CONTENTS

DECISION

The Appellant's applications are dismissed.

REASONS

Introduction

1. On 12th April 2013 the Charity Commission ("the Commission") decided to open an inquiry into a registered charity known as The Cup Trust ("the Charity") under section 46 of the Charities Act 2011 ("the Act"). On 26th April 2013, the Commission decided to appoint an interim manager ("Interim Manager") of the Charity and also ordered the Charity not to part with any property respectively made under sections 76(3)(g) and 76(3)(d) of the Act. The Charity's sole corporate trustee Mountstar (PTC) Limited ("Mountstar") was not given notice of these decisions and the related reasons until 26th April 2013.

2. On 30th April 2013 Mountstar requested the Commission to review the decisions, setting out lengthy grounds as to why they were unlawful. The review was carried out by the Commission's Head of Legal Services Alice Holt ("Ms Holt") and its recently appointed legal board member Tony Leifer ("Mr Leifer") who produced their decision on 15th July 2013 ("the Review Decision").

3. On 31st May 2013 Mountstar applied to the Tribunal to review and quash the decision to open the inquiry and appealed against the appointment of the Interim Manager and the order not to dispose of property, the latter now having been overtaken by the revocation of that order on 19th August 2013 following assumption of control of all Charity assets by the Interim Manager.

4. It is Mountstar's case that the Commission's decision to open the inquiry was unlawful principally because it was motivated by a desire to vindicate its own reputation following heavy criticism from the press and Parliament. There was no mismanagement or misconduct to warrant the appointment of the Interim Manager. Both decisions were disproportionate, there being little left for the Charity (and Mountstar) as they await the outcome of the donors' claims for higher rate tax relief and then their own claims for gift aid on donations which have been submitted to Her Majesty's Revenue and Customs ("HMRC").

5. There are two separate issues for determination:

   (a) Should the decision to open the inquiry be quashed; and/or

   (b) Should the appointment of the Interim Manager continue?

6. There has been voluminous documentation and, unusually in a hearing such as this, live evidence from one of Mountstar's directors Matthew Jenner ("Mr Jenner") and the Commission's Sharon Michelle Russell (who made the decision to open the inquiry ("Ms Russell")), Steve Law (who made the decision to appoint the interim manger ("Mr Law")) and Ms Holt (whose sole involvement was to act as one of the reviewers). At the hearing, Mountstar was represented by Matthew Smith and the Commission by Ben Jaffey. We record our thanks to both counsel for their assistance during the hearing and subsequently.

7. It is convenient to start with an account of the material facts as they presently appear. We say "presently appear" because the inquiry has not been progressed pending the outcome of this appeal and we have only been furnished with material and evidence by the parties which they consider necessary for us to decide the issues before us.

The role of the Commission

8. The Commission has five overarching statutory objectives which are set out in section 14 of the Act:

> "14 The Commission has the following objectives-
>
> 1. *The Public confidence objective*
>
> The public confidence objective is to increase public trust and confidence in charities.
>
> 2. *The public benefit objective*
>
> The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
>
> 3. *The compliance objective*
>
> The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
>
> 4. *The charitable resources objective*
>
> The charitable resources objective is to promote the effective use of charitable resources.
>
> 5. *The accountability objective*
>
> The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public."

9. By section 16(1) the Commission has a general duty to "act in a way… which is compatible with its objectives; and… which it considers most appropriate for the purpose of meeting those objectives". When performing its functions it must, so far as reasonably practicable, "act in a way which is compatible with the encouragement of… all forms of charitable giving". The Commission must have regard to the principles of proportionality, consistency, transparency and targeting action only at cases in which action is needed: see section 16(4). The Commission is vested with an array of powers to enable it to fulfil its objectives and discharge its duty.

The Charity

10. The Charity was registered as a charity on 7th April 2009 having been established by declaration of trust by Mr Jenner on 10th March 2009 ("the Declaration of Trust") with the general charitable object of applying its income and capital "for all and any charitable purposes", the formulated grant policy being to make awards to small or start up charities that benefit children and young adults. It is a general purpose, granting-making charity.

11. Mountstar had been incorporated a few months earlier, on the 2nd January 2009, in the British Virgin Islands. Mr Jenner was appointed a director on the same day, the second director, John Mehigan ("Mr Mehigan"), shortly afterwards and the third (and only other) director, Darren

Stones ("Mr Stones"), on 26th January 2010. All remain directors save for Mr Stones who resigned on 22nd April 2013.

12. Mr Jenner and Mr Mehigan had been business associates since 2005. They own and were and are directors of a company called NT Tax Adviser Limited ("NT"). It markets various tax avoidance schemes which, if successful, will earn substantial contingency fees not dissimilar to the contingency fees payable to HNW Tax Advice Partners ("HNWTAP") in this case. Mr Jenner is well-versed in tax avoidance schemes for high net worth individuals having specialised in such schemes for well over ten years. Mr Mehigan appears to have some knowledge, but it is not clear how much. Little if anything is known about Mr Stones.

13. Mr Jenner and Mr Mehigan set up Romangate Limited ("Romangate"), a key player in this fundraising scheme, which they incorporated on 14th November 2008 and jointly owned until 21st January 2009. It is now, Mr Jenner told us, owned by a charitable trust whose trustee is Plectron Trust Company Limited ("Plectron"), a Jersey-registered trust company which also holds some or all of Mr Jenner's erstwhile shares in HNWTAP on trust for the families of Mr Jenner and his civil partner. Mr Jenner has been a director of Romangate through the material period and remains one, Mr Mehigan until 10th February 2010 and Mr Stones until 22nd December 2010.

14. Mr Jenner donated £10,000 to the Charity on establishment since when he has made no financial donation to it. A further £20,000 and £80,000 were donated in December 2009 and January 2010 by The Somerton Charitable Trust, a charity based in Northern Ireland which was involved in a tax avoidance scheme promoted by Mr Jenner in 2004. Mr Jenner has said that he is not otherwise involved in that charity.

15. Apart from a further small donation of £5,000 made in early 2012 from an undisclosed party there have been no further donations outside of the gift aid tax fundraising scheme introduced to the Charity by Mr Jenner which is central to this case (the "Scheme"). Mr Jenner has said that he was unaware of the Scheme when establishing the Charity in March 2009. That Scheme has to date generated £155,000 for the Charity with a potential of a further £46 million gift aid payment to the Charity.

16. The Charity has made grants to small charities that benefit children and young adults totalling £55,000 in its financial year ending 31st March 2011; £97,292 in the following year, £18,500 of which had been earmarked for certain charities the previous year; and a further £13,500 shortly before the appointment of the Interim Manager.

Charity trustee's duties

17. A charity trustee, whether an individual or corporation, owes the charity an obligation of undivided disinterested loyalty, to act solely for the benefit and in the best interests of the charity. When making decisions, a trustee is under a duty to act with reasonable diligence and to conduct its affairs in the same manner as an ordinary prudent man of business would conduct his own affairs, save that he must consider that he is acting for the benefit of the charity's objects which usually excludes speculative transactions which he might occasionally make for himself. By statute he is under a duty to "exercise such care and skill as is reasonable

in the circumstances" taking into account the trustee's own special skill and knowledge[1]. In cases of doubt or difficulty a trustee may take legal advice and other expert advice including from the Commission. Implicit is that the trustee must act independent of its own interests or indeed anyone else's, save for those of the Charity.

18. A trustee must not profit from the trust and must not in any way make use of the trust property or of its position as trustee for its own benefit or private advantage unless properly and transparently authorised by and in accordance with the charity's governing documents and, in appropriate cases, the prior approval of the Commission. If it does so without due authorisation it must account to the charity for any profit made or advantage received even where the profit or benefit has not caused the charity loss. This is a sanction to ensure due compliance by trustees with their duties to the beneficiary.

Conflicts of interest

Generally

19. A trustee, whether individual or corporate, must not intentionally place itself in a position in which its interests may conflict with its duty. It must not enter into engagements in which it has or can have a personal interest which conflicts or possibly may conflict with the interests of the charity which it is bound to protect. As already stated, a trustee in breach is liable to account for any profit made out of the trust.

20. Where as here the trustee is a sole corporation, the trustee acts by the agency of its directors and officers who owe fiduciary duties and duties of care to the corporation. The fact that one of three directors has a conflict of interest or loyalty does not prevent the corporation from continuing to act as charity trustee provided those conflicts are properly managed, and the corporation (by its remaining directors) makes decisions properly and independently of the conflicted director.

21. Where there is a potential conflict, it is not enough to show that the trustee has made a decision which a reasonable body of trustees might take. The trustee must also show that it has not in fact been influenced by the conflict. See *Public Trustee v Cooper* [1999] WL 1425717 per Hart J. A similar principle applies to a director of a corporate trustee.

The Charity's Conflict of Interest Policy

22. Mountstar as trustee of the Charity has adopted a policy on conflicts of interest ("the Charity's Conflicts Policy") applicable to its directors. It is modelled on guidance given by the Commission applicable to charity trustees, which are broadly reflective of well-established fiduciary duties and equitable principles, the material parts of which are set out in the Annexure to this decision which we summarise thus:

    (a) The policy applies to directors in a decision-making or influential role and embraces actual and potential conflicts as well as the perception of actual or potential conflicts;

    (b) Potential and actual conflicts of interest must be declared by directors in relation to any transaction the Charity is to enter into;

[1] Section 1 Trustee Act 2000.

(c) A conflict of interest is any situation where a director's personal interests or interests owed to another arise or appear to clash with those of the Charity, it embraces actual and potential financial and non-financial benefits as well as personal loyalty owed to another;

(d) The onus of declaring conflicts of interest is on each director; and

(e) Conflicts must be declared with sufficient information to enable the other directors to understand what they are and whether to authorise them or whether the director should continue as a director or be recused from decision-making.

The Scheme

How it worked, in outline

23. In broad terms, the Charity purchased gilts at full value (from The VL Settlement) with the aid of a loan (from a foreign-based lender, Jamie McCulloch) which it then sold to an intermediary (Scott Clark) at a nominal value (0.01% of full value) who on-sold them to a high net worth UK-based taxpayer at nominal value who then sold them at full value (back to The VL Settlement) and "donated" the net proceeds of sale plus a small amount (0.02%) to the Charity which the Charity then used to repay the loan from the foreign-based lender retaining the 0.02%.

24. Provided repaid within twenty-four hours, the loan to the Charity was interest free. All of the steps were therefore executed on the same day, virtually simultaneously, and repeated numerous times during the course of the day. That was facilitated by all steps being transacted *via* and all parties utilising the same bare trustee (Romangate) whose bank account was used[2] and who held legal title to all of the financial instruments, specifically, the gilts (their beneficial ownership being transferred from The VL Settlement to the Charity to the intermediary to the UK-based taxpayer and then back to The VL Settlement all on the same day). All documents were executed by their common appointed attorney HNW Tax Services ("HNWTS") who acted by Mr Jenner.

25. The "movement" of the money and the gilts was therefore circular, both finishing the day where they started off. There were ten "rounds" of such transactions between 30th January 2010 and 28th November 2010 involving 826 transactions, over 300 or 400 individual taxpayers and over £176 million of gilts being purchased and sold by the Charity with money borrowed from Jamie McCulloch. The Scheme did not require the Charity to borrow a large lump sum of money. Rather, the Charity, for example, would borrow £1 million[3] at the beginning of the day which would be used to complete one cycle of transactions which would then be repeated numerous times before Jamie McCulloch was repaid at the end of the day. Transactions were not constrained by normal working hours as all steps were executed *via* Romangate as bare trustee and involved no movement of funds between accounts or transfers of legal title to the gilts. The only cash which the Charity retained was £155,000 (in total) representing the nominal payments made by Scott Clark and the taxpayer/donors.

26. The taxpayers were then able to claim higher rate tax relief on their "donations", the Charity claiming gift aid and gift aid transitional relief from HMRC on those "donations". If successful, the Charity will receive some £46 million gift aid from HMRC whilst the donors' higher rate tax

[2] So no money actually "changed hands" in the sense of moving between different bank accounts.

[3] Which, in parenthesis, we observe some might regard to be very large for a charity of modest means.

relief totals some £55 million. That contrasts with the more conventional gift aid arrangement where the donors give £176 million which the Charity retains and then claims gift aid (£46 million) generating total funds of £222 million for the Charity. The donors receive their higher rate tax relief of £55 million to offset their original donations of £176 million, leaving them £121 million out of pocket. Thus, if successful, the £155,000 of actual cash provided to and retained by the Charity generates £46 million gift aid and £55 million tax relief for the donors at a total cost of £101 million to HMRC.

27. Whether the higher rate tax relief and gift aid claims are effective is for determination by HMRC and the tax tribunals and courts, not the Commission or this Tribunal. Success depends upon whether the "donations" constitute "qualifying donations" within the relevant tax legislation. Surprising as it may seem, we are told that this is not a straight-forward question even though, from a common sense point of view, the only real "donation"[4] was £155,000 in the sense that that is all that stayed with the Charity for more than twenty-four hours, the rest washing through the Charity (*i.e.* through Romangate) as part of a pre-ordained series of transactions executed virtually simultaneously, and which *had to be* so executed, and *had to be completed* within the same day, otherwise the Charity would have been unable to enter into the Scheme because it could not have afforded the interest on the loan and, presumably, Jamie McCulloch would not have lent the money. We should say here that it is Mr Jenner's view, he says supported by counsel's advice, that Parliament drafted the gift aid legislation with a (presumably inadvertent) loophole which the Charity is perfectly legitimately exploiting. Whether he is right and whether it is lawful remains to be seen.

28. We should say that the Scheme is of considerably greater complexity than that averted to. For these purposes it is not necessary to go into greater detail, save to say that it was common ground between the parties that the Scheme was so structured that there was no financial risk (in the sense of the risk of financial loss or harm from the transactions *per se*) to the Charity from entering into the Scheme. For example, if for some reason the Charity did not receive a donation to match its borrowing obligation it had an option to call the gilts back from Scott Clark and then sell them back to The VL Settlement to avoid any losses. Whilst the gilt sales were at below market value, we recognise that there is an argument that they were at full value when other aspects of the Scheme – such as the call option – are taken into account. Again, it is not necessary for these purposes to delve into those intricacies.

Introduction and adoption of the Scheme

29. Mr Jenner introduced, or proposed, the Scheme "as a partner in [HNWTS]" to the Charity by letters dated 8th December 2009 and then again on 13th January 2010 when he proposed a modified version to Mr Mehigan at a time when they were the only two directors of Mountstar. In those letters, Mr Jenner said that he would step aside from any "discussions, deliberations or negotiations" regarding the proposed Scheme owing to the Charity's conflicts of interest policy and that he "may (or may not) benefit financially". Although the promotional letter and Scheme documentation only refer to HNWTS[5], the key partnership which sourced the donors and for whom Mr Jenner was introducing the Scheme was in fact HNWTAP in which he was then a partner advising taxpayer clients about entering into the Scheme.

[4] We recognise that even that sum could be argued to be donor entry payment for participation in the Scheme rather than a "donation", particularly as its payment was not in substance voluntary but part of the Scheme.

[5] Apart from the immaterial reference in the 13th January 2010 letter to HNWTAP providing the costs indemnity referred to elsewhere.

30. On 30th January 2010 Mountstar as trustee of the Charity resolved to, and on that same day did, enter into a fundraising agreement with Harry Associates by which the Charity adopted the Scheme. Also on that day the first "round" was executed totalling 250 transactions worth £74,872.60 raising £20,000 charitable funds (being the small percentage uplift payable) and the ability to claim gift aid in excess of £18 million from HMRC. As will become clear, Harry Associates in fact did nothing at all: it was an entity created and interposed into the Scheme for the sole purpose of collecting contingency fees to avoid them being paid directly to HNWTAP.

31. At this time, the directors of Mountstar were Mr Mehigan and Mr Stones (appointed 26th January 2010), Mr Jenner having just resigned. Mr Jenner[6] was a director of Romangate (the bar trustee for Scheme participants) when the Scheme was introduced, or proposed, adopted and executed by the Charity. Mr Mehigan was a director of Romangate when the Scheme was proposed by Mr Jenner and adopted and the first "round" executed 30th January 2010[7]. Mr Stones was a director of Romangate from adoption of the Scheme onwards[8].

32. The Scheme was proposed by Mr Jenner and adopted by Mountstar on the footing that once the Charity had submitted its claims for gift aid there would little for it to do as it awaited the outcome of the donors' claims which in all probability would result in litigation between HMRC and donors to determine whether there were any "qualifying donations". If HMRC disputed the tax status of the Charity, as distinct from the Charity's gift aid claims, HNWTAP would act for the Charity "at no cost for its time"[9]. Other costs (such as counsel's or other fees) were not covered by that "indemnity". Neither were the Charity's costs of dealing with its gift aid claims. For example, if the Charity chose to press for early resolution of its claims ahead of the donors' claims it would have to fund that itself.

