether the Tribunal properly and consistently addressed Mr Wilson's case that he was precluded as a matter of law from participating in any decision as to the terms of the relationship between the Charity and the Union.

183. Having reread these particular paragraphs several times, I therefore remain satisfied that so opaque a formulation again does not satisfy the requirements of ***Emery*** nor did it properly address Mr Wilson's case that he was precluded as a matter of law from participating in any decision as to the terms of the relationship between the Charity and the Union.

184. Given that the Tribunal's conclusion on that fundamental matter is so opaque and internally inconsistent. I am satisfied that the matter should be remitted for rehearing and not made the subject of findings by the Upper Tribunal, particularly in the light of any detailed analysis by the Tribunal at first instance.

185. Mr Smith submitted that the Tribunal was right in paragraph [11], but wrong in paragraph [40]. I do not have to reach a conclusion on that question and, in the light of the conclusion which I have reached as to the complete remittal of the matter for rehearing it is not appropriate that I should reach any findings on the matter.

186. By the same token, although Mr Sadiq (in his written submissions, although he did not press the point orally) sought to uphold the Tribunal's decision by submitting that grounds 1(3) and 1(4) fell away because it was Mr Wilson's evidence that he *had* acted and taken part in such discussions, again in the light of the considerations which I set out in paragraphs 146 to 155 above, I am satisfied that it would be inappropriate to usurp the function of the fact-finding tribunal in this respect either and I therefore decline to take the path of upholding that part of the Tribunal's decision pursuant to r.24(1B)(a) of the 2008 Rules.

187. I therefore allow the appeal on ground 1(3)-1(4).

Ground 2

188. Although at the original permission hearing I accepted Mr Sadiq's submission that the question of conflict of interest and the articles of association was in issue from the outset of the proceedings, and that, despite Mr Wilson's conflict of interest, he did not declare any interest/conflict of interest at board meetings (save at the first

two), it seemed to me to be arguable that the Tribunal did not consider such evidence as there was of Mr Wilson's compliance with that duty (in the form of the declaration of interests form in the bundle) or the impact of s.177(6) of the Companies Act 2006 or any of the other matters mentioned in the second ground of appeal. It also seemed to me that there was arguably an inconsistency between the Tribunal's findings in paragraph [46] and its findings in [40] that Mr Wilson was "particularly responsible" for not addressing the relationship between the Charity and the Union. As Mr Smith submitted, it was arguable that the Tribunal could not simultaneously criticise Mr Wilson for (a) failing to participate in a discussion and (b) for not declaring such a conflict and absenting himself from that discussion.

189. Mr Sadiq submitted that the allegation was in no sense "unheralded", but that in any event the point was simply not raised in the decision of the Tribunal and therefore the ground of appeal fell at the outset. There was no reference to the allegation of breach of the articles of association in paragraph [11] of the Tribunal's decision; there was no reliance on the allegation in paragraph [46] of the decision and indeed no reliance on it at all in the whole of the decision. Whether "unheralded" or not, the Tribunal had not relied on it in reaching its decision.

190. I take the point that the allegation of breach of the articles of association is not mentioned in the judgment, but the closely allied question of conflict of interest was the subject of findings by the Tribunal (and it had not been part of the Commission's original case of mismanagement, which was based on the three other allegations) and I accept Mr Smith KC's submission that the Tribunal did not deal fairly with the evidence concerning the question of declaration of interest. I do not therefore accept the submission that Ground 2 falls away in any event because there was no reliance on the constitutional issue.

191. What the Tribunal said in paragraph [46] was that

> "46. The Tribunal was particularly concerned that *the Appellant showed no appreciation of the importance of a declaration, or a*

> *need to declare, any conflict of interest when acting in his role as trustee of the Charity. This was a very basic failing on his part in that context.* It was not acceptable, but understandable at a certain level, that he should seek to rely on not being advised in respect of such matters, particularly when a solicitor was present at each meeting of the trustees, apparently, to merely take minutes of the meeting."

192. That finding was materially relevant to the question of unfitness since it then found in paragraph [49] that

> "49. … the concern identified by the Respondent concerning the management and operation of properties of the Charity, was not, in itself, strong evidence of mismanagement by the Appellant in his role as trustee of the Charity. *However, taken together with the failure to declare an interest* and the deficiencies in the accounting for a significant sum of money by the Charity, *there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee*."

