Lehtimäki v Cooper: Duty and Jurisdiction in Charity Law

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Lehtimäki v Cooper[1] establishes for the first time that voting members of charitable companies are in a fiduciary relationship to their charity. They have a duty to further the purposes of their organisation. At the practical level, the case is authority for the proposition that judges can determine what the duty entails in a given case. Where the court provides them with a direction, voting members are not able to make a subjective assessment of the best way to further the duty of good faith. If a member threatens to disobey the court with her vote, then she threatens a breach.

The case is important both because it is conceptually innovative and because it has the potential, depending on how it is received by later courts, to impact upon large numbers of people. Independent voting members have varying roles depending on the constitution of the organisation, but they broadly hold the directors to account, acting as a decision-making body. In some charities, they will be only a small and select group of individuals, appointed for a specific skill set. By contrast, some other charitable organisations, such as the RSPB or the National Trust, have a mass membership.

This note assesses the model of fiduciary relationship developed by the Supreme Court, as well the likely extent of its future application. It then criticises the Supreme Court for its square focus on charitable companies and insufficient consideration of charitable incorporated organisations. Finally, it is seen that the case marks an expansion and solidification of a new judicial jurisdiction over charitable companies.

Background to the Case

Once a staple of the law reports, Charity Law decisions are now a rarity. Following the Charities Act 1960, which established a register of charities and placed the Charity Commission as its regulatory gate-keeper,[2] the role of the courts in developing the law has greatly reduced. There are under-used rights of appeal, in relation to certain Charity Commission decisions,[3] into the tribunal system. But the First-tier Tribunal (Charity) has a very scant case-load.[4] In this instance, faced with fresh points-of-law questions, the Charity Commission could not make a decision through its ordinary processes. Instead it permitted

[1] *Lehtimäki v Cooper* [2020] UKSC 33.
[2] S 4 Charities Act 1960. Now s 29 Charities Act 2011.
[3] Schedule 6, Charities Act 2011.
[4] For analysis of the tribunal system and blockages to the progression of cases, see, B Crumley & J Picton, 'Still Standing? *Cy-près* and Charitable Service Users in the First-tier Tribunal (Charity)' (2018) 82 *Conv* 262 – 279.

the case to enter into the main court system.[5] In turn, this provided a rare opportunity for high-level judges to consider the field in overview.

Sometimes small-scale events lead to substantial precedents. *Lehtimäki* flows from the consequences of a divorce. The Children's Investment Fund had been established as shared venture between Jamie Cooper and her former husband, hedge fund billionaire Christopher Hohn. Registered in England, it is one of the wealthiest philanthropies in the World with assets over $4bn.[6] Unfortunately, the couple suffered an acrimonious separation and decision-making in the organisation ceased to function effectively. To resolve this crisis in governance, the couple devised an unusual family deal. Cooper agreed to stand down from the board of directors, so long as the Children's Investment Fund paid over a grant of $360m to a new charity – since named Big Win Philanthropy – that she had founded.

This agreement might have been a satisfactory personal solution for the couple, but it caused extended legal problems. Charitable companies with independent voting members are not under the formal control of their management. In this instance, the grant to Big Win Philanthropy could not be brought about by the directors alone. The transfer is a payment to a connected person for loss off office, which required a resolution of the members,[7] as well as the prior consent of the Charity Commission.[8] There was only one unconflicted member able to vote and approve the transfer – i.e. Marko Lehtimäki, a university friend of the couple.

Lehtimäki took centre stage when he resisted a first instance direction from Sir Geoffrey Vos, the Chancellor of the High Court, to vote in favour of the transfer.[9] Wisely, he never revealed his preference in relation to his vote, but it must be suspected from his willingness to see the case progress to the highest levels of the court system, that he did not wish to make the transfer.

Marko Lehtimäki won in the Court of Appeal, where although it was held that he was a fiduciary,[10] the court still could not direct him as to how he should exercise his fiduciary discretion. Yet upon an appeal to Supreme Court by Jamie Cooper, Lehtimäki lost his right to subjective decision-making. He was directed to approve the grant on the basis that the court had determined that the resolution, which would resolve the dispute between Hohn and Cooper, would be beneficial as being in furtherance of the purposes of the troubled charitable company.

In the case, the interaction of the judicial opinions is unusual. Lady Arden's judgment is of considerable length and clearly intended to be comprehensive. However, on the core ratio, which is that Lehtimäki would be in breach of a judge-determined fiduciary obligation if he were to refuse to vote as directed, Lady Arden found herself opposing Lord Briggs and the majority in a lone dissent. Yet despite her dissent on the matter of breach, in relation to her

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[5] The Commission authorised proceedings under S 115 of the Charities Act.

[6] For critical analysis of The Children's Investment Fund, see, L McGoey, *No Such Thing as a Free Gift* (London, Verso, 2015) 99.

[7] Ss 217(1) & 215(3)(a), Companies Act 2006.

[8] S 198, Charities Act 2011.

[9] *Children's Investment Fund v Attorney General* [2017] EWHC 1379.

[10] *Lehtimäki v Children's Investment Fund Foundation (UK)* [2018] EWCA Civ 1605.

broader working through of the general principles of Charity Law, the majority still adopted conclusions derived from her exposition.

A New Model of Fiduciary Duty has been Developed

The first and most basic issue must be to define where the new fiduciary relationship is directed. As it has developed in *Lehtimäki*, the relationship is different in form from those owed to natural persons, such as the duty a solicitor will owe a duty to her client, or a trustee will owe to beneficiaries.[11] That interpersonal model makes little sense in the context of a charitable company, which is not a natural