33. Whilst the operation of the Scheme *per se* may not have run the risk of financial loss, the pursuit of the claim for gift aid might involve considerable uncovered costs. In closing submissions, both counsel accepted that whilst the question of "qualifying donations" was common to both donor and Charity claims, the claims were not strictly co-dependent as the donors and the Charity could each press their own claims with HMRC and litigate without reference to the other. The only practical problem being that the Charity did not have the funds to be proactive whereas HNWTAP had agreed to pay the donors' litigation costs.

The ten "rounds"

34. The first five "rounds" of the Scheme were executed on and between 30th January and 20th March 2010[10] when Mr Jenner was not a director of Mountstar. He was a director when the Charity submitted gift aid claims for 2009/10 totalling £27,291,770 to HMRC on 5th September 2011 and when, on 17th October 2011, HMRC said payments would be withheld pending completion of its enquiries. In its solicitors' letter dated 26th October 2011 Mountstar told the

[6] Mr Jenner was a director of Romangate from 21st January 2009 to 21st January 2010 and then again from 27th January 2010 to date.

[7] Mr Mehigan was a director of Romangate from 10th February 2009 to 10th February 2010.

[8] Mr Stones was a director of Romangate from 27th January 2010 to 22nd December 2010.

[9] See paragraph 11 of Mr Jenner's 13th January 2013 letter to Mr Mehigan.

[10] 30th January, 7th, 21st and 28th February and 20th March 2010.

than HMRC so as to publish and circumvent the confidentiality provisions of the statutory gateways. To allay those concerns Mountstar wanted the Commission either to undertake to maintain taxpayer confidentiality by treating the information as having been provided under the statutory gateway and agree never to release it or, alternatively, to accept a summary of the content of the taxpayer documentation upon which the Commission could then raise specific questions which Mountstar (Mr Jenner) would then answer.

63. In evidence Mr Law said that he could not understand this response as the Commission was not seeking information about individual taxpayers and that he could not see that these requests for information were any different from previous requests which had been answered by the Charity without question. Neither Ms Russell nor Mr Law were prepared to agree to these conditions. They gave a number of reasons. Uppermost were that they wanted to see the source documents and that information or documentation provided under the statutory gateway is of limited use as the Commission can not lawfully use or refer to it for any purpose or as "evidence" without prior HMRC dispensation.

64. Mr Jenner said in evidence that his concern was caused by public statements of Mr Shawcross to the effect that the Commission was intent on publishing taxpayer information which might cause donors to withdraw their claims for higher rate tax relief or otherwise limit the Charity's use of the Scheme. By this stage Mr Shawcross had appeared before the PAC on 7th March where he had said that a long and very full report (the RCR) would be published on "everything that we did" but that otherwise the Commission awaited the outcome of HMRC's enquiry into the Scheme. The Chair challenged the Commission's refusal to publish correspondence between the Commission and the Charity pursuant to Freedom of Information Act ("FOI") requests, to which Mr Shawcross replied that he hoped "we can release many of the documents".

65. Mr Jenner was also aware that Mr Shawcross had given a lunchtime talk at the law firm Farrer & Co ("Farrers") on 19th March during which he said the Commission had been "too lenient" during the first investigation and should have been "more aggressive, more public in our disquiet" and "should in future learn from that". It is clear that the reference to publicity was to an RCR which should have been published at the conclusion of the first investigation so as to provide members of the public with information upon which to make their own decisions. He maintained the Commission's line that the efficacy of the Scheme was for HMRC to determine – "charity law is not a weapon to fight tax avoidance".

66. Meanwhile, Mr Law had reached version 9 of the draft RCR which he had provided to Mr Shawcross on 22nd March. At around the same time Ms Russell sent a copy of the draft to HMRC to make sure it would not prejudice any HMRC enquiry. She had not previously had any contact with HMRC about its content, although both organisations had shared press releases after 1st February 2013 as both had been criticised. HMRC responded to the draft RCR on about 28th March with no material amendments. It was not until 9th April that Ms Russell next heard from HMRC when they indicated they might have some relevant information.

67. The draft RCR is a lengthy document which summarises the history and findings of the first investigation. It is clear that by this stage Mr Law had fully immersed himself in the intricacies of that investigation and had equipped himself with a fuller understanding of the various complexities and nuances. It summarises his (and Ms Russell's) understanding of the conclusion that as at March 2012 the Commission took the view that potential conflicts of

interests arising because of Mr Jenner's association with HNWTAP and HNWTS appeared to have been sufficiently managed in practice although Mr Jenner recusing himself from decision-making meetings about the Scheme had not been properly recorded.

Commission Board meeting – 27th March 2013

68. On Wednesday 27th March Ms Russell presented a briefing document to the Board of the Commission updating it on the Charity. She too was now fully immersed in the intricacies and nuances of the issues. By this stage the draft RCR and other matters had been referred to external counsel for advice. The briefing document referred to the need to explore further the possibility of a conflict of interest if HNWTAP was acting for the donors and also a duty to account by virtue of being linked to Mr Jenner. It also refers to Mountstar's failure to comply with Mr Law's request for information and that it was becoming clear that HMRC was likely to challenge the Scheme.

69. Of the possible ways forward proposed by Ms Russell, the Board acknowledged the need to publish the RCR and

> "3.6.2 The Board supported the proposal to require the trustee [Mountstar] to meet with the Commission, reserving the option to open an inquiry depending on changing circumstances and the trustee's response and conduct. The Board was supportive of opening an inquiry if this was required, and AGREED to fund an interim manager if use of our powers under Section 46 were thought to be necessary."

70. At the foot of the minutes of that meeting prepared for the Board's 21st May Board meeting is the usual follow up "schedule of actions". It accurately summarises the action for Ms Russell to take, to "proceed with arranging a meeting with trustees of Cup Trust with a view to a possible appointment of an IM". For the purposes of the forthcoming Board meeting, the next column succinctly records what progress has been taken: "Inquiry opened and IM appointed". This must have been added sometime after 26th April.

After Easter 2013

71. It was not until after the Easter break that Mr Law replied on Thursday 4th April to Mr Jenner's 22nd March letter to the effect that he could not understand why the 2010/11 documentation was not being supplied when precisely the same information had already been supplied regarding 2009/10. He slightly widened matters: he referred to the delay in dealing with the gift aid claim to HMRC and

> "the issue of how conflicts of interest can be adequately managed particularly in the light of the involvement of and engagement with HMRC"

and proposed a meeting to discuss "these issues and next steps" on 11th or Friday 12th April. This was the first time conflicts had been raised with Mountstar since receipt of their solicitors Bates Wells Braithwaite's ("BWB") letter of 26th October 2011.

72. On the same day, 4th April, Mountstar responded that it was not concerned with individual taxpayer confidentiality but the confidentiality of the Charity as a taxpayer. This is somewhat puzzling as it appeared that that was precisely what Mountstar had been concerned about, and indeed that line of thinking formed the thrust of Mr Smith's cross-examination of Ms Russell and Mr Law and of Mr Jenner's evidence before us.

73. Be that as it may, there then followed further correspondence between the two to the effect that whilst the Commission was content to meet the directors separately or with some on conference call Mr Jenner said[17] that the directors had decided that all three of them must be present in person at the meeting which would have to be after 22nd April as Mr Mehigan was out of the country until then save that Mr Jenner was prepared to attend on his own on 12th April to discuss a few residual accounting matters and the HMRC documentation. He stated his reason for requiring that all three directors be present in his 9th April email:-

> "The circumstances are such that the trustee [Mountstar] cannot put itself in a position where any comments/responses can be misunderstood and the only way the trustee can ensure that is by a face to face meeting where all three provide answers in the same forum. The directors [of Mountstar] have again, this afternoon [9th April 2013] since our call, confirmed that position remains the position of the trustee."

74. In response to Mr Law's request for Mr Mehigan's and Mr Stones' email address and telephone numbers so he could liaise with them direct, Mr Jenner provided the email addresses but not their telephone numbers.

The turning point - 10th April 2013 HMRC email, in context

75. It was in those circumstances that Mr Law forwarded that exchange of emails to his superior Ms Russell on 9th April at 5.55pm, commenting that Mr Stones' email address looked a bit odd and that he had not been given the telephone numbers of Mr Mehigan or Mr Stones. That very afternoon Ms Russell had been told by HMRC that an email would be sent with information which might be relevant but she was not told what it was. At 8.13am on 10th April she replied to Mr Law:-

> "I am increasingly worried about the conduct of the trustee in this.
>
> "Mr Jenner seems to be careful replying that (*sic*) to be saying he is cooperating but the reality [is] that this is doubtful; and they are being increasingly difficult challenging information request, querying powers etc.
>
> "We discussed just telling them to come in for a meeting; but considered if we did that they would ask for what it was about before agreeing; so we gave a broad indication. However, even the broad indication is being used to delay coming in. It is possible to arrange meetings from one week to the next; many trustees do; we can be flexible on timings to make it out of office hours if that is the problem.
>
> "You asked for telephone numbers, he has ignored that request. Do you think he is avoiding at all costs us speaking to the others without him being a party to it? If we emailed them, they could be under instruction to forward it to him/not reply without him.
>
> "This is more evidence that Mr Jenner is the key driver and in control and this gives more concern on the issue of how conflicts are being handled and can be handled particularly as regards the GA claims with HMRC.
>
> "I was informed later yesterday as you know, that HMRC have information relevant to our deciding next regulatory engagement. They are considering today whether

[17] See Mr Jenner's 8th and 9th April 2013 email to Mr Law and Mr Law's memorandum of a telephone conversation with Mr Jenner on 9th April 2013.

they can disclose it formally under the gateway and give us permission to disclose it to the trustee.

"Can you get the telephone number of Mr Stones (and Mr M); if necessary flag up the concern as to why this was not forthcoming."

76. Mr Law had in fact already (on 9th April) emailed Mr Jenner (copied to Mr Mehigan and Mr Stones) regretting that he had not provided the telephone numbers of Mr Mehigan and Mr Stones which he had wanted "to enable me to speak to them directly in relation to the meeting arrangement". Six minutes later Mr Jenner replied (9th April):

> "I believe we all wish to keep written records and so each of us believe that email correspondence is better for that Mr Law. I note that you are still able to discuss with the individuals directly via email and you did ask for their email addresses."

77. That exchange Mr Law forwarded to Ms Russell at 10.26am on 10th April commenting:

> "I share your frustration and suspicion of the reason why Mr Jenner has chosen to ignore my request for their telephone numbers which was specifically to the arrangement of a meeting this week. As I have now got their email addresses, I could email them directly in the first instance and ask for their telephone numbers. I don't think there could be room for allegations as to the purpose of the phone calls.
>
> "However, the position of the trustee as stated in Mr Jenner's reply is clear that all the three directors will not attend a meeting together until after 22nd April. There is also the outstanding question of whether we want to meet Mr Jenner alone this Friday [12th] and if so what do we propose to discuss with him. Mr Jenner indicated in his email of 8th April that he would be happy to attend the meting on behalf of the trustee to receive the draft RCR and to deal with the residual matters concerning the accounting issue and the HMRC document issue. Given his latest replies below [*i.e.* that cited in the previous paragraph], I am not sure he would discuss anything else with us if we were to meet this Friday."

78. Mr Law then emailed Mr Mehigan and Mr Stones (not, it appears from the copy in the hearing bundle, Mr Jenner) on the addresses given by Mr Jenner. It was Mr Jenner who replied, copied to Mr Mehigan at a different email address to that previously given and also to Mr Stones:

> "To clarify Mr Law, the other two directors only gave me permission to provide their email details as that (1) still enables you to deal directly with them which was what your request was; and (2) allows them to have written records of what is said to avoid misunderstandings."

Which was followed by an email apparently from Mr Mehigan (sent from the different email address which Mr Jenner had used) to Mr Law:

> "Mr Law
>
> "I am willing to discuss with you on email and I concur with Mr Jenner's comments
>
> "It is essential that there are no misunderstandings here…"

79. In evidence Mr Law said he was getting concerned because he had only asked for their telephone numbers to fix a meeting date and Mr Jenner had himself, during a long telephone call earlier on the 9th April, agreed that it was not unreasonable to request his fellow directors'

contact details. Mr Stones did not reply to any of the emails: he resigned as a director of Mountstar a fortnight later on 22nd April at a time when Mr Jenner had (apparently with Mr Stones' agreement) fixed the meeting day for 30th April.

80. A few hours later Ms Russell and Mr Law received, *via* the Commission's Intelligence Tasking email address, the anticipated email from HMRC. They were informed for the first time that Mountstar had failed to respond to requests for information since 4th September 2012 necessitating the issuance of a formal notice on 19th December which, when not complied with, triggered fines of £300 (which had been paid) and a further £3,420 of fines from 12th February to 9th April. HMRC had sent Mountstar a letter on that day, 10th April, by registered delivery informing them of the latest fines and giving another deadline for compliance of 10th May.

81. In evidence, Ms Russell explained that this was the "last straw" causing her to decide to open the section 46 inquiry. However, the information of itself was of little use, she said, because it had been provided *via* the statutory gateway so could not be used without permission of HMRC. It was not until 12th April at 10.47am that Ms Russell and Mr Law were forwarded HMRC's consent to disclose the information emailed the previous day.

Decisions to open inquiry and make other orders - 12th and 26th April 2013

82. There was then a meeting between Ms Russell, Mr Law, Mr Dibble and two other Commission officers on 12th April. It was decided to refer the matter for Pre-Investigation Assessment authorisation to open a section 46 inquiry. The minutes of that meeting record, *inter alia*:

> "We agreed that the information from HMRC adds to the increasing concerns we already had and adds further weight to the considerations we were giving and triggers the opening of statutory inquiry…
>
> "[Conflict of interest] concerns are crystallised through the ongoing non cooperation of the trustee with HMRC over the period 4 Sept 2012 to now. This is an indication non cooperation and possible mismanagement by the charity over a period of time….
>
> "We agreed that we would pass the case to PIA for consideration of escalation to s46 inquiry…
>
> "We agreed that because of the circumstances of the case the likely strategy would be the swift appointment of an interim manager. Once appointed their functions include liaising with HMRC in regards to the gift aid claim, the future of the charity and Mr Jenner's duty to account for any fees that they may have earned in relation to the scheme."

83. This necessitated a report from Mr Law to another Commission officer Mr Sladen and thence to Ms Russell who decided to open the inquiry on 12th April as, she told us, a precursor to appointment of an Interim Manager and a property protection order which she knew would take a few weeks to gain funding authorisation. Reports and decision logs documenting the decisions and reasons for them were prepared. The full reasons are set out in the Commission's 26th April statement of reasons which is the subject of this review.

84. At the 12th April meeting Mr Law was tasked to set up a meeting of all three directors of Mountstar for the week commencing 22nd April. He had email exchanges with Mr Jenner and apparently with Mr Mehigan and Mr Stones at their given email addresses save that neither ever replied. Mr Jenner confirmed that all three could meet on various dates. Mr Law opted for 30th April. On 23rd April, Mr Jenner notified Mr Law that Mr Stones had resigned the previous day, the 22nd, with the result that Mr Stones would not be at the meeting. Meanwhile, Mountstar provided all, or some, of the information requested by HMRC to HMRC on 26th April. We should finally record that on 11th April Mr Jenner emailed the Charity's accounts for the financial year just ended, 31st March 2013.

Statement of Reasons for opening the inquiry – 26th April 2013

85. In its lengthy letter of 26th April setting out the background, which included the inherent conflicts of interest growing more acute the longer the gift aid claim took and the likelihood of HMRC challenge and litigation as well as concern "that the trustee is failing to provide the necessary responses to HMRC as evidenced by their need to issue financial penalties", the Commission identified the following factors as being of particular relevance to its decision:

- "Based on the known facts and the identified risks there is likely to be significant damage to public trust and confidence in the charity or charities more generally if an inquiry is not opened.
- "There is significant public interest and a need for public accountability in relation to serious issues of concern in the administration of charities.
- "The regulatory concerns are otherwise so serious and/or complex that it warrants the opening of an inquiry to investigate the facts, father evidence and/or to formalise our engagement with the trustees.
- "It is necessary to establish and verify facts or collect evidence.
- "There are reasonable grounds to believe that there may be a need to use the Commission's regulatory powers of remedy and protection which are only available if an Inquiry has been opened.
- "There are significant risks in drawing conclusions outside the framework of an Inquiry.
- "The trustees are unwilling or unable to take the necessary action to protect the charity – in particular the trustee's failure to cooperate with HMRC by providing information requested over the period September 2012 to April 2013 resulting in a penalty being levied against the Charity incurring financial penalties. The penalties are incurred on a daily basis and so there is a continuing risk of further financial penalties."