193. It is, however, apparent that (a) there had been a declaration of interest at the Charity's inaugural meeting in 2013 (b) there had been a further declaration of interest on 22 June 2016 when Mr Wilson had signed a declaration of interest form, which was in the hearing bundle and which I was shown again during the substantive hearing before me in July (and which had specifically been drawn to the Tribunal's attention) (c) the other directors knew of the conflict of interest. In the light of that evidence, it is entirely incorrect for the Tribunal to have stated that

> *"the Appellant showed no appreciation of the importance of a declaration, or a need to declare, any conflict of interest when acting in his role as trustee of the Charity. This was a very basic failing on his part in that context."*

194. Whether all or any of those disclosures (or the impact of s.177(6) of the Companies Act 2006) were sufficient for Mr Wilson to have complied with his duty of disclosure, or to be found fit to be a charity trustee, is another matter, but as it stands the Tribunal has simply misrecorded or simply misunderstood his evidence and used that inaccurate finding as a significant plank in its conclusion as to unfitness, in

conjunction with one matter which it had found in paragraph [48] not to be evidence of mismanagement and another matter which it had found, ambiguously in the earlier part of paragraph [49], not to be “strong” evidence of mismanagement.

195. Mr Smith KC accepted that s.177(6) qualified the director’s statutory duty of disclosure, but that it did not qualify the articles of association and he accepted that Mr Wilson had acted in breach of the procedure set out at article 6.2.5 of the articles, but he argued that the law took a pragmatic view of such a breach; it may have been a breach of the articles, but it was a technical breach and was not tantamount to unfitness. In that respect he prayed in aid the remarks of Morgan J in ***Instant Access Properties v Rosser*** at [351] to the effect that the absence of formal disclosure may not amount to more than a technical non-declaration of an interest.

196. By contrast, Mr Sadiq referred to the immediately preceding paragraphs [348] to [350] to the contrary effect that the legislation demonstrates the importance that the legislature attaches to the principle that a company should be protected against a director who has a conflict of interest and duty and that such a breach will not be regarded as a technical breach. He also made the point that what was said in Instant Access was directed to the different question of relief from liability for breach of duty and that it was not directed to the question of unfitness to act. The new Tribunal will have to grapple with such questions and reach a conclusion on them, but it should not be for me to pre-empt the decision of the new Tribunal in that respect. It must, however, grapple with them and not ignore them.

197. I do not therefore need to decide whether and to what extent the allegation put to Mr Wilson was or was not a new or unheralded point and whether Mr Smith KC objected sufficiently to the point being raised or pulled his punches and did not object with sufficient vigour to the Commission’s case on the point. The point resolves itself into the relatively short one that the Tribunal has simply misrecorded or misunderstood Mr Wilson’s evidence and used that inaccurate finding as a significant plank in its conclusion as to unfitness. As such the decision, to the extent

that it relied on the findings in paragraph [46] and [49], betrays an error of law and cannot stand.

198. Mr Sadiq sought (again in his written submissions, although he did not press the point orally) to uphold the Tribunal's decision by submitting that Mr Wilson was duty bound pursuant to the articles to declare a conflict of interest, but that on his own evidence he participated in discussions about payments to the Union and letting properties to it without declaring that interest, and thus that the Tribunal was entitled to have regard to how he acted when acting in breach of the articles of association, so that it was entitled on the material before it to reach the conclusions which it did.

199. Again, however, in the light of what I have said above, I am satisfied that it would be inappropriate to usurp the function of the fact-finding tribunal and I therefore decline to take the path of upholding that part of the Tribunal's decision pursuant to r.24(1B)(a) of the 2008 Rules.

200. I therefore allow the appeal on ground 2.

The Cross-Appeal

201. I accept Mr Sadiq's submissions in relation to the cross-appeal.

Grounds 1 and 2

202. In paragraph [48] the Tribunal held that

> "48. The facts surrounding the issue of the £1.9M transfer to and from the Union by the Charity, one of the Respondent's concerns, were not found by the Tribunal to be evidence of mismanagement in the overall scheme of things. However, the Tribunal did find that the Appellant, as Finance Director of the Union and financially qualified Trustee of the Charity should have had a better grasp of this issue than he displayed in the course of the Respondent's Enquiry or in the hearing. In particular, the Tribunal was concerned that the Appellant did not appear to concern himself with whether a sum of this, or any, magnitude was, in fact, properly Charity money until the accountants were producing year end journals."