Statement of Reasons for appointing the Interim Manager – 26th April 2013

86. On the same day the Commission wrote a lengthy letter in similar form but summarised its reasons for appointing the Interim Manager thus:

- "It is apparent that the trustee's non-cooperation with HMRC is on-going; and
- "That the trustee's repeated failure to comply with HMRC's legal notice resulting in fines being imposed on the Charity on a continuing basis is evidence of mismanagement in the administration of the Charity by the trustee;

- "The Commission considers that the current directors of the trustee are unable to adequately manage the conflicts of interest in handling the gift aid claim and making decisions in connection with it and the Charity's involvement in the Scheme in the best interests of the Charity;
- "There remain outstanding issues about the propriety of the trustee entering into and continuing to participate in the Scheme for the purposes of establishing a gift aid claim on behalf of the Charity and as a result of which tax payers are also able to benefit, and subsequently making the gift aid claim on behalf of the Charity to HMRC."

Powers granted to Interim Manager – 26th April 2013

87. The Commission granted the Interim Manager "all the powers and duties of the trustee of the Charity to the exclusion of the Charity with effect from" 26th April 2013. He is specifically tasked to assume the responsibility of managing and administering the Charity, examining, considering and handling the gift aid claims and how conflicts of interest have been managed and whether any claim for an account should be made.

Decision Review – 15th July 2013

88. Following Mountstar's challenge to the decisions, Ms Holt and Mr Leifer carried out an internal review during which Mr Jenner had an opportunity to be heard. In their Decision Review they took a somewhat starker approach than Ms Russell, concluding that the Commission had got it wrong back in 2012 and should not have closed the first investigation, whereas Ms Russell's approach was that something new had emerged – principally the HMRC email – which justified re-engaging with the Charity. There has been no suggestion by Mountstar that this Review was not carried out independently of the original decision-makers.

Three month report of Interim Manager – 26th July 2013

89. As part of his reporting duties, the Interim Manager produced his first tri-monthly report on 26th July 2012. He reported that five blank cheques signed by Mr Jenner and Mr Stones, both being authorised signatories, had been found in Mountstar's safe.

Should the decision to open the section 46 inquiry be quashed?

Statutory framework

90. Section 46 of the Act sets out the Commission's power to institute inquiries, the material parts of which are as follows:-

> 46 (1) The Commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes.
>
> (2) But no such inquiry is to extend to any exempt charity except where this has been requested by its principal regulator.
>
> (3) The Commission may—
>
> (a) conduct such an inquiry itself, or
>
> (b) appoint a person to conduct it and make a report to the Commission.

91. Once opened, an inquiry enables the Commission to obtain information verified by statutory declaration, direct the production of documents and records and the taking of evidence under oath under section 47; permits the report to be published subject to qualified privileged under section 50; permits the making of an order not to part with possession and also to appoint an interim manager under section 76. Protection is afforded to the charity or the trustee who may apply for the decision to be reviewed and quashed under section 322(2)(a).

92. When hearing an application to review the decision to open an inquiry, the "the Tribunal must apply the principles which would be applied by the High Court on an application for judicial review": respectively, sections 322(2)(a) and 321(4). The proper approach to the hearing of a review is set out in *Regentford v Charity Commission* (CA/2013/0002, 21 August 2013):

> "Although the Tribunal rules, for the sake of brevity, treat applications for a review as appeals, the legal powers of the Tribunal are very different. The Tribunal does not hear the whole case afresh, as it would do if there were a right of appeal against the decision to open an enquiry. Instead it must apply the principles which would be applied by the High Court on an application for judicial review. It is important also to bear in mind that, at this stage, the Commission has not made any final findings. *The question whether there is sufficient material on which to "look and see" is very different from the question of whether there is sufficient material on which to make a finding of fact*." (Emphasis supplied.)

93. Put shortly, the question is whether, on the information available to the Commission on 12th April 2013, the Commission acted reasonably in opening the statutory inquiry which is to be determined on well-known *Wednesbury*[18] principles.

Commission Guidance on opening a statutory inquiry

94. The Commission has published guidance on its approach to the opening of a statutory inquiry:

> "We consider opening inquiries in the most serious cases…
>
> "In practice it is likely that the inquiry will be concerned with higher risk issues, although not every higher risk issue will be dealt with in this way. We have identified… what we consider to be the serious, higher risk, issues. These are, in no particular order: …
>
> - "charities deliberately being used for significant private advantage;
> - "where a charity's independence is seriously called into question;
> - "other significant non-compliance, breaches of trust or abuse that otherwise impact significantly on public trust and confidence in a charity and charities generally."

And has identified 'modifying factors' which indicate an increased level of risk that makes an inquiry more likely to be appropriate:

> - "Scale of assets alleged to be at risk or already misapplied…
> - "Indicators of a high level of interest, for example interest from the media, parliamentarians…

[18] *Associated Provincial Pictures House Limited v Wednesbury Corporation* [1948] 1 KB 223 at 229.

- "Level of co-operation by the trustees and the action they are taking to deal with the issue…
- "Complexity or novelty of the issue (for example, could it set a precedent)
- "Any wider impact or implications for charities generally or for a particular group of charities…
- "Any wider public interest considerations
- "Other factors which indicate the need to act in the public interest
- "Other indicators of damage to public confidence in the charity or charities generally."

Concluding that an inquiry is more likely to be appropriate where:

a. there is likely to be significant damage to trust and confidence in charity if there is not an inquiry;

b. there are risks in drawing conclusions outside the framework of a statutory process;

c. there is significant public interest and a need for public accountability; or

d. the regulatory concerns are serious or complex (Tab 23, p. 19).

A particularly important factor is if the charity is "largely supported from public funds".

Mountstar's arguments

95. It was not suggested by Mountstar that the Commission was not entitled to open the inquiry on the basis of the information before it or that it could not open it if it thought it had got it wrong the first time around. The "look and see" threshold is low and statutory bodies are always entitled to have a second look if they think they might have got it wrong first time around. Here of course the Commission did not open the inquiry because it thought it had got it wrong the first time around, but because of, it said, new developments.

96. What was submitted was that the decision was unlawful because the Commission (a) had failed to taken into account considerations which it should have and taken into account considerations which it should not have and/or (b) had opened it for improper purposes and/or (c) had acted disproportionately in opening the statutory inquiry.

Ir/relevant considerations

97. Mountstar submitted that the Commission had failed to take into account five relevant factors which mitigate or explain Mountstar's actions. First, that the HMRC penalties had not caused any loss to the Charity because they had not been paid out of Charity funds. This is without foundation as there is no evidence that the Commission knew this on 12th April. Whilst the Commission had been provided with the accounts for the financial year ending 31st March 2013, those accounts do not record (perhaps surprisingly) the penalties as a liability or as having been paid.

98. Secondly, that Mountstar had offered in its 22nd March 2013 letter to provide documents on condition of confidentiality or in summary form. We do not accept this. In our judgment, the

Commission, acting reasonably, was entitled to request documentation and to receive it without conditions and would have being acting in dereliction of its duties as charities regulator had it accepted either alternative. In our judgment Mountstar (by Mr Jenner), whilst appearing to be at any rate partly co-operative, was in fact delaying production of the information and trying to restrict its use by the Commission on the footing that they should have been obtained *via* the statutory gateway whilst at the very same time, and beyond the Commission's gaze, failing to provide that readily available information to HMRC. We find it unsurprising that the Commission found this odd and suspicious. The Commission acted reasonably in having those concerns.

99. Thirdly, that Mountstar's directors were prepared to meet the Commission to discuss matters. In our view the Commission, in taking the view that Mountstar (by Mr Jenner and apparently by Mr Mehigan) was prevaricating and trying to set the agenda, trying to control the meeting by demanding that all three directors be present and being uncooperative in requiring all communications to be by email, acted reasonably. It is of little surprise that the emails of 9th to 12th April fanned the flames of concern in Ms Russell and Mr Law's own minds. Mr Law's concerns about Mr Stones' email address appear vindicated by the fact that he never received an email from him, and their concerns about the meeting vindicated by the fact of Mr Stones' resignation on 22nd April having not two weeks' previously agreed to attend it.

100. Fourthly, that Mountstar had been slowed down in providing information to HMRC by having to deal with the Commission's requests for information, and HMRC had extended their deadline to 10th May 2013. This does not have any merit. The Commission only started asking Mountstar for information after 1st February by which time Mountstar had broken two deadlines imposed by HMRC as well as its own assurances to provide documents before Christmas 2012.

101. More generally, it was submitted that the Commission did not mention all of the possible reasons or factors which bore upon its decision to open the statutory inquiry. The principal omission being that the Commission did not list Mountstar's failure to provide information to the Commission in addition to its failure to provide information to HMRC. In our judgment, none are of any materiality. It is not necessary for the Commission to list each and every possible reason or factor to justify its decision, just the principal ones. In this respect, of the seven key factors which the Commission listed as being of particular import to its decision-making which it adumbrated in its 26th April 2013 letter cited above, Mountstar challenged only the last one (lack of cooperation with HMRC).

102. In our judgment the reasons set out in the statement of reasons for opening the statutory inquiry are reasonable and rational on the basis of the information then available to the Commission. They also satisfied the Commission's own Guidance on the Opening of Inquiries. Even without that Guidance, there was ample material to justify the Commission in wishing to "look and see" into the affairs of the Charity.

Improper purpose

103. Law. The exercise of a discretionary power for a purpose alien to that for which it is granted is unlawful, regardless of whether or not that alien purpose is in the public interest. Where a power is exercised for purposes partly authorised and partly unauthorised by law, the court or tribunal may (a) ascertain the dominant or true purpose or (b) ascertain whether the decision

was significantly influenced by the existence of the unauthorised purpose, and if it was, quash the exercise of the power on the ground that it was exercised having regard to irrelevant considerations. This was agreed by counsel to represent the law.

104. Mountstar's argument. It was Mountstar's case, as put in closing submissions, that the real reasons for opening the inquiry was not to "look and see" but to (a) vindicate the Commission's reputation and that of the charity sector as a whole and (b) procure the dropping of the gift aid claim by (i) appointing the Interim Manager who would drop the Charity's claims and (ii) procuring a breach of the usual confidentiality of individual taxpayers by somehow publishing or causing to be published their names so as to embarrass or "name and shame" them into dropping their claims to higher rate tax relief on their "donations".

105. This, it was submitted, should be inferred from the public utterances of Mr Shawcross that the Commission had been too lenient on the Charity during the first investigation and that documents would be released when it published its report (the RCR), the fact that the Commission had sought correspondence between the Charity and HMRC including the name of one donor directly from the Charity so as to avoid the statutory gateways whilst refusing to give Mr Jenner undertakings to keep the documents confidential and that it would be much easier for the Commission, who was in regular contact with HMRC and knew that it disliked these sort of tax avoidance schemes.

106. Discussion, and decision. Before dealing with the specific points, it in our judgment is important to focus on the internal records of the Commission and the contemporaneous correspondence, Board minutes, decision logs, memoranda and statement of reasons. They reveal that rather than opening an inquiry immediately on 1st February 2012 as a knee-jerk reaction to media and Parliamentary interest to salvage its badly mauled reputation, the Commission decided to do nothing other than publish the RCR and obtain and scrutinise the Charity's latest accounts. In so doing it maintained the stance adopted the previous year that it would not re-engage with the Charity until after resolution of the gift aid claim by HMRC.

107. The Commission maintained that line until a confluence of three converging strands. First, the way in which Mr Jenner responded to fairly routine requests for information, which caused a slight shift in strategy on 27th March 2013 when the Commission decided that there should be a meeting with Mountstar's directors. Secondly, a growing concern and then suspicion in the minds of Ms Russell and also Mr Law (who were getting deeper into the case as the RCR was being drafted, counsel's advice was taken and as the unhelpful emails with Mr Jenner developed) that Mr Jenner either was or was likely to be in control of Mountstar and the whole Scheme. This was brought into focus when Mountstar demanded that all three directors be present *in person* at the substantive meeting and that, after Mr Jenner had failed to provide his co-directors' telephone numbers, there be only email communication (9th April). Thirdly, the information from HMRC (10th April), which confirmed Ms Russell's and Mr Law's concerns and suspicions that Mr Jenner was controlling the release of information. They were concerned that that might be motivated by him favouring the interests of his, or HNWTAP's, donor-clients to the detriment of the Charity.

108. When those converged, the issue of conflicts of interest came into sharp focus. Although not expressed as such in the documents, the underlying point was: *if* Mr Jenner has been and remains in control of or influences key elements of the Scheme, including some or most of the different entities involved in the Scheme, can actual or potential conflicts of interest in the

past have been or in the future be properly managed by the directors of Mountstar when making decisions for the Charity relating to the Scheme? It was then that Ms Russell (aided by Mr Law's analysis) decided to exercise the section 46 powers and open the inquiry to carry out the investigation to see whether or not that was the case.

109. Mountstar's argument can only succeed if it can be shown the documents did not reveal the actual reasoning of Ms Russell and Mr Law but that there was another ulterior or hidden agenda. We have had the benefit of the oral testimony of both which was to the effect that the documents speak for themselves, and record the decisions and their views as matters developed and that neither Mr Shawcross nor anyone else put them under any pressure or sought to influence their decision-making. We found both Ms Russell and Mr Law to be honest, diligent and conscientious public servants who came to assist the Tribunal and tell the truth. There was nothing in their evidence to suggest that they had any motive other than the discharge by the Commission of its functions as regulator of charities.

110. Ms Russell's oral evidence is best summarised in paragraph 14 of her witness statement, which we accept:

> "The decision to open an inquiry was not motivated by concern for [the [Commission's] reputation or other improper purpose. It is correct that the high (and justified) level of public interest led the [Commission] to re-engage with the Charity and thereafter in the light of the increasing concerns of the [Commission], the new information with HMRC's request for information leading to a significant financial penalty) and the crystallisation of the potential conflicts of interests of [Mountstar] and its directors, it decided to act to open an inquiry."

111. In evidence she found it difficult to say what she meant by "crystallisation". In our judgment, what she meant was that she had a "light bulb" moment when suddenly, the penny dropped and she could see that Mr Jenner was or may well be in control of the whole Scheme (the donors' and the Charity's claims; all or some of the entities and so on) in consequence of which he and therefore Mountstar was so conflicted that it could not properly act as charity trustee. That is borne out by her 10th April 2013 email to Mr Laws. In our view, there were ample grounds for that concern. Indeed, as we explain below, implicit within Mountstar's concern that the donors will be "named and shamed" into dropping their claims for higher rate tax relief is a concern for protecting the interests of the donors and of the promoters of the Scheme (HNWTAP) in preference to those of the Charity.

112. In cross-examination both Ms Russell and Mr Law accepted that they were aware of Mr Shawcross's comments before the PAC and at the Farrers talk. It was suggested that Mr Shawcross was somehow pressuring or trying to influence their decision-making to rescue the reputation of the Commission. This was denied and, furthermore, is contradicted by the fact that the Commission initially decided to do nothing apart from publish the RCR and ask for the latest accounts. It later decided to have a meeting – but as far as Ms Russell and Mr Law were concerned, that was due to Mr Jenner's failure to provide what they regarded as fairly routine information which was either in Mountstar's possession or was readily available. Whilst it is clear that Mr Shawcross was concerned about the damage being done to the Commission's reputation by the adverse media and PAC comments, there is no evidence to suggest that he was somehow trying to pressure or influence Ms Russell or Mr Law into making decisions and execute statutory powers to salvage that reputation, and that proposition is therefore rejected.

113. There is nothing in the passages in the transcript of Mr Shawcross's evidence before the PAC[19] or his reported comments at the Farrers talk[20] to indicate that he was adopting a public stance different from that adopted by the Commission internally, namely, that it was not the Commission's function to fight tax avoidance but in retrospect it should have published a RCR at the conclusion of the first investigation. That is what the Commission decided to do on 1st February 2013: no criticism has been levied at its decision to publish the RCR (whose publication has been overtaken by the opening of the statutory inquiry).

114. The "progress" note prepared for the 21st May Board meeting recording that since the 27th March the "Inquiry opened and IM appointed" was relied on to prove that the Commission had already decided what to do well before receipt of the 10th April HMRC email. We reject this. Ms Russell was not responsible for preparing the minutes or the schedule of actions. And it is clear that the "progress" note was added subsequent to opening the inquiry and appointing the Interim Manager in order to inform the Board of what action had been taken since the previous board meeting.

115. Reliance was also placed upon the fact that, as Mr Law accepted, he had changed his tone in his 11th March email. We reject this and find that Mr Law was frustrated at Mr Jenner's failure to provide simple, straightforward information and general obfuscation. He changed the tone in the hope of firmly encouraging Mr Jenner to start co-operating.

116. Great weight was placed upon an email dated Monday 15th April from Mr Shawcross to his fellow Board member John Wood in which he said that the Commission had decided to

> "appoint an Interim Manager for Cup Trust – apparently because HMRC told us they had fined them a small sum, and this gave us a pretext".

It was said that the use of the word "pretext" amounted to an admission by Mr Shawcross on behalf of the Commission that the HMRC penalty was not the real reason for the opening of the inquiry but that it was being used to disguise or conceal the real reason.

117. We can not accept this argument. Mr Shawcross played no part in the decision on 12th April. It is clear from his email the previous Saturday (13th April) to John Wood lamenting another attack on the Commission by the Chair of the PAC in *The Times* that he did not even know that the decision to open an inquiry and appoint an interim manager had then been taken. As far as he was then aware, Mr Law was still busy finalising the RCR as agreed back in February. It may have been ill-advised of Mr Shawcross to so characterise the reason for the decisions which he had played no part in making and in any event could not have known in his email. As Ms Russell said in evidence, that may have been his view but he was mistaken as it was not in fact the reason why she had decided to exercise that the Commission should exercise its powers.

118. Criticism was levied at the Commission for failing to call Mr Shawcross to give evidence. That was in the context of a complaint that the Commission had chosen to call no evidence "directly relating to its decision-making process from any senior member of the

[19] Internal page 7 of 31 of PAC's Minutes of Evidence.

[20] As reported on *Civil Society* website.

Commission"[21]. This is misconceived: Ms Russell was the senior member of the Commission who made the decision and she and Mr Law gave lengthy testimony of the decision-making process. Their reasoning was recorded within the Commission's internal decision-making process and set out in the statements of reasons. Mr Shawcross was not part of that process, and there is nothing within any of the documentation disclosed or evidence to indicate that he played any part in the 12th or 26th April 2013 decisions. We therefore draw no adverse inferences from his failure to give evidence.

119. Neither is there anything in Mr Shawcross's public utterances or elsewhere to suggest that the Commission was going to or had any intention of publishing documents which it should not publish or publish the names of individual donors to "name and shame" them into abandoning their tax relief claims. Notwithstanding that there may be statutory and other restrictions applicable to the release of such information, Mr Shawcross's expression of hope before the PAC to release documents is not inconsistent with the position the Commission took with Mountstar in correspondence. As far back as 1st February, Mr Law had told Mr Jenner that the RCR would be published but only after a draft had been provided to the Charity for comment. Ms Russell said that was standard practice, and the Commission had no interest in publishing the names of donors, and is bound by and respects the confidentiality which exists between individual taxpayers and HMRC. The Commission also respects that many donors for perfectly legitimate reasons wish their charitable donations to remain confidential.

120. It was said that Mr Jenner was concerned about Mr Law's reference in his 20th March letter to correspondence between the Commission and the Charity being subject to FOI requests. Ms Russell's view was that what could be disclosed was fairly restrictive whereas Mr Law's was that it was not so restrictive but any request is subject to "qualified privilege" which the Commission would have to first consider. What this line of cross-examination was seeking to do was to justify Mr Jenner's concerns about disclosure of confidential taxpayer information. In our judgment, this is not in point. What is relevant is the obligation of Mountstar to provide information to the Commission, which must operate within the law including FOI requests. The reference to FOI requests provides no evidence that the Commission was intent on publishing information unlwfully. Rather that it was being careful to ensure that it operated within the law.

121. This was all consistent with Mr Law's letter of 4th April where he states that the Commission was not asking questions about or intending to publish the names of individual donors. It is right that Mr Law did ask for the name of one donor, but that (as he explained in evidence) was in the context of a discreet (and discrete) inquiry. He was concerned that of the £5,000 donated in the financial year ending 31st March 2013 Mr Jenner had said that £2,850 was still owed by a donor hence it being recorded in the "debtors" part of the balance sheet. Mr Law therefore asked the name of that debtor. To extrapolate from that an intention to publish the names of other donors whose names had not been requested – or even that particular donor - is in our judgment unreal and amounts to nothing more than speculation. We can understand why Mr Law would want to test the circumstances of why a pledged gift which had not been received was being recorded as a debt, representing as it did a significant portion of the Charity's annual income.

[21] Paragraph 16 of Mr Smith's 3rd September 2013 Skeleton Argument.

122. Reliance was also placed upon the Commission's refusal to agree to Mr Jenner's 22nd March conditions for release of documentation if they were not prepared to obtain them from HMRC *via* the statutory gateways. We have already dealt with this and rejected Mountstar's position. We only note that somewhat oddly, Mr Smith submitted that the Commission's failure to use its section 52 powers (under which there would be no gateway limitations on the use of documents) was evidence that the Commission had acted improperly.

123. In our view, that Mr Jenner is so concerned that the Commission wants the documents to "name and shame" the donors indicates that he is or might be concerned to protect the donors' and HNWTAP's interests. In closing submissions both counsel accepted that withdrawal of the donors' claims will not affect the ability of the Charity to maintain its gift aid claim (save that it would have to fund it), and will not put off new donors because the Scheme can not now be re-run, or at any rate it has been stated that it will not be re-run. But it will prevent the £3.52 million contingency fee from ever being paid by the donors to HNWTAP and so from being enjoyed by Mr Jenner and his civil partner's families *via* Cherry Cake.

124. In our judgment, that suggests that Mr Jenner is causing or using Mountstar or at any rate has a clear interest in using Mountstar to advance this argument to benefit the interests of his donor clients and family when it really makes little if any difference to the Charity, save that it would no doubt be helpful if the donors and the Charity adopted a common stand towards HMRC.

125. Whilst Ms Russell rightly acknowledged that she understood that the Interim Manager would have the power to withdraw the gift aid claim, there was no evidence that that was her or the Commission's desire: her concerns were regulatory and not driven by the efficacy of the Scheme, the Commission having long-since resolved to leave that to HMRC to determine. That there was any ulterior motive does not follow from the fact that the Commission had, in effect, decided to appoint the Interim Manager at the same time as it decided to open the inquiry. The latter was a necessary precursor to the former. Nor does the fact that it is now on the Interim Manager's agenda, of itself, indicate any improper motive: that is something for him to consider, there being no suggestion that he has or will be subjected to improper influence or pressure from Commission.

126. Criticism was also made of the Commission's failure to raise any concerns about conflicts of interest with Mountstar and follow up the invitation to raise further questions issued in Mountstar's solicitors 26th October 2011 letter to the Commission. Nothing turns on this. The Commission did raise broad concerns about conflicts of interest in Mr Law's 4th April 2013 letter which it then anticipated discussing at a forthcoming meeting with Mountstar. That, however, was overtaken by events as already set out.

127. Furthermore, in our judgment that letter of 26th October 2011 was designed to provide sufficient information to encourage the Commission into closing the investigation, which it did. The invitation to ask further questions was an attempt to give the appearance of co-operation when in fact giving none, the letter being misleading, inaccurate and omitting key information which the Commission had asked for from as far back March 2010 since when Mr Jenner had successfully strung the Commission along. The submission also overlooks the somewhat fundamental point that as part of his fiduciary duties as director of Mountstar and also as laid down by the Charity's Conflicts Policy, Mr Jenner owed Mountstar duties to declare all of the interests which have now been revealed in evidence, and Mountstar was

obligated to ensure that its directors had properly complied with that Policy. We refer to the letter further below.

128. Reliance was also placed upon Mr Jenner's evidence that an (unnamed) friend of his has been briefed by an (unnamed) Member of Parliament that HMRC will make public the names of the donors. Even if that is correct, which we have no means of establishing, it might indicate that HMRC was going to misuse its powers. But that could not redound upon the Commission.

129. Finally, it was submitted that the Interim Manager had been provided with information by HMRC which had authorised its disclosure, from which it should be concluded that such information would arrive at the doors of the Commission. This is misconceived. First, the information from HMRC does not reveal the names of the individual donors. Secondly, the Interim Manager has all of the Charity's documentation and therefore knows the names of individual donors removing the need to get them from HMRC. Thirdly, HMRC has statutory power to release and allow disclosure of otherwise confidential information if it so wishes without funnelling it through the Commission.

130. In conclusion, we find no evidence to support Mountstar's case that the Commission was acting in any way improperly or otherwise unlawfully when deciding to open the inquiry.

Proportionality

131. Mountstar submitted that the Commission has acted disproportionately because it would not have exercised its powers to open an inquiry, and appoint an interim manager, for incurring penalties for late provision of information to HMRC had it not been for the Scheme. It was of course the existence of the Scheme and the media and Parliamentary interest which stimulated the Commission's attention back to the Charity. However, given the unjustifiable failure of Mountstar to provide information to HMRC coupled with its equally unjustifiable failure to respond to the Commission's own requests for information, the Commission was in our judgment justified in reaching the conclusion that further investigation was required within the framework of a statutory inquiry with the additional powers which that affords. Indeed, we are surprised that the Commission took as long as it did to reconsider its earlier decision to close the investigation, and failed to recognise that it had been mistaken in deciding to close that investigation.

132. We also bear in mind here that Ms Russell's judgment as an experienced and senior officer of the Commission was that the only way the Commission had any hope of getting to the bottom of things was if it had the full panoply of statutory tools at its disposal which only a statutory inquiry would afford it. It would also afford the Charity and charity trustee some measures of protection. In our view that judgment has been vindicated by what transpired subsequent to 12th April 2013 and also the evidence of Mr Jenner before this Tribunal. Within days of apparently agreeing to attend a meeting Mr Stones resigned, with the consequence that he would not attend the meeting. Even under oath, Mr Jenner was unable to give reliable evidence about the beneficial ownership of Cherry Cake, we finding it somewhat surprising that he, a man with otherwise remarkable capacity for detail, had forgotten that he had gifted potentially £3.52 million to his and his civil partner's families rather than some Canadian friends. The only thing he could clearly remember was that he and his civil partner had been excluded as beneficiaries for tax purposes.

133. We did consider whether, as Mr Smith sought to persuade us should be done, any significance should be attached to the fact that the appointment of the Interim Manager was effectively decided on the same day. We shall revert to this shortly.

Should the appointment of the Interim Manager under section 76(3)(g) continue?

Statutory framework

134. Section 76 of the Act sets out the Commission's power to appoint interim managers, the material parts of which are as follows:

> 76 (1) Subsection (3) applies where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied—
>
> (a) that there is or has been any misconduct or mismanagement in the administration of the charity, or
>
> (b) that it is necessary or desirable to act for the purpose of
>
> (i) protecting the property of the charity, or
>
> (ii) securing a proper application for the purposes of the charity of that property or of property coming to the charity.
>
> (3) The Commission may of its own motion do one or more of the following—
>
> (d) order any person who holds any property on behalf of the charity, or of any trustee for it, not to part with the property without the approval of the Commission;
>
> (g) by order appoint (in accordance with section 78) an interim manager, to act as receiver and manager in respect of the property and affairs of the charity.

135. Trustees may appeal the appointment of an interim manager to the Tribunal. Unlike the hearing of the appeal against the opening of the statutory inquiry (limited to judicial review of the decision based upon the information available to the Commission at the time of making the decision), the Tribunal hearing an appeal against the appointment of an interim manager acts afresh based upon the evidence then available to it even if that evidence was not available to the Commission at the time of the appointment: section 319(4)(a) and (b).

136. There is no statutory guidance as to what is meant by "mismanagement" or "misconduct". Both are ordinary English words which should be given their ordinary meaning: *Scargill v Charity Commissioner* (unreported) 4th September 1998 (which was confined to the meaning of "mismanagement"). The Commission has issued guidance :

> "Misconduct includes any act (or failure to act) in the administration of the charity which the person committing it knew (or ought to have known) was criminal, unlawful or improper.
>
> "Mismanagement includes any act (or failure to act) in the administration of a charity that may result in significant charitable resources being misused or the people who benefit from the charity being put at risk."

137. Mr Smith submitted that both take their colour from the serious consequences which follow from the appointment of an interim manager, namely the powers it opens up as well as the reputational implications for the Charity, Mountstar and all those involved. Only serious

mismanagement and even more serious misconduct will suffice to satisfy the statutory threshold, albeit that this argument shades into whether the decision to appoint a manager is proportionate to the acts of mismanagement or misconduct complained of by the Commission.

138. We do not think it necessary to so qualify "mismanagement" and "misconduct". We do however accept that it or the several acts or omissions complained of in their totality must be of some substance to justify the appointment of an interim manager rather than the alternative which would involve the use of some or all of the other statutory tools within the Commission's armoury. The Commission's guidance may provide illustrations of what might constitute mismanagement and misconduct, but cannot restrict their ordinary meaning.

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 respective cases

140. The Commission's case is that an Interim Manager is required because Mountstar has both mismanaged and shown misconduct in the administration of the Charity and it is necessary or desirable to protect the Charity's property and secure a proper application of it or of property coming to the Charity in the future. The Commission focuses on the adoption of the Scheme itself and the fee arrangements, the triggering of penalties for failing to provide information to HMRC and the existence of blank cheques, arguing that Mountstar is paralysed by its inability to manage conflicts of interest.

141. Mountstar denies that there has ever occurred anything of sufficient weight to justify the continued appointment of the Interim Manager, there being nothing much remaining for the Charity to do in the near future until the donors' claims have been determined, and that his continued appointment is disproportionate and not necessary particularly as there is no suggestion that the Charity's property or documentation is at risk.

Conflicts of interest

142. It is convenient to consider conflicts of interest at this stage because that is at the heart of the Commission's submissions and actions. Mr Jaffey submitted that if any of Mountstar's directors are tainted by a conflict or potential conflict of interest then Mountstar will be in breach of its fiduciary duty to the Charity and must withdraw as sole trustee. If any of the directors had a conflict, then so did Mountstar which is bound by and liable for the acts of its directors. As he put it:

> "The sole trustee of the Cup Trust is Mountstar. However, Mountstar is merely an offshore trust company that acts through the agency of its directors. If any of Mountstar's directors are tainted by a conflict or potential conflict, Mountstar's conduct as trustee will be in breach of its fiduciary duty to the Cup Trust and Mountstar must withdraw as sole trustee. If any of the directors had a conflict, then

> Mountstar's decision-making processes were conflicted, and it had to withdraw as sole corporate trustee. If the Directors were conflicted, Mountstar's position was untenable also. Mountstar had no way of acting separate from its directors. If the corporate trustee is conflicted, or does nothing about the conflicts of its controlling minds, that is undoubtedly misconduct."

143. We disagree as that conflates the directors' fiduciary duties with those of Mountstar. It is Mountstar which owes the Charity fiduciary duties. The directors of Mountstar do not owe the Charity any fiduciary duties but do owe Mountstar fiduciary duties *qua* directors. If there is a conflict, the conflicted director owes Mountstar a duty to disclose and withdraw or seek authorisation. If he does withdraw and takes no part in the decision-making process, in principle Mountstar (by its remaining directors) may make decisions free of the absent director's conflict. That type of management of conflicts is recognised by the Commission's guidance and also by the Charity's Conflicts Policy.

144. To that extent we agree with the submissions of Mr Smith, who referred us to *HR v JAPT* [1997] OPLR 123. If the conflicted director has failed to disclose a profit or interest but is absent at the time when the material decision is made, the liability to account for any benefit (if any) is owed to Mountstar but probably not the Charity: see *Gregson v HAE Trustees* [2008] EWHC 1006 (Ch). Where only one director, whether in form or substance, is the decision-maker and has failed to declare material conflicts of interest such that he should have recused himself, we doubt whether he would be able to keep his profits and benefits with impunity.

145. We do not need to decide this point or the extent to which the corporate veil can be pierced because Mr Jaffey, who did not refer us to any of the usual authorities in this area, did not invite us to do so. He submitted that if it is right that no fiduciary duties were owed by the directors to the Charity, if Mountstar failed to properly manage the Charity (for example by failing to properly scrutinise the Scheme, and independently of the influence of the conflicted Mr Jenner) then it would be guilty of mismanagement or possibly misconduct.

146. We agree with this approach. In our judgment the question is: in managing the Charity and making Charity decisions, did Mountstar act as an ordinary prudent man of business would when conducting his own affairs, independent of any influence from any conflicted director (Mr Jenner)? If it did not, that would amount to "mismanagement" and (if appropriate) "misconduct" without the need to make any judgment about the substance of the decisions themselves.