203. Mr Sadiq's grounds of cross-appeal were that

(1) the Tribunal had detailed submissions from the Commission as to why the transfer of the £1.9 million to and from the Union by the Charity constituted mismanagement, but in its judgment it did not address the Commission's detailed arguments as to why that conduct constituted mismanagement in the administration of the Charity. Alternatively, the Tribunal's reasons were not sufficient to satisfy the requirements of ***Emery***.

(2) in finding the transfer of the £1.9 million to and from the Union did not constitute mismanagement, the Tribunal erred in law:

(a) Mr Wilson (as a trustee of the charity) had a legal duty to act with reasonable care and skill. A careful and competent trustee (especially a trustee with his skills, qualifications and experience) ought to have discovered and addressed these errors and ought to have been able to provide a consistent account for how and why any errors arose. Mr Wilson was the trustee to whom the others deferred and relied upon as respects the Charity's finances.

(b) his explanation as to why the transfer took place changed over the course of the Commission's investigation.

(c) even if his explanation for the error were correct, it was evidence of extremely poor financial controls on his part – i.e. that he had transferred nearly £2 million pounds from the Charity's bank account, but when challenged as respects the transfer, he was unable to give an accurate explanation until the Commission threated proceedings for disqualification

204. I am satisfied that the first ground of cross-appeal is made out. In the first sentence of paragraph [48] the Tribunal merely states a conclusion without giving any supporting reasons for its conclusion. All that it says is the facts surrounding the

issue of the £1.9M transfer to and from the Union by the Charity were not found by to be evidence of mismanagement without any further elaboration. It did not address the Commission's arguments at all. It was not obliged to accept the Commission's arguments, but if it did not it ought to have explained what they were and why it did not agree with them.

205. It is correct that the Tribunal went on to find that Mr Wilson, as Finance Director of the Union and financially qualified Trustee of the Charity, should have had a better grasp of the issue than he displayed in the course of the Commission's inquiry or in the hearing and that he did not appear to concern himself with whether a sum of that, or any, magnitude was, in fact, properly Charity money until the accountants were producing year end journals, but that does not deal with the central fact that the Tribunal reached its conclusion on mismanagement in one single sentence without any supporting reasons.

206. In the light of the conclusion which I have reached that the whole matter should be remitted for rehearing, I do not need to determine the second ground of cross-appeal, which is in essence a distillation of the detailed grounds on which the Commission relied and on which the Tribunal made no findings. Given that the matter is to be reheard in full, it would be wholly inappropriate to determine on evidence not yet given and facts not yet found whether the ground of mismanagement was or was not made out.

207. Mr Smith KC manfully sought to uphold the decision of the Tribunal in the paragraph in question on the basis that it was a positive finding of no mismanagement in relation to the transfer of the monies. The essential problem with that submission, however, is that the Tribunal did not give any reasons for its conclusion. More fundamentally for an appellate tribunal to make positive findings, in the absence of any by the fact-finding tribunal, on the basis of evidence which it has not heard from witnesses whom it has not seen, seems to me to be inviting the appellate tribunal to indulge in I referred to above as "island hopping", an exercise in which I decline to engage.

Grounds 3 and 4

208. In paragraph [49] the Tribunal found that

> "49. Similarly, by reason of particular issues of law and the dual loyalties held by the Appellant, together with the facts that emerged in the course of the hearing, the Tribunal, on the balance of probabilities, decided that the concern identified by the Respondent concerning the management and operation of properties of the Charity, was not, in itself, strong evidence of mismanagement by the Appellant in his role as trustee of the Charity. However, taken together with the failure to declare an interest and the deficiencies in the accounting for a significant sum of money by the Charity, there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee."

209. In relation to that paragraph, Mr Sadiq's grounds of cross-appeal were that

(3) the Tribunal again had detailed submissions from the Commission as to why the issues relating to the Charity's properties constituted mismanagement, but again it did not in its judgment address the detailed mismanagement in the administration of the Charity. Alternatively, again the reasons given by the Tribunal were not sufficient to satisfy the requirements of ***Emery***.

(4) in finding the transfer the issues relating to the Charity's properties did not constitute mismanagement, the Tribunal erred in law:

(a) Mr Wilson (as a trustee of the charity) had a legal duty to act with reasonable care and skill. A careful and competent trustee (especially a trustee with his skills, qualifications and experience) ought to have discovered and addressed those errors and ought to have been able to provide a consistent account as to how and why any errors arose. He was the trustee to whom the others deferred and relied upon as respects the Charity's finances.