147. What must be borne in mind here is that by clause 9(i) of the Declaration of Trust a corporate trustee "may act by one director". Self-evidently, bearing in mind its own Conflicts Policy, if a director is conflicted that director must be recused and decisions taken by one or both of the non-conflicted directors. An important aspect of administration and management of the decision-making process is rigorous adherence to the Charity's Conflicts Policy requiring full and proper disclosure of conflicts and recusal if appropriate. This is not merely ensuring that conflicts are properly documented, but ensuring that in substance, behind the documentation, they are in actual fact being properly managed.

What are the conflicts of interest?

148. Mr Jenner, as paid or unpaid worker for HNWTAP or otherwise, owed and continues to owe a duty or loyalty to the donors to properly advise on and co-ordinate their original participation in the Scheme itself and the on-going management of their claims for higher rate tax relief – when and how to deal with HMRC, what information to disclose and when, when to institute or defend proceedings and so on. Even if his work for HNWTAP is unpaid, an aspect of this duty is to ensure so far as possible that the Scheme is successful so that HNWTAP receives its contingency fees from the donors.

149. Mr Jenner owed and continues to owe fiduciary duties to Mountstar as one of its directors. Whilst he may not have been a director during the first five "rounds" and says he stepped aside from decision-making for the next five "rounds", he was a director at the time he promoted the Scheme to Mountstar. He is the director who has managed the timing of the submission of the Charity's claims for gift aid, the first one being delayed until 5th September 2011 and the second until 1st February 2012 for no apparent reason save for completion of submission of the donors' claims for higher rate tax relief. And he is the director who conducted the Charity's on-going management of those claims – when and how to deal with HMRC, what information to disclose and when and so on.

150. This leads to a slightly more nuanced conflict. Mountstar as charity trustee owes obligations of disclosure and co-operation to the Commission *qua* charities' regulator, and HMRC *qua* tax collector, which are of a different order to those which ordinary taxpayers such as the donors might owe to HMRC. It may well be legitimate for a private taxpayer or donor to be economical and tactical with the provision of information and data to HMRC or cause delays to stretch things out for as long as possible: such is his choice and he takes any consequences.

151. Charities, however, are in a different position. They must act as an ordinary prudent man of business would act, independently of the interests others. Also, and importantly, charities are established for public benefit and enjoy special privileges, advantages and tax exemptions which carry with them (in our view) an obligation to be open and transparent in the provision of information to the Commission which, we judge, extends to the provision of information to HMRC.

152. Thus there may come times when the Charity acting properly should be providing information to the Commission and to HMRC which it would be in the interests of the private donors to delay or not provide at all. It is therefore difficult to see how Mr Jenner can be involved in any decisions relating to the handling by Mountstar of the Charity's gift aid claim when still acting for the donors. Whilst it is proper for a charity trustee, or one or more of its directors, to utilise his own skill and expertise when discharging his duties *qua* charity trustee or one of its directors, that must be done solely in the interests of the charity and its beneficiaries, and cannot sensibly be done when he is simultaneously advising another party about the same subject matter.

153. Mr Smith sought to persuade us that there was no conflict of interest between the Charity and the donors but a common interest to have the Scheme succeed. Whether that is so can only be adjudged if the charity trustee has taken its own decision after proper inquiry and taking any necessary advice independently of any conflicted trustee or director. This points to an inherent defect, or fault line, within the design of the Scheme: in order to achieve its substantive goal of a successful gift aid claim the Charity must await the outcome of the

donor's claims, both being co-ordinated and advised by Mr Jenner. The possibility of independent, and independently advised, action is not countenanced.

154. Then there are conflicts of financial interest, direct and indirect. HNWTAP is indirectly interested in the Charity paying Harry Associates the £6.3 million contingency fees and directly interested in the donors paying the £3.52 contingency fees. Whilst the complex steps and legal structures taken by Mr Jenner to distance himself and his civil partner from these monies *via* Cherry Cake, P1 and P2 may be effective for tax purposes, they are not, in our judgment, effective for the purposes of eliminating, or managing, the conflicts of financial interest of a fiduciary such as a director: Mr Jenner, without doubt and taking his evidence at face value, remains indirectly interested *via* his and his civil partner's families' benefiting in those fees *via* Cherry Cake.

155. In our view, the suggestion that both donors and Charity (and advisors) share a common interest of the Scheme succeeding masks an important financial, and personal conflict.

    (a) If the Charity withdraws its gift aid claims it will *not* stop the private donors successfully litigating with HMRC in which case they will have to pay the £3.52 contingency fees to HNWTAP to be shared (it seems) by Cherry Cake beneficiaries.

    (b) But it *will* stop Harry Associates receiving the £6.3 million contingency fees from the Charity.

    If that happens, nothing will be paid to the financial intermediaries who have built HNWTAP's donor client base which enabled HNWTAP to receive the upfront fees and earn the £3.52 contingency fees from the donors and to whom Mr Jenner and HNWTAP must owe or will be perceived as owing personal loyalty if nothing else[22].

156. Thus Mr Jenner has a great personal interest in the Charity maintaining its gift aid claim, including his own personal reputation as well as on-going access to those financial intermediaries who introduced the donor clients to HNWTAP. As we have already said, this conflict manifests itself in the arguments put forward in these proceedings. If Mr Jenner was acting solely in the best interests of the Charity, it would make no or no real difference to him if the donors did not make or abandoned their claims, although it would probably look better in dealings with HMRC if a united front was maintained. Likewise if he was acting solely in the best interest of the donors, it would make no or no real difference to him of the Charity abandoned its claims. Even if, which we are told is not the case, withdrawal of the Charity's gift aid claim would fatally undermine the donors' claims that would be an immaterial consideration for the Mountstar to take into account when considering how to act in the Charity's own interests.

157. However, because the Scheme is structured in the way it is (donors' claims to be pursued first) because he (or his and his civil partners' families) are financially interested in their success by dint of the donors' contingency fee to HNWTAP and because he is acting for both "sides" of the claims, Mountstar (by Mr Jenner) is using within these proceedings arguments which are in fact advancing or protecting the donors' claims rather than focusing on outcomes which are in the best interests of the Charity.

[22] We here assume, for these purposes, that there are no revenue sharing arrangements between HNWTAP and the financial intermediaries.

158. Of these conflicts, only receipt of the upfront fee to 5th April 2010 and Mr Jenner continuing to advise the donors were disclosed to the Commission. There are myriad other conflicts of interest. For example, Mr Jenner/HNWTS was attorney appointed by and acting for all parties; Mr Jenner and Mr Stones were directors of Romangate throughout. Whilst acting in a neutral, bare trustee or attorney capacity does not usually connote conflict, it is a curious thing for one individual (Mr Jenner) and one company (Romangate) to act for all parties, some of whom are in fact counterparties to the gilt sales with opposite objectives (buyers aim to lower price, sellers to raise price). The full nature and extent of these, and all other conflicts, are suitable questions for the statutory inquiry, but also surface in the allegations of mismanagement and misconduct.

Mismanagement and misconduct – section 76(1)(a)

159. No due diligence, and no real arms length decision-making, when adopting the Scheme on 30th January 2010, particularly regarding Harry Associates. The Commission submitted that Mountstar had failed to exercise due diligence when adopting the Scheme by failing to make any adequate inquiries particularly about the fundraising agreement with Harry Associates. When it adopted the Scheme, Mountstar was acting by Mr Mehigan and Mr Stones, Mr Jenner having resigned on 21st January 2010 recognising that he was conflicted.

160. An ordinary prudent man of business would have careful reviewed the documentation and exposition of the Scheme provided in Mr Jenner's 13th January 2010 letter and the draft documentation. He would have noted that Mr Jenner had stated that he was introducing the Scheme as partner in HNWTS and "may (or may not) benefit financially" from the Scheme which by itself was in breach of the Charity's Conflicts Policy for failing to declare what those benefits might be, save that the letter does state somewhat obscurely that

> "… such benefit would not be in respect of remuneration for any trustee services provided by Mountstar and only result as a consequence of certain individuals making gifts to the Charity".

He would have asked him to fully declare those possible interests and benefits. He would have scrutinised the Harry Associates fundraising agreement and noted that it would be paid the contingent fee (at that time £5.5 million) for providing fundraising services but that donors would only be sourced from those who had already appointed HNWTS their attorney. He would then have enquired further to understand precisely why the donor pool was exclusive and limited, what Harry Associates was doing for their fee when the donors had already been sourced by HNWTS and who Harry Associates was and what the link with HNWTS was (if any).

161. Whilst Mr Jenner has proven himself adept in correspondence, in his witness statement and in the witness box at avoiding answering questions or answering them ambiguously, if pressed he does ultimately give answers although not always wholly satisfactory or complete. We have no reason to suppose that had he been asked and if necessary pressed at this stage, January 2010, he would not have said what he said in the witness box.

162. The nub of Mr Jenner's evidence was that Harry Associates was created as a one-off vehicle with no fundraising experience which would provide no fundraising services but was to collect contingency fees payable by the Charity in order to pay financial intermediaries who had introduced donor clients to HNWTAP and HNWTS (both owned by Mr Jenner) avoiding fees being seen to be paid to HNWTAP which had most probably already benefitted by having its

client-base enlarged and would certainly immediately benefit by receiving upfront fees from those donor clients and contingency fees if the Scheme was successful.

163. The first time Mr Jenner explained the role of Harry Associates (and, fully, HNWTAP) was in evidence to the Tribunal. We infer, and find, that neither Mr Mehigan nor Mr Stones asked him for what we regard as fairly basic information required to make such a momentous decision for the Charity. That is borne out by the Schedule to the 30th January 2010 board resolution adopting the Scheme stating that Harry Associates "will provide services related to fundraising" when Me Jenner's evidence showed that it had nothing to do except collect and pay fees, which stretches the notion of "fundraising service".

164. In our judgment these failures by Mountstar (acting by Mr Mehigan and Mr Stones) to require a full and proper declaration of interest and ask questions at the outset amount to serious mismanagement. By failing to ask the sort of questions we identify above Mountstar (by Mehigan and Mr Stones) failed to put itself into a position in which it could consider the true nature and effect of the Scheme, what further issues might arise and questions be asked, whether professional and other advice independent of Mr Jenner was required and whether either of the remaining directors were conflicted by any personal loyalty to or shared interest with Mr Jenner.

165. From that information opens a further line of inquiry to an ordinary prudent man of business. Why, if it was HNWTAP who had or would be doing all of the work, should the Charity enter into any agreement with Harry Associates, and one which did not reflect *actualité*? In other words, why involve Harry Associates at all? Mr Jenner gave two answers: to avoid money going through HNWTAP, and because it was "part of the structure of the Scheme". Neither is particularly illuminating. He went on: "the fees enable the Scheme to proceed, instead of the taxpayer paying the fees the Charity does". Putting that in context, if the Scheme is successful the Charity is to benefit by £46 million out of which it pays £3.52 million contingency fees to Harry Associates and thence to the financial intermediaries, Scott Clark and his (unidentified) partners; the donors are to benefit by £55 million but pay £6.3 million contingency fees to HNWTAP and thence to Mr Jenner.

166. We infer from Mr Jenner's evidence that (a) to participate in the Scheme fees had to be paid to "someone" otherwise the financial intermediaries would not be paid for introducing the donor clients and without whom there would be no Scheme; (b) Harry Associates was interposed to create the appearance that HNWTAP was not involved when it was in fact very much involved in fundraising, by finding "donors" for the Charity; and (c) it also enabled fees to be paid to Scott Clark, the intermediary who purchased the gilts from the Charity before on-selling them to the donors, a pivotal part of the transaction sequence. As we have already said, HNWTAP's role was not disclosed in Mr Jenner's 13th January 2010 letter or any of the draft documentation. We infer, and find, that the reason Harry Associates was interposed was to create the impression that all of the parties were separate and independent of and from each other when in fact they were not and that that was a necessary part of the structure of the Scheme for the purposes of presenting it to HMRC to secure gift aid for the Charity and also higher rate tax relief for the donors.

167. The ordinary prudent man of business, in our judgment, would be concerned that the Charity was being invited to enter into written agreements which did not reflect, in fact were designed to conceal, the true nature of arrangements, the true identities of the participants.

Agreements which would be presented to HMRC as part of its inevitable enquiry into the Scheme and would also have to be made available to the Commission which would inevitably raise questions that might affect its charitable status in particular if the private benefit so outweighed the public benefit. Using the bluntness of an ordinary businessman, it might look like a scheme to extract from HMRC very large sums where the overwhelming beneficiaries, the Charity to one side, were private clients of HNWTAP and HNWTS, Mr Jenner personally and a myriad of financial intermediaries known to Mr Jenner.

168. He would also be interested to know just why the Canadian Jamie McCulloch was prepared to lend money to the Charity, albeit intra-day, apparently for no reward (noting that on 5th April 2010 he replaced Mr Jenner as trustee of PT which held its share in HNWTAP on trust for Mr Jenner). Equally, why would The VL Settlement be prepared to "sell", in reality "lend", the gilts to the Charity for apparently no return? Were they somehow getting fees from Harry Associates or elsewhere?

169. Throughout the hearing, it was impressed upon the Tribunal by both counsel that there was nothing inherently unlawful about a charity entering into a tax avoidance fundraising scheme such as the Scheme. Whether it worked was to be determined by HMRC and (potentially) tested in the courts. Assuming that to be so, it does not follow that the ordinary prudent man of business would be so "blinded by science" that he would not have stood back and asked a very simple question:

> "If the donors really are gifting the Charity £176 million, how come the Charity only ends up with £155,000?"[23]

He may well adopt a common sense approach and conclude that whatever the perhaps arcane tax position might be, it could not sensibly be regarded as a donation so far as the Charity was concerned. He would then be concerned as to whether the Charity and also himself as trustee were being involved in a tax recovery and gift aid claim scheme which might not be lawful, namely, claiming gift aid on "donations" which had not in substance been made and which the Charity and he both knew had not been made in any normal sense of the word.

170. If not already sufficiently put off, in our judgment such a businessman would have taken independent legal advice about the merits and tax effectiveness of the Scheme, the breadth and depth of the embedded conflicts and any risks to the Charity and himself of attracting other sanctions. He might also have taken expert advice from within the tax avoidance and charity fundraising industries as to whether fees for the work involved were reasonable and how these sort of schemes should be structured, if at all. He would not have simply relied upon the tax advice which Mr Jenner had apparently obtained for others, not Mountstar, because what was required was advice *to Mountstar/the Charity* independent of Mr Jenner and his clients as well as ensuring that the advisor had been fully and accurately informed as to the substance behind the legal form of all of the documentation, the Harry Associates fundraising agreement being a prime example.

171. He would also have been concerned that the Scheme might put at risk the Charity's charitable status, that the charitable status of the Charity was being (mis)used to promote the private interests of the settlor (who *via* HNWTAP is entitled to retain over £700,000 of upfront fees

[23] In January 2010 the question would have been limited to £100 million as that is what was then expected to be "donated".

irrespective of success of the Scheme) and his clients, that the Charity would become embroiled in protracted litigation with HMRC and the Commission (for which the Charity had no funds) during which the substance behind the legal form of the Harry Associates fundraising agreement would have to be explained and that the potential for adverse publicity would prevent the Charity from establishing the sort of reputation which any ordinary prudent charity trustee would want to attract. These concerns would have been reinforced had he enquired further (which he surely would have done) and discovered that The VL Settlement was a client or former client of Mr Jenner and that Mr Jenner was a director of Romangate.

172. Without asking these basic questions and then following through the further lines of inquiry opened up by those answers, Mountstar did not equip itself with sufficient information to properly consider whether to adopt the Scheme at all or indeed Mr Jenner's past and future involvement in the Charity's affairs. We have considered the written board resolution of 30th January 2010. It goes at, or to, some lengths to record how Mr Mehigan and Mr Stones considered whether the Scheme benefits the Charity, whether the fees are justified or justifiable, whether it is solely for charitable purposes and so on. However, Mountstar (by Mr Mehigan and Mr Stones) could not possibly, or properly, have considered any of those points or made its decision without having first made the fairly rudimentary enquiries already referred to. With some surprise, we note that the resolution records that Mr Mehigan and Mr Stones had both been informed of various matters "by Harry Associates" which, according to Mr Jenner, was a mere fee-collecting shell. As we have said, a striking feature of the first investigation was the Commission's failure to consider any of these questions or even interview Mr Mehigan or Mr Stones.

173. We should also say that the information we have already referred to would, or should, have caused Mr Mehigan, acting independently of Mr Jenner, to consider his own ability to remain a director owing to his conflicts, actual or perceived, with Mr Jenner from his personal involvement with him from their long-term association in tax avoidance schemes and continued interest in NT and involvement with and continued directorship of Romangate. That would or might conflict with or affect his ability to discharge his fiduciary duty to Mountstar to rigorously probe into the Scheme and reach potentially serious adverse conclusions about Mr Jenner's conduct when he was a director of Mountstar.

174. Mr Stones might also have been concerned as to his position, having only joined the boards of Mountstar four days previously and Romangate three days previously, noting that all three (Mr Jenner, Mr Mehigan and Mr Stones) were directors of Romangate on 30th January 2010. A strange, and in our judgment incredible, aspect of Mr Jenner's evidence was that he claimed to know nothing much at all about Mr Stones (who, it will be recalled, resigned as director of Mountstar on 22nd April 2013 having apparently less than two weeks previously agreed to attend a meeting with the Commission on 30th April). We were unable to divine whether Mr Stones' involvement with Mountstar was at the initiative of Mr Mehigan, neither party participating in the hearing although holding directorships at crucial, if not pivotal, moments.

175. It is not the Commission's case, and we have not been asked to decide, whether it constituted mismanagement to adopt the Scheme at all. However, on the basis of the evidence before us we should be most surprised if any ordinary prudent man of business would have adopted the Scheme even without getting independent legal advice. We say this because such a businessman would not sign up to a scheme where the lynch-pin, the fundraising agreement, did not mean what it said and Harry Associates was a mere artifice to avoid fees going to

HNWTAP. He would be most unlikely to sign up to a scheme where key players, Jamie McCulloch and The VL Settlement, were lending money and "selling" gilts for no apparent reward without a full understanding of whether and if so why that was so.

176. We are conscious that the focus of attention on Harry Associates did not emerge until during cross-examination of Mr Jenner. It does not form part of the Commission's pleaded case. This, in our judgment, causes no injustice or unfairness to Mountstar. The information was within the exclusive knowledge of its director Mr Jenner who should have disclosed it before he resigned as a director of Mountstar on 21st January 2010 and, indeed, when he was reappointed later that year, he being the sole representative chosen by Mountstar to represent it and give evidence before this Tribunal. Mr Mehigan and Mr Stones could have added nothing because it was clear from the evidence before us that Mr Jenner had not told them about Harry Associates, and they had not asked him about it. Had they been told the true position of Harry Associates, the board resolution could not have recorded (as it did) that they understood Harry Associates to be providing fundraising services: for the reasons already given, it was not.

177. Much of the hearing before the Tribunal, including cross-examination of the Commission's witnesses, was on the footing that the donors' claims had to be resolved before the Charity's. In evidence, Mr Jenner said that "he" knew this was how these schemes worked, and how the Revenue worked in practice, requiring the donors' claims to be determined before the Charity's. Any special skill, knowledge or expertise which Mr Jenner had or may have could not be relied upon by the remaining directors of Monutstar as Mr Jenner was conflicted, the remaining directors being obliged to obtain independent advice. No advice independent of Mr Jenner was taken by Mountstar. It seems that Mountstar (by Mr Mehigan and Mr Stones, neither of whom gave evidence as to their actual expertise and knowledge) simply relied upon what Mr Jenner said and upon his professed knowledge about how these sort of schemes worked.

178. As we have said, both counsel accepted in closing submissions that contrary to what Mr Jenner had said the claims are not dependant upon each other, albeit that the answer to one will answer the other. The failure of Mountstar (by Mr Mehigan and Mr Jenner) to take independent advice as to the appropriateness of the Scheme being so structured that the Charity had to await the outcome of the donors' claims in our judgment constitutes serious mismanagement and lack of independence from Mr Jenner. This, as will become clear, became a feature of Mountstar's handling of HMRC's requests for information.

179. There is one final point. Mr Jenner has said that the first "round" had in fact taken place on 29th January 2010, the day before the 30th January 2010 board resolution. If that is so, and if Mr Stones was involved in that undocumented decision of Mountstar, it would have meant that he had but three days to consider and make enquiries about the Scheme: as it is, he only had four days. As we have said, Mr Jenner professed to know nothing about Mr Stones or his expertise.

180. If on the other hand it was Mr Mehigan who had approved the "round" on 29th January 2010, that should have been separately recorded rather than the fleeting reference in the resolution to Mountstar by Mr Mehigan having "provisionally" agreed to the draft fundraising agreement. Either way, we observe that it would amount to serious mismanagement of the highest order to embark upon 250 transactions worth in excess of £74 million without any

form of due diligence or documentation or board authorisation. We however make no findings on this as it was not ventilated during the course of the hearing.

181. Failure to re-negotiate fees on revival of Scheme in June 2010. The Commission also submitted that Mountstar had failed to negotiate a greater uplift than the 0.02% payable by the donors to the Charity when the Scheme started up again in June 2010.

182. Mr Jenner accepted that there had been no negotiations about any element of the Scheme at any time. His position was that when presented with fundraising proposals charity trustees do not look too carefully and are not too concerned about how much the fees are and what fees go to whom and so on. The focus is on the bottom line of what they will get. He got perilously close to saying that that is how Mr Mehigan and Mr Stones acted in this case before stepping back and saying that he of course was not involved in their decision-making so did not know what approach they had adopted, but we were left with the impression that their approach was consistent with Mr Jenner's experience of trustees. We found this part of Mr Jenner's evidence somewhat disingenuous given that it is plain that those directors had not raised any of the inquiries which an ordinary prudent man of business would have raised. All this aspect of Mr Jenner's evidence means is that charity trustees with whom he has experience routinely act in breach of duty by failing to act as ordinary prudent men of business would.

183. Mr Jenner accepted that after he had been reappointed as director of Mountstar on 3rd June 2010 and when he realised the Scheme could start up again he did not tell Mountstar that the Charity was the only charity in the market for the Scheme. That was because, he seemed to be accepting, that it would be against the interests of his donor clients. In a part of his evidence which was difficult to follow, he also seemed to be saying that he did not disclose this market intelligence because that would have put him in conflict because he would then have had to negotiate on behalf of the donors with Mountstar acting as trustee of the Charity.

184. Mr Jenner therefore held back information so as not to be conflicted without identifying that retention. We find that to have been a manifestation of conflict in action, preferring the interests of his donor clients to those of the Charity. It is not an answer that Mr Jenner stepped aside during the decision-making process because this information was held back at a time before the decision-making process started. Further, this, together with all of his other interests and conflicts which we have already referred to, should have been openly and fully declared throughout the period of the last five "rounds" because he was director of Mountstar and owed it fiduciary duties including compliance with the Charity's Conflicts Policy. In our judgment, this could not be cured by stepping aside when decisions were being made by his co-directors.

185. It does not automatically follow from Mr Jenner's breach of duty to Mountstar that Mountstar was in breach of its duties to the Charity. Rather, the breach is the failure of Mountstar (by Mr Mehigan and Mr Stones at the relevant time) to make enquiries and generally review the terms and conditions of the Scheme and, particularly, whether it could get more upfront money from the donors which the Charity would keep even if the Scheme failed as well as requiring further declarations of interest from Mr Jenner as to what the conflicts were which caused him to step aside.

186. Armed with that information, Mountstar would then have had to consider and decide whether they should take independent advice as to renegotiating of the fees and then whether or not to negotiate. These in our judgment represent further instances of mismanagement, but add little to that which we have already found. That said, we do recognise that these submissions are somewhat artificial given what we have already said about the approach of the ordinary prudent man of business in respect of the initial decision to adopt the Scheme.

187. Receipt of and entitlement to receive fees. The Commission submitted that there has been actual receipt of money from the donors by Mr Jenner prior to 5th April 2010 which constitutes a breach of fiduciary duty to the Charity. As we have already said, this would, or should, have been revealed had Mountstar (by Mr Mehigan and Mr Stones) required that Mr Jenner properly disclose his conflicts of interest. It is however not quite so simple as the Commission submits because on one view of the authorities he owed no such duty. We do not need to consider this point further as the Commission chose not to press it.

188. That said, as Mr Jaffey submitted, there are legitimate and proper lines of inquiry for Mountstar, or another charity trustee, to consider. Specifically, should Mr Jenner/HNWTAP be pursued to account to the Charity for the (a) upfront fees and the contingency fees to be received from the donors, possibly as well as any additional benefits as a result of HNWTAP's client base being enlarged by new donor-clients; and/or for the (b) contingency fees to be paid to Harry Associates if the Charity maintains and succeeds in its gift aid claims. Whilst receipt of part of the upfront fees was disclosed to the Commission in the 26th October 2011 letter, that is irrelevant as none were disclosed to the entities to whom they should have been disclosed, namely, to Mountstar and ultimately, arguably, to the Charity.

189. Even if the Charity chooses not to pursue its gift aid claims, it will be for Mountstar, or another charity trustee, to consider whether to seek an account of the fees and benefits referred to in (a) above, the purpose of such an account being to ensure due compliance with fiduciary duties not to benefit from directorships and the trust. Even if Mr Smith is correct that the present position is that a director of a trust corporation owes no duty to account to a charity (so at one extreme can profit with impunity even though in breach of the Charity's own Conflicts Policy which he has himself, as director of Mountstar, voted to adopt), that does not mean it is something which should not be investigated and considered by Mountstar.

190. The problem here is that these matters *may* render Mountstar itself liable to the Charity to account for the fees and benefits which Mr Jenner/HNWTAP have and will make. In addition to the conflicts with its directors, Mountstar *qua* charity trustee is or is itself potentially conflicted as it self-evidently, and even with a new un-conflicted board of directors, can not properly consider whether *it* is so liable to the Charity.

191. These matters point to the future and plainly can not be considered properly whilst Mr Jenner remains a director of Mountstar or indeed whilst Mountstar remains charity trustee. But in our judgment they add little to the seriousness of the mismanagement by Mountstar which we have already found. We do not consider further one of the Commission's opening submissions that that the Charity was being used for a collateral purpose, namely, to further the commercial interests of the directors of Mountstar and the donors which, indeed, was not pressed by Mr Jaffey in closing submissions.

192. Provision of inaccurate and misleading information to the Commission. Mountstar, by letter dated 26th October 2011 from its then solicitors BWB, wrote to the Commission stating that (a) Mr Jenner had no share in the income or profits of HNWTAP after 18th June 2010; and (b) from 18th June 2010 onwards only the trustees of PT were entitled to the income and profits from HNWTAP.

193. This information was inaccurate because Mr Jenner told us that he retained (a) direct ownership of his 95% of HNWTAP until gifting it to P1 in December 2010 which he owned absolutely until gifting his P1 shares to the Cherry Cake beneficiaries on 16th January 2011 and (b) indirect ownership of the other 5% as beneficiary of PT. It follows that at the time of the letter Mr Jenner remained entitled to 100% of the income and profits of HNWTAP *i.e.* the whole of the £704,000 upfront fees payable by donors of which he had already received around £368,000.

194. The letter also states that (a) from 17th December 2010 the partners of HNWTAP were P1 and the trustees of PT but that (b) Mr Jenner from 5th April 2010 had relinquished all control over HNWTAP to the trustees of PT (even though he remained 95% owner and 5% *via* PT). This letter is misleading for what it does not state, namely, that (a) Mr Jenner was the sole director and owner of P1 (and so retaining control of HNWTAP *via* P1); (b) in addition to Mr Triggs, the new trustee of PT was Jamie McCulloch (he being the Canadian lender to the Charity without whose involvement the Scheme could not work, so may well be amenable to Mr Jenner). BWB's letter is also inconsistent with Mr Jenner's 30th September 2010 Declaration of Interests Form in which he states that he still owns a share in HNWTAP but does not state that he controls P1, one of PT's trustees.

195. In our judgment these are of especial seriousness as the letter was in response to the Commission's 19th September 2011 letter asking in very broad terms and so there really could be no misunderstanding whether any director of Mountstar "has or may gain" financially from any association with any of the "HNW" entities. This was at a critical juncture of the first investigation when the Commission was trying to get to the bottom of who owned and controlled what. They had already seen Mr Jenner on two occasions in person, but plainly still required further confirmation and clarification.

196. The letter from BWB, sent on Mountstar's instructions acting by Mr Jenner, typifies the way in which Mountstar (by Mr Jenner) has dealt with requests for information, adopting a literalist approach then narrowing and re-framing questions and giving only incomplete answers leading, to the astute reader, having to ask more questions. This in our view is inimical to the proper discharge by a charity trustee of its duties.

197. We give an illustration of an economy of explanation. When the Scheme was adopted Mr Jenner had established three "HNW" entities. The Harry Associates fundraising agreement provides that Harry Associates can only source "donations" from donors who had appointed HNWTS attorney. The missing and unstated but critical link is that the donors were in reality sourced by HNWTAP from its clients introduced to it by financial intermediaries who are to be paid introductory fees *via* Harry Associates out of the contingency fees paid to it by the Charity so as to avoid the money going to HNWTAP. This was not stated in Mr Jenner's 13th January 2010 letter which states he is presenting the proposal "as a partner in HNW Tax Services".

198. In response to numerous requests for information from the Commission from 22nd April 2010 onwards, Mr Jenner carefully re-frames and confines his answers to HNWTS, saying that HNWTS is paid nothing for its attorney services. It is not until BWB's 26th October 2011 letter that it is clearly stated that HNWTAP received "upfront tax advice and fees and introductory commissions (funded directly or indirectly from its clients who participate in the scheme)" and "additional tax advice fees from those clients, which are wholly conditional upon their Gift Aid claims being successfully processed". Even then it is not stated that *all* donors are HNWTAP clients. There then follows a complicated explanation of how much Mr Jenner received and is entitled to in the future, which was materially inaccurate as we have summarised above.

199. Mr Jenner has adopted the same approach during these proceedings. Instead of being open and frank about the beneficial entitlement to the contingency fees payable by donors to HNWTAP, he makes no reference in his witness statement to his and his civil partner's families' beneficial entitlement via Cherry Cake and carefully states that he has disclaimed any right to remuneration as "director" of P1 but not as "shareholder", thus leaving open an ambiguity as to whether he remains entitled to the £324,000 odd balance of the upfront fees.

200. Even in the witness box it was only when pressed that he said he had given his share of the £3.52 million to his (unidentified) Canadian friends because that is what he does, he is a generous man, only to correct it the following day saying that in fact it is his and his civil partner's families who are to benefit from his largesse (accepting that he could but chose not to give it to the Charity which he had founded and said he strongly supported but had only given £10,000 to).

201. The failure to give any meaningful information in Mr Jenner's witness statement about Harry Associates and the fundraising agreement is a particularly striking example of an absence of the full and frank disclosure required of a director of a corporate charity trustee. As long ago as his 6th July 2010 meeting with the Commission, Mr Jenner said "The taxpayers were introduced to the Scheme by Harry Associates. HNW (High Net Worth) introduced the charity to the Scheme through MJ [Mr Jenner]." In his 26th July 2010 letter, he states that there is no agreement in place between the Charity and Scott Clark, yet we were told that Scott Clark is one of the partners of Harry Associates (whom the Commission had asked to be named but which request Mr Jenner did not comply with). Whilst that is what the paperwork may have shown, it was not what was happening behind the façade of the documents.

202. Obtaining information from Mountstar has been like pulling teeth, only to find once successful that a new denture has already been fashioned and placed to cover the hole. An example of this is that shortly after BWB's 26th October 2011 letter, Mr Jenner gifted his share in HNWTAP to P1 in December 2011. This gives the legal appearance that he is no longer the legal owner, but in fact, or substance, he is because he owns and controls P1. Then in January 2012 his shares are transferred to Plectron and the Cherry Cake beneficiaries again to give the appearance of ever-greater distance and lack of personal interest, but as he told us, his and his civil partner's families remain interested.

203. As recently as 22nd May 2013 Mr Jenner wrote to the Commission informing them that he had resigned his directorship of P1 so that he will have no "management, ownership or control of any entities that deal with the donor Gift Aid claims". What he did not state was on that same day P2 had replaced P1 as a partner and that P2 was owned and controlled by his business friend Mr Groves. It is also somewhat disingenuous because *even if* he no longer

manages owns or controls any of those entities in form, he is still working for HNWTAP advising the donors and coordinating their tax claims. This, by any measure, amounts to having an influence over the affairs of participants in the donors' claims.

204. The provision of accurate information to the Commission is part of the duties and responsibilities of a charity trustee when administering the Charity. In our judgment even when viewed in isolation the provision by Mountstar of inaccurate and misleading information to the Commission in the BWB letter constitutes serious mismanagement. It is also misconduct because a charity trustee is under a duty to provide accurate information particularly during the course of an investigation. Mountstar did not properly establish and represent the facts nor fully and frankly declare information relevant to the first investigation. When viewed in the context of the way in which Mountstar has dealt with provision of information as a whole, the seriousness of this aspect of mismanagement and misconduct is underlined.