(b) he was aware that the Union and related entities were occupying the Charity's properties rent free – at the very least as respects the property at 7-8 Philpot Lane,

London - but he took no steps to address the issue until the Commission opened its investigation into the affairs of the Charity.

(c) trustees have a duty to act in the best interests of their Charity and to manage their resources responsibly. In this case, Mr Wilson failed to do so.

(d) he could not rely upon any conflict of interest to absolve himself of responsibility as:

(i) he was acting qua trustee in breach of the rules on conflict of interest as respects the Charity's finance in breach of the rules on conflict of interest.

(ii) if he had complied with the rules on conflict of interest – e.g. Article 6.4 of the Charity's Articles - he was obliged to disclose any conflict - thereby flagging the issue of unpaid rents.

(iii) he was not a fiduciary of the Union and was therefore not precluded from flagging the rent issue to his fellow trustees.

210. My initial view, on reading this opaque paragraph, was that it was a finding that there *was* evidence of mismanagement, albeit not strong evidence, and that that was sufficient to ground a positive finding of mismanagement on the balance of probabilities. In that event it would not have been open to Mr Sadiq to seek to cross-appeal in relation to that matter because it could not be said that he had been unsuccessful in that matter (as opposed to not having a finding as robust as he might have liked). On reflection, however, it seemed to me that it was by no means clear whether or not there was a finding of mismanagement. The reference to "Similarly" at the beginning of the paragraph and "However" at the beginning of the last sentence suggested that, like paragraph [48] it was not a finding of mismanagement. It was for that reason that I granted permission to cross-appeal.

211. An appellate tribunal should not have to indulge in elaborate textual exegesis to try and divine what the fact-finding tribunal below did or did not decide on one of the crucial issues in the case. Having reread the paragraph several times, I therefore remain satisfied that so opaque a formulation again does not satisfy the

requirements of ***Emery*** nor did it address the arguments of the Commission as to why such conduct constituted mismanagement in the administration of the charity.

212. The Tribunal merely said that, by reason of particular issues of law (which it did not identify) and the dual loyalties held by Mr Wilson, together with the facts that emerged in the course of the hearing (which it did not specify), the Tribunal decided that the concern concerning the management and operation of properties of the Charity, was not, in itself, strong evidence of mismanagement by him in his role as trustee of the Charity. So all that it held was that "in itself", that was not "strong evidence" of mismanagement, but it did not say was whether or not it *found* that it *was* or *was not* mismanagement.

213. It then went on to say that

> "However, taken together with the failure to declare an interest and the deficiencies in the accounting for a significant sum of money by the Charity, there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee."

214. The Tribunal then stated that it took into account the management and operation of the properties (as to which its finding of mismanagement or not was equivocal) together with deficiencies in the accounting for a significant sum of money by the Charity (which it had found in the previous paragraph not to be mismanagement) and failure to declare an interest (in which its findings in paragraphs 11 and 46 were arguably inconsistent), which taken together showed that

> "there was a pattern of behaviour that contributed to the Tribunal's finding of unfitness to act as a trustee."

215. It seems to me that, in the light of ***Emery***, that paragraph cannot stand.

216. Again, in the light of the conclusion which I have reached that the whole matter should be remitted for rehearing, I do not need to determine the fourth ground of

cross-appeal, which is again in essence a further distillation of the detailed grounds on which the Commission relied and on which the Tribunal made no findings. Just as in the second ground of cross-appeal and given that the matter is to be reheard in full, it would be wholly inappropriate to determine on evidence not yet given and facts not yet found whether the ground of mismanagement was or was not made out.

217. Again Mr Smith KC sought to uphold the decision of the Tribunal in paragraph [49] on the basis that what had been found was that there had been no mismanagement as regards the management and operations of the properties. It sems to me that there are two difficulties in that respect. In the first place it is by no means clear that the Tribunal did make a finding that there had been *no* mismanagement in the management and operation of the properties. My initial view, on reading the opaque paragraph, was that it was a finding that there was evidence of mismanagement, albeit not strong evidence, and that that was sufficient to ground a positive finding of mismanagement on the balance of probabilities. In that event, Mr Wilson would not be seeking to uphold the finding of the Tribunal. Secondly, given the Tribunal's paucity of reasoning, it leaves Mr Smith KC having to submit that what the Tribunal "seemingly did" was to consider the proportionality of the complaint which was that about £20,000 per annum of rent went uncollected for a comparatively short period out of a turnover of tens of millions and that it was all repaid with interest once the mistake was spotted and thus the Tribunal was entitled to find that that was not mismanagement, but that is a process of divination, not of interpretation of the decision. Whether that was the process of reasoning which animated the Tribunal is, however, entirely unclear since it did not give reasons for its conclusions. Had it given reasons which could then have been impugned or challenged, Mr Wilson might have been on stronger grounds in that respect.