205. We are again conscious that the allegation of provision of inaccurate and misleading information did not fully emerge until during the course of Mr Jenner's cross-examination, when he gave evidence contradicting and elaborating upon that which had been stated in the 26th October 2011 letter. For the reasons already stated, we do not consider that this causes either injustice or unfairness to Mountstar.

206. Lateness in providing information to HMRC and incurring penalties. In summary, Mountstar failed to provide information requested by HMRC for almost eight months (4th September 2012 to 26th April 2013) which triggered £300 and £3,420 penalties. Two statutory notices (4th September and 19th December 2012) requesting information were ignored. Four deadlines were broken despite Mountstar's assurances that the documents would be provided. In evidence Mr Jenner said the documents were readily to hand and could have been provided to HMRC in time.

207. A Charity, like any other taxpayer, is obligated to comply with requests from HMRC. Unlike any other taxpayer (who can decide what to do and how to spend their own money), as we have said, the charity trustee must consider how to respond to HMRC'S notices and whether delay and incurring penalties would be in the best interest of the Charity *i.e.* would an ordinarily prudent man of business break deadlines and run up penalties which could be avoided by providing the documents?

208. That question would have to be considered in a wider context. By this stage it was known that HMRC had opened the inquiry into the gift aid claims and was requiring information by statutory notices. A prudent trustee would or ought to review the position and consider the best way forward for the Charity. One issue for consideration would be how best to advance the claims so as to receive the money from HMRC as quickly as possible especially as almost three years had passed since completion of the first five "rounds". Another would be whether the penalties should be avoided by providing the information, when most of the Charity's modest cash was already earmarked for charitable grants which the Commission had been pressuring them to make.

209. Given that there had been no proper consideration of the Scheme or any independent due diligence carried out in 2010, a prudent trustee would or ought to also have considered the

efficacy of the Scheme as a whole. This would also include, particularly after *The Times* article, a consideration of whether the Charity's continued involvement in the Scheme was suitable given the matters raised in that article and the adverse publicity. The actual or potential conflicts of all directors would have to be fully disclosed, and Mountstar would have to have required the fullest of disclosures from them. Any conflicted director would have to have stepped aside from the decision-making process. Whilst Mr Jenner did not, in breach of his duties to Mountstar to observe the Conflicts Policy, volunteer the information, there is no reason to suppose that he would not have had he been pressed by Mr Mehigan and Mr Stones, which they should have done.

210. This would involve Mountstar carrying out essentially the same exercise which should have been carried out back in January 2010 and adopting the last batch of "rounds" as outlined above, with the knowledge that all of the "rounds" had now been executed and the Charity had lodged its claims for gift aid relief so had embarked upon the journey of securing gift aid. Having got itself into that position, a decision would have to be made on (a) whether to withdraw the gift aid claims (which would not prevent the donors from continuing their claims), (b) whether to continue the gift claims, and if so (i) whether the Charity had access to resources to take steps to progress the claims expeditiously or (ii) whether it just had to sit behind the donors claims, passively leaving it to Mr Jenner.

211. In the end it was Mr Jenner who made all of the decisions about how to deal with HMRC's requests, not the other two directors. All of the correspondence is with him. He is the only one who has given to explain Mountstar's dealing with HMRC. Mr Mehigan and Mr Stones were so disengaged from discharging their duties as directors of Mountstar that they just allowed Mr Jenner to "get on with it" without any or any proper consideration of the issues then confronting the Charity. Having chosen to act by its sole director Mr Jenner, who was as conflicted in September 2012 and subsequently as he was during the ten "rounds" in 2010 and before, Mountstar had effectively placed itself into a position whereby it was enthral to third parties and unable to act properly as trustee of the Charity.

212. In our judgment, this amounts to serious mismanagement. First, acting by the sole and seriously conflicted director. Secondly, not properly considering how to deal with the narrow issue of HMRC notices. Thirdly, not considering and reviewing on-going involvement with and progression of the gift aid claims afresh. Fourthly, in effect relying upon the skill and expertise of Mr Jenner in handling matters with HMRC, from which it inexorably follows that these decisions and the strategy was not taken independently of the influence of Mr Jenner.

213. This is illustrated by Mr Jenner's evidence. In his witness statements he says that as a director of Mountstar "I" knew that (a) a delayed response would have no impact on the Charity's gift aid claims or on the donors' repayment claims; that (b) the Charity would never be repaid until the donors' claims had been proved; and that (c) any penalties would not place the Charity's funds on risk. Later on he says that "I" believed (d) that HMRC already had the requested information and that it would not help in determining the donors' claims. (b) is, as counsel conceded, demonstrably wrong, but it is something upon which Mountstar had taken no advice independent of Mr Jenner. (a) and (d) indicate that Mr Jenner was treating the interests of the donor and the Charity as the same, when they were not. (c) is only right if Mr Jenner had already decided to use not-charitable funds to pay the penalties – but that leads to a further question of why would anybody, acting reasonably, run up penalties which could be so easily avoided?

214. Mr Jenner was unable to provide any satisfactory reasons for the delays. He may be right that it is not uncommon for HMRC deadlines to be missed, but the delay here was of a different order and being done by a charity trustee who had no need to. He may well have been busy dealing with the press following *The Times* article on 31st January, but that cannot explain breaking HMRC deadlines on the 16th November 2012 and 1st February 2013. Any concerns he may have had about taxpayers' confidentiality are immaterial as they were not raised until well after expiry of the 1st February deadline.

215. We find that Mountstar (acting by Mr Jenner) decided to delay responding to HMRC and run up penalties because it was in the interests of the donors to do so. One of those benefits was that any delay in conclusion of the tax investigation for perhaps as long as seven years would benefit those donors who had already deducted their claims to higher rate tax relief in their self-assessment forms and would therefore enjoy the use of that money for all that time even if the claim was ultimately unsuccessful. There may well have been other reasons too. We can only infer from Mr Jenner's approach that there were rational reasons which can only have benefitted the donor clients otherwise the Charity would have just provided the information which was readily available to HMRC.

216. We should add that there never has been any explanation as to why submission of the Charity's gift aid claim for 2009/10 was delayed until 5th September 2011 and the one for 2010/11 to 1st February 2012 save to ensure, as we understand it, that the donors' had submitted all their claims to higher rate tax relief first. We are driven to the conclusion that the delay is an example of a conflict in action rooted in how the Scheme proposal was structured and which subordinated the Charity's claims and receipt of the gift aid to that of the donors.

217. Mr Jenner, and Mountstar. On a more subtle level, when acting as director in discharging Mountstar's duties to handle the HMRC requests for information Mr Jenner in our judgment was constitutionally incapable of viewing those duties through the lens of a charity trustee, acting as an ordinary prudent man of business, rather than through the lens of a skilled tax avoidance expert used to dealing with HMRC for high net worth individuals. This was evident in his failure to provide information to HMRC which triggered the penalties. He was unable to give any sensible explanation at all and, as we find, the only rational explanation is that he preferred the interests of the donors to those of the Charity. To him, as a tax avoidance tactician, his actions and responses were second nature, normal, acceptable and par for the course. What did running up a few thousand pounds in penalties matter when the fees ran into millions?

218. Another example is the gift of his share in HNWTAP to the Cherry Cake beneficiaries. He was quite clear that he and his civil partner were excluded from the trusts to ensure that so far as HMRC was concerned neither could benefit as part of the tax planning of his very complex personal tax affairs. But what he could not see, simply could not understand, was that that did not resolve the issue of indirect conflict of interest, the Charity's Conflicts Policy itself (which he was instrumental in adopting) flagging up that indirect financial benefit by family members was not permitted. His fixed mind-set, and therefore that of Mountstar's when acting by Mr Jenner handling the HMRC requests, was and is that of a sophisticated client-facing tax adviser, unable to grasp and embrace the quite different duties imposed upon a charity trustee, unable or unwilling to accept that some of his actions and responses are incompatible with the fiduciary duties of a charity trustee.

219. The same approach and inherent conflict is to be found in Mountstar's communications with the Commission which we have just been dealing with. When responding to the Commission's requests, it was in the interests of the donors to provide as little information as possible so as not to run the risk of undermining the Scheme and the apparent independence of all participants within the Scheme. That was also of immediate personal interest to Mr Jenner as it was he who caused the Charity to execute five further "rounds" of the Scheme from June 2010 onwards which earned HNWTAP (which he owned) a further £324,000 fees. Those duties and financial interests conflicted with the duty of Mountstar to cooperate with and provide accurate information to the Commission.

220. It was at this time that by letter dated 4th June 2010 Mountstar (by Mr Jenner) gave the Commission what we regard as clear written assurances that the Charity would not embark upon further rounds of the Scheme, which was a one-off *ad hoc* fundraising opportunity only available before 5th April 2010. Mr Jenner has said that those assurances were given during a meeting with the Commission on 6th July 2010 but the Commission misunderstood that he had said that the Charity would not embark upon any further *other similar* schemes not *the Scheme* itself.

221. Whilst this was not fully explored during the hearing, in our judgment properly and fairly read Mountstar's letter makes clear that no further "rounds" of the Scheme *itself* would be run, written as it was at a time when Mr Jenner did not appreciate that new "rounds" were possible. It was against that background that it was erroneously represented in BWB's 26th October 2011 letter that Mr Jenner had divested himself of any share in the income or profits of HNWTAP on 18th June 2010, a critical date being just three days before the last batch of "rounds" started to be run on and from 21st June 2010.

222. Blank cheques. Five blank cheques signed by Mr Jenner and Mr Stones were found by the Interim Manager in the safe. This was in breach of the internal financial policy which Mountstar had adopted in respect of the Charity "to provide automatic 'double check' on all financial transactions conducted within" the Charity. The cheque payment policy provides, in accordance with Commission guidance:

> "The bank mandate … shall require at least … two officers of a corporate trustee as signatories on any transaction. At least one of those signatories must not be the person authorising the actual expenditure.
>
> "No person (who is authorised to sign cheques) shall at anytime sign blank cheques…
>
> "All cheque expenditure must be recorded immediately in the cash book and noted with the relevant cheque number, nature of payment and payee. The recording must be made by the signatories of each relevant cheque.
>
> "No signatory of a cheque may sign a cheque without documentary evidence of the nature of the payment, e.g. invoice/grant authorisation."

223. In evidence, Mr Jenner accepted that the policy had been breached, but said that the cheques were locked in the safe to which only the three directors had access and they trusted each other. He said he had signed them at the end of March 2013 at a time when he was not sure whether the intended grantees would still be willing to accept the charitable grants from the Charity in the light of recent publicity and at a time when the Charity was under some pressure to make the grants having previously told the Commission they would make the

payments by financial year ended 31st March 2013. He said that he had in fact signed seven blank cheques, leaving Mr Stones to fill in and sign them once the grantees had said they would accept the cheques, and two of them had been filled in and paid appropriately.

224. We do not accept that these can simply be shrugged off as something which charity trustees do "hundreds of time every year" as Mr Smith submitted. If they do they should not, not only because it is imprudent but also, in this case, because it breaches a documented policy. In our judgment, these and Mr Jenner's explanation are acts of serious mismanagement for three reasons, and are further illustrations of his inability to discharge his duties in any way other than through the prism of specialist tax advisor where the significance of this sort of thing may well be different.

225. First, they indicate that Mountstar certainly by Mr Jenner and Mr Stones (the majority of Mountstar's then directors) do not understand or have no real regard for the policy (which they themselves adopted for the Charity) or the reason behind the policy, namely, to safeguard Charity money from the risk of unnecessary loss and ensuring that payments are only authorised after the amount and recipient have been confirmed.

226. Secondly, they indicate a disregard for the authorisation and record keeping provisions thereby undermining the integrity of the Charity's record keeping and audit. If blank cheques are signed the signatory has no idea whether it will be paid to a duly authorised grantee and can not record and sign the cash book. If this is done at a later stage, the auditor will be proceeding on the false premise that all is in order and the internal controls are being observed when they are not. Perhaps presaging this point, one of the duties the Interim Manager is charged with is to review the accuracy of its grant giving records.

227. Thirdly, if it was Mr Stones who was going to sign and fill in the cheques later, why did Mr Stones not wait until he knew the payee and then fill in and sign? Or if it was Mr Jenner who was to fill in the name, likewise? The fact that both signed the blank cheques in our judgment casts doubts on the reliability of Mr Jenner's explanation.

Protecting Charity property and securing its proper application – section 76(1)(b)(i) and (ii)

228. The Charity's present property consists of its reputation, its right to pursue the gift aid claims and its right (if any) to sue Mr Jenner and HNWTAP to disgorge them of any fees or benefits received and any contingent fees payable if the gift aid claims succeed.

229. For reasons which by now will be clear, Mountstar is unable or unwilling by its present directors to properly discharge its duties as charity trustee. On the basis of the evidence before us, all roads lead to Mr Jenner. It is he who advises and coordinates the donors' claim and makes all of the decisions in relation to the Charity's gift aid claims. It is he who controls or is able to sufficiently influence each of the entities historically and presently involved in the Scheme. Mr Stones has resigned and there is a risk that Mr Mehigan is at least potentially conflicted by his personal history or relationship with Mr Jenner.

230. From his evidence before us, Mr Jenner is either unwilling or unable to fully and frankly identify the manifold and manifest conflicts of interest inherent in the operation of the Scheme he constructed, which in substance rules him out of any involvement as director of Mountstar so long as it is charity trustee. Which leaves Mr Mehigan who evidently is so dis-

engaged from and disinterested in the interests and management of the Charity that he has neither given evidence nor, so far as we are aware, attended court.

231. We observe here that it has been most unhelpful that Mountstar has chosen to rely upon the apparently only conflicted director, Mr Jenner, to handle these proceedings and give evidence on its behalf. This has put the Tribunal in the somewhat odd position of only hearing evidence from the conflicted director who simply could not shed light upon how the other directors have made their decisions. Whilst Mr Mehigan and Mr Stones could not have anticipated the questioning relating to Harry Associates, it would have been very helpful to hear their evidence in relation to the general issue of conflicts of interest and also the HMRC and blank cheques issues.

232. There is not a commonality of interest between the donors and the Charity except on the superficial level of both benefiting if the Scheme succeeds. Private donors can act as they want – prudently, recklessly, hands-on, hands-off, leaving the management of their affairs to others, influenced or not influenced by another, or otherwise. The Charity can only act consistent with the standards of an ordinary prudent man of business, independent of the influence of anyone interested in the transaction (Mr Jenner).

233. Having adopted the Scheme and now made the gift aid claims, the Charity has to consider whether to press those claims given that HMRC has challenged them and how to co-operate with HMRC. Whether to pursue the claims and how to handle requests from HMRC for information and also how to deal with inquiries from the press and possibly other regulatory bodies will impact on its reputation, a key asset of any charity. At some stage it may need to consider whether to sue Mr Jenner/HNWTAP for disgorgement of the benefits already received. Self-evidently, Mountstar at any rate with its present directors can do none of this.

234. For those reasons and pending the outcome of the statutory investigation, it in our judgment is both necessary and desirable to appoint an Interim Manager to protect the property of the Charity.

Proportionality – continuation of the Interim Manager

235. The respective arguments. Mountstar submitted that the Commission acted disproportionately in opening the inquiry on 12th April 2010 as a precursor to the appointment of the Interim Manager on 26th April, not least because the appointment of an interim manager is a "Draconian" measure effectively seizing, albeit temporarily, control of the Charity from the duly appointed trustee. As Ms Russell accepted the Commission had no concern that Mountstar would dispose of documents or dissipate Charity assets. Meetings had been agreed and were to be scheduled and were in fact scheduled before 26th April 2010.

236. It was submitted that at the very least the Commission should have waited until after that meeting to decide what to do. It had "jumped the gun". It had sufficient statutory powers to support a non-statutory investigation *vide* it can compel people to give evidence (section 47(2)); obtain evidence under oath or with a statement of truth (section 47(3)); and can direct the Charity to take specific action (section 84); and can require documents under section 52.

237. Further, there is next to nothing for the Interim Manager or indeed Mountstar to do pending the outcome of the donors' claims to HMRC, which makes the costs of appointing the Interim

Manager quite disproportionate even though borne at public expense. Far better to keep Mountstar in the saddle, "there being no reason to suppose that [it] cannot be expected to behave properly if allowed to run the Charity" having "properly managed" it in the past and utilise Mr Jenner's tax expertise to progress the gift aid claim.

238. The Commission submitted that the continuation of the appointment of the Interim Manager is proportionate particularly given what is now known about the Scheme, Mr Jenner's interests and the conflicts. The appointment of the Interim Manager is a temporary protective measure which ensures proper co-operation with HMRC and that no steps are taken in the handling of the gift aid claim which could be to the dis-benefit of the Charity and that any decisions are not tainted by conflicts of interest. There is no material disadvantage to the Charity because, as Mountstar submits, there is "nothing" to do save for process the gift aid claims.

239. Discussion, and decision. Mountstar is, for the reasons already stated, presently incapable of acting consistent with the fiduciary duties of a charity trustee due to the involvement of Mr Jenner and also the dis-engagement of Mr Mehigan. It has no un-conflicted director capable of addressing the issues now facing the Charity. Mountstar's submission is in and of itself demonstrative of its inability to even consider the possibility that the Scheme might need to be examined by someone with true independence, and might be of questionable appropriateness for any charity to enter into, let alone a Charity whose trustee is controlled or irresistibly influenced by the same person who has controlled and influenced other participants and promoted the Scheme to the Charity.

240. There is much to be done. The gift aid claim must be re-visited afresh, fully investigated and decisions made about whether to continue with it and how to handle any further HMRC inquiries. The role of Mr Jenner and others involved and any possible claims for recovery of the fees and benefits received by him and others needs to be investigated and considered. The press and the Commission must be handled to salvage what remains of the Charity's reputation.

241. Some of these are for the statutory inquiry, some for the Interim Manager. In our judgment, the Interim Manager should continue in post to hold the ring to protect the Charity and its property from unnecessary risks and carry out the functions with which he has been charged pending the outcome of the inquiry.

242. Looked at more generally, and addressing the issue of proportionatality to both the opening of the inquiry and the appointment of the Interim Manager, it is in our judgment overwhelmingly in the public interest for there to be a full and proper inquiry by the Commission or by someone appointed to do so on its behalf under section 46(3) of the Act during which time the Interim Manager should remain in post.

243. In this regard, we repeat and incorporate the observations made below about the approach of the Commission. In our judgment, the inquiry should not be confined to the Scheme and all that that entails but should also revisit the question of whether the Charity was established for public benefit or to serve or predominantly serve the private interests of HNWTAP, Mr Jenner, the donor clients and others.

Residual discretion

244. Had we decided that the Commission had acted unlawfully we would have had a residual discretion to declare the opening of the inquiry unlawful but also to refuse to quash the decision and allow the Interim Manager to continue. Had we reached that decision, for reasons which will be clear, we would still have refused to quash the opening of the inquiry or the continued appointment of the Interim Manager, both of which are powerfully in the public interest to keep on foot.

Generally – the Commission

245. The approach of the Commission during the first investigation and also the statutory investigation and maintained before this Tribunal is that the legitimacy of the Scheme is for HMRC to investigate and determine. Such matters are not part of the remit of the Commission, which must sit back and await action by HMRC. It was on this basis that the Commission dis-engaged from the Charity in March 2012 and even now will not investigate that aspect of the Scheme, preferring to focus on issues of charity governance such as mismanagement of conflicts of interest and so on.

246. This approach, in our judgment, is in error. Whilst it is not the role of the Commission to *adjudicate* upon the tax efficiency of these sorts of fundraising schemes *per se*, it is the role of the Commission to promote compliance by charity trustees with their legal obligations in exercising control and management over the administration of charities and their accountability to donors, beneficiaries and the general public. One aspect of those overarching objectives is to ensure that charity trustees act in accordance with the standards of ordinary prudent men of business and independently of any conflicted party. If considering embarking upon an untested tax avoidance fundraising scheme, the charity trustee must carefully examine all aspects of it, fully understand it, require all directors to properly and fully disclose and declare their interests and take any necessary independent advice.

247. To discharge its statutory duties and fulfil its role as sole regulator of charities, the Commission must "look and see" if the charity trustee has discharged those duties. That necessarily involves a careful understanding of the scheme and the parties involved. It cannot do that without understating the scheme within the wider setting of the gift aid law. If the charity trustees have properly examined the fundraising scheme and taken appropriate independent advice, the chances are that that will conclude the Commission's interest.

248. However, as we have said, there may be circumstances where the Commission reaches the conclusion that even where the "process" (the procedure by which decisions are made) is satisfactory, the decision itself is flawed or one which an ordinary prudent man of business would not have made. In that unusual case, the Commission has the power to intervene. Putting it colloquially, even if the charity trustees have asked the "right" questions and taken into account the "right" factors, the Commission remains entitled to conclude in a suitable case that the charity trustee has reached the "wrong" answer *i.e.* it is a decision which no ordinary prudent man of business would reach acting independently of any conflicts of interest or loyalty.

249. This is not to second-guess charity trustees but to promote compliance with their legal obligations as well as their accountability to donors, beneficiaries and the general public. In highly complex novel untested tax avoidance fundraising schemes such as the Scheme

(especially a scheme involving very large sums of public and/or charity money) it behoves the Commission, and it is under a statutory duty, to rigorously and vigorously analyse and scrutinise the scheme itself and each step in and of the transactions and of the entities and individuals behind them, getting to the bottom of precisely who is involved and why, what is the relationship between them (corporate, trust, partnerships and natural persons) and what individuals are involved, drilling down below the legal façade if necessary to understand and see whether it is consistent with the substance, what their real functions are and where the money actually comes from and goes to. This may require looking at source documentation behind each of the entities and any agreements and using external experts.

250. A critical, sceptical eye should be cast over all of the documentation to consider whether it means what it says or is to conceal the *actualité*, to establish whether the substance is consistent with the legal form. Searching questions should be asked of key individuals to test consistency. This is not to pre-judge the scheme or those involved but is to discharge the statutory objectives of the Commission as regulator of charities, which include maintaining public confidence in charities and the regulator and also ensuring that a charity and its privileged charitable status and access to funding opportunities such as gift aid are not being used to advance the private interests of those involved, even if the charity benefits in financial or other terms. If this is not done, and only the Commission is charged with regulating charities, public trust and confidence in charities and the regulator will be eroded.

251. During the first investigation the Commission was transfixed by its misconception that tax matters were not for it and also on whether or not conflicts of interest had been properly managed rather than focusing on the central issue: has the trustee, Mountstar, acted as an ordinary prudent man of business, independent of any conflicts, and discharged all of its duties owed to the Charity? Unfortunately, this error was carried through to the decision to re-engage with the Charity and to the submissions before us, the Commission being unwilling to open an inquiry unless there was something new.

Conclusions

252. In conclusion, we dismiss both applications.

ANNEXURE

CONFLICTS OF INTEREST

Extracts from Commission's Guidance on Conflicts of Interest

"2. What is a conflict of interest and what issues does it raise?

"A conflict of interest is any situation in which a trustee's personal interests, or interests that they owe to another body, may (or may appear to) influence or affect the trustee's decision making…

"3. What does the law say about conflicts of interest?

"The law states that trustees cannot receive any benefit from their charity in return for any service they provide to the charity unless they have express legal authority to do so…

"The rule that a trustee cannot receive any benefit from his or her charity without explicit authority is based on the principle that trustees should not be in a position where their personal interests and their duty to the charity conflict, unless the possibility of personal benefit from which the conflict of interest arises is transparent. Transparency is achieved by requiring explicit authorisation of the benefit, and by ensuring that any particular conflict of interest is properly and openly managed.

"It is the potential, rather than the actual, benefit from which the conflict of interest arises which requires authority. In order to avoid a breach of trust and to ensure transparency, authority is required where there is a possibility of benefit. This will avoid accusations of impropriety, which could in turn have a damaging effect on the charity's reputation…

"4. How do I identify a conflict of interest?

"Conflicts of interest may come in a number of different forms:

- direct financial gain or benefit to the trustee, such as: ... the award of a contract to another organisation in which a trustee has an interest and from which a trustee will receive a financial benefit…
- indirect financial gain…
- conflict of loyalties, such as where a trustee is appointed by the local authority or by one of the charity's funders, or where a friend of a trustee is employed by the charity…

"We expect trustees to be able to identify conflicts of interest when they arise and to ensure, if they receive a material benefit as a result of the conflict of interest, that the benefit is authorised…

"7. How can conflicts of interest be managed effectively?

"All trustees need to be alert to possible conflicts of interest which they might have and to how they can minimise their effects. A key aspect of minimising the effects of conflicts of interest is to be open and transparent about such situations when they arise. We recommend that all trustees advise their charity of any actual or potential conflicts of interest of which they are aware, as soon as they arise.

"We recommend that charities have a policy on how they will deal with any conflicts which arise as a result of the work which the charity undertakes. A policy can include guidance on the procedures to follow when a trustee is subject to a conflict of interest, such as:

- the removal of the trustee concerned from the decision making process
- managing the conflict of interest once a decision has been made
- recording details of the discussions and decisions made

“We also recommend that trustees establish a register of interests. In recording all their other interests openly, any actual or potential conflicts of interest can be identified more easily. The register of interests should be regularly updated.

“It is good practice at the beginning of a meeting for every charity trustee to declare any private interest which he or she has in an item to be discussed, and certainly before any discussion of the item itself. Simply declaring that a conflict exists and withdrawing from the discussion and any decision making will be all that is required if the trustee is not receiving any material benefit as a result of the conflict of interest. However, if a trustee is receiving a material benefit this will need authority…

“We strongly recommend that all charities disclose benefits received by trustees in their report and annual accounts. This can help protect trustees from accusations that they are benefiting in a hidden way. It is a legal requirement for charitable companies, those non- company charities with a gross annual income or expenditure over £100,000, and smaller charities which prepare their accounts on an accruals basis, to disclose benefits to trustees…

“8. What are the most common situations in which conflicts of interest can occur?

“There are a number of situations in which conflicts of interest commonly occur, and of which you, as trustees, should be aware.

“Direct financial gain or benefit to a trustee

“Payment of trustees

“The most common type of direct financial gain to a trustee is the payment of a trustee...

“In the case of a trustee also being employed in a separate post within the charity, or a trustee being paid for a service provided to the charity, the conflict of interest may result in a liability to repay salary or other related benefits. It should not be assumed that such conflict can be overcome merely by the person concerned resigning as a trustee, either before or after taking up the post. The only instance where authority may not be needed is where, practically, the trustees can show that there is no conflict of interest. In our view, this is confined to the fairly narrow circumstance where the trustee concerned:

- has had no significant involvement with the trustees’ decision to create or retain the post, or with any material aspect of the recruitment process
- where that person resigns as a trustee in order to apply for the employed post in advance of a fair and open competition for it

“Indirect financial gain or benefit to a trustee

“The most common situation in which a trustee will receive an indirect financial benefit from the charity is when a close relative, such as a spouse or partner, is employed by the charity. By being involved in the appointment or payment of their spouse or partner to a paid position within the charity, the trustee could be seen to benefit, at least indirectly, from the appointment and the resulting payment.

“If the trustee is wholly or partially dependent upon the financial support of his or her spouse or partner, the payment could be said to directly benefit the trustee. Even if the trustee has other income, if he or she and his or her partner or spouse are living in the same household, and are reliant on joint income and share joint expenses, the payment received contributes to the "joint purse" and the trustee is receiving some benefit through the contribution to these expenses.

“Despite the fact that the payment is not being made directly to a trustee, the payment will still need to be authorised, and if there is no suitable power in the charity's governing document, the trustees will need to apply to the Commission for the necessary authority…

“Non-financial gain

“Conflicts of loyalty

“Trustees should bear in mind that when they are dealing with the business of the charity, their overriding duty is to act in the best interests of the charity. There may be situations in which a trustees' loyalty to the charity conflicts with their loyalty to the body which appointed them, to another charity of which they are a trustee or to a member of their family. Such conflicts of loyalty will not stop anyone from being a trustee, but they can occasionally cause conflicts of interest.

“Any trustee who has a conflict of loyalty should declare this and it should be included in the register of interests. They should also declare the interest at the beginning of any meeting at which an issue is to be discussed that is subject to the conflict and should take no further part in the discussions on the issue. This will help to ensure transparency and avoid any accusations of impropriety.”

Extracts from the Charity’s Conflict of Interest Policy

Mountstar by its directors Mr Jenner and Mr Mehigan and possibly Mr Stones as well adopted a Conflict of Interest Policy (the “Conflicts Policy”) which was broadly reflective of the Commission’s Guidance. Although unclear, we understood from Mr Smith that it was adopted before approval of the Scheme on 30th January 2010. The material parts are as follows:

“**Introduction**

“Under Charity law and out governing document, trustees cannot receive any benefit (broadly defined) directly or indirectly in return for their servies or otherwise unless explicitly authorised…

“**1. Declaration of Interests**

“The present policy relates to issues affecting the sole Trustee (Mountstar (PTC) Limited) and officers of Mountstar (PLC) Limited who are in decision-making or influential roles…

“There are five occasions when it is recommended that potential conflicts be declared via the relevant form… and/or in writing to the trustees: …

(c) semi-annually after each trustee meeting;

(d) when anything significant changes and/or in relation to any transaction that The Cup Trust is to enter into: new matters should not await an annual declaration before being notified; and

(e) verbally at any meeting where specific relevant conflicts may arise.

“In relation to the remainder of this document the term “Trustee” shall include an individual trustee, a corporate trustee and an officer of a corporate trustee.

“**2. What type of interest needs to be declared**

“According to the Charity commission “A conflict of interest is any situation in which a trustee's personal interests, or interests which they owe to another body, and those of the charity arise simultaneously or appear to clash”… the issue is not the integrity of the trustee concerned, but the management of any potential to profit from a person’s position as trustee, or for a trustee to be influenced by conflicting loyalties. Even the appearance of a conflict of interest can damage the charity’s reputation, so conflicts need to be managed carefully.

“Relevant interests may be financial or non-financial; direct or indirect…

“Indirect financial interest may arise where such potential financial benefits accrue to a close member of the Trustee’s family, or even a friend, business partner or colleague, where their finances are interdependent… or where it could otherwise be perceived that such benefits could lead to a conflict of interest, i.e. by influencing the Trustee’s decisions other than in the best interest of the

Charity. .. It is the responsibility fo the Trustee to determine whether they feel a matter relating to a third party represents a potential conflict of interest and should therefore be declared…

“There are also issues associated with “conflict of loyalties” where another appointment or employment or association (of the Trustee or of a relative or friend) may be felt to influence the decisions of the Trustee in directions which may not be in the best interests of The Cup Trust. In particular, in this context, it is expected that other charity roles, as Trustee or employee or through other significant relationship, should be declared.

“Ultimately it is not possible to define all the circumstances which may lead to a potential Conflict of Interest. It is therefore the responsibility of each individual or corporate trustee (or officer thereof) to declare any matters which they feel may present actual or potential conflicts, or the perception of such conflicts. In exercising their judgment about which matters to declare, Trustees may seek advice.

“If in doubt about any matter, it is always better to make a declaration…

“The Declaration of Interest Form lists the categories of matter which should be declared in advance in case they may become sources of potential conflict of interest. These categories should also be declared for financially interdependent relatives or associates.

“The results should be complied into a Register of Interests…

“If it could be perceived that a matter could lead to a conflict of interset, the following matters need to be declared whether included in the form or not:

- all significant sources of income for the trustee…
- membershiop or board positions in other bodies…
- other employment, voluntary work and/or trusteeships…
- details of any relationship with any staff or potential staff members suppliers of services or funders or other trustee
- details of any relationship with any third party with whom you deal on a regular basis.

“These declarations would need to be expressed in such terms, and contain sufficient information to enable Trustees to determine whether a conflict is likely to occur in any particular instance, e.g. actual levels of income are not necessary but the name of the company or organisation which is a source of income would need to be declared.

“**3. Procedures in the event of conflict**

“In the event of a declaration of a matter of material financial benefit or interest arising from the charity itself, authorisation must be sought fo this benefit to be provided by the charity… [which] is likely also to require the explicit authorisation of the Charity Commission. In the event that such an interest is fundamental and regular, the Trustee should consider whether it is consistent with the best interest of The Cup Trust that they continue as a Trustee.

“In the case of indirect or non-financial benefits, or where there may be a perception of impropriety, or where a financial benefit has been authorised, a declaration iof interest should also be made at the start of any meeting of Trustees at which relevant matters are on the agenda, and the Trustee should offer to withdraw from any discussion or decision-making in respect of any matter in which a conflict of interest may arise. The minutes of the meeting should record any such declaration and the action taken in response.

“Should any Trustee become aware of any potential undeclared conflict of interset it is his or herm duty to inform the Board of Mountstar (PLC) Limited (acting as trustee of The Cup Trust) in the first instance and, if they do not feel the matter is being addressed to raise it at a Trustees meeting. If they feel it has still not been addressed they may seek guidance from the Charity Commission.”