Disposal of the Appeal and Cross-Appeal

218. I am therefore satisfied that the decision of the Tribunal involves errors on a point of law and that both the appeal and the cross-appeal should be allowed.

219. The Commission's ultimate position in that event was that the matter should be remitted for rehearing.

220. Mr Smith KC argued that, if I were to find that the decision was inadequately reasoned in some or all respects, I should exercise my discretion to set aside the decision and to remake it by quashing the disqualification order made by the Commission. I have explained in paragraph 156 above why, given that the disqualification order ran for 4 years from 26 June 2023, any success by the Commission at the rehearing would not be pyrrhic.

221. He also stressed that Mr Wilson had proffered an undertaking not ever to act again as a charity trustee without the prior written consent of the Commission and that, given that the mischief at which s.181A was aimed (the protection of charities from rogue trustees), there was no public interest in prolonging the proceedings. I have explained the Commission's position on that in paragraphs 158 to 161 above. I take the point that Mr Wilson has been prepared to offer an undertaking, but as I have made clear in paragraph 163 above, the Commission has not accepted that undertaking on the basis that it believes that it has no jurisdiction so to do.

222. I accept Mr Smith KC's further point that Mr Wilson will suffer prejudice in that the ongoing proceedings will impede his ability to act as a charted accountant and to provide for his family. Nevertheless, one must also weigh in the balance the public interest in having serious allegations properly examined and be the subject of definitive rulings with adequate reasons given for those conclusions. It would not, in my judgment, be an appropriate course of action to conclude that the decision of the Tribunal was inadequately reasoned and then simply to quash that inadequately reasoned decision and its order and leave nothing in its place. Nor do I think that that course of action would provide appropriate vindication for Mr Wilson.

223. I am therefore satisfied that the appropriate course of action is to remit the whole matter to a differently constituted tribunal for a complete rehearing.

224. For the guidance of the new tribunal in making its findings of fact on the rehearing, I draw attention to the fact that in ***H v East Sussex CC*** [2009] EWCA Civ 249 at [16–17], Waller LJ cited with approval what Sir Thomas Bingham MR said in ***Meek v Birmingham City Council*** [1987] EWCA Civ 9, [1987] IRLR 250 to the effect that a decision of a tribunal (in that case an industrial tribunal)

> "is not required to be an elaborate formulistic product of refined legal draftsmanship but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts."

225. In future, tribunals charged with fact finding in charity cases would do well, as a matter of good practice, to follow the guidance in ***Simetra Global Assets Ltd v Ikon Finance Ltd*** [2019] EWCA Civ 1413 at [46], particularly in relation to the third point (with emphasis added)

> "46. Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. *Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable.* Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it."

Conclusion

226. For these reasons I am satisfied that the decision of the First-tier Tribunal (General Regulatory Chamber) (Charities) dated 26 June 2023 (after a video hearing on 17-19 January and 2 February 2023) under file reference CA/2022/0006 involves error on a point of law. The appeal and cross-appeal against that decision are allowed and the decision of the Tribunal is set aside.

227. The matter is remitted to a differently constituted tribunal for a complete rehearing.

228. The new tribunal must consider and make relevant findings as to whether or not

(a) one or more of the conditions listed in s.181A(7) of the Charities Act 2011 is satisfied:

(b) the Appellant is unfit to act as a charity trustee;

(c) it is desirable in the public interest to make an order in order to protect public trust and confidence in charities;

(d) the Tribunal should exercise its discretion to make an order and, if so, what that order should encompass and in particular whether it should apply to all charities or only some, the length of any disqualification and whether the order should or should not prevent Mr Wilson from exercising any senior management function in a charity.

229. The new tribunal is not bound in any way by the decision of the previous Tribunal.

230. These directions may be supplemented as appropriate by later directions by a Tribunal Judge of the First-tier Tribunal (General Regulatory Chamber) (Charities).

Signed: ***Mark West*** **Judge of the Upper Tribunal**	**Date: 6th November 2024**
Issued to the parties on: 07 November 2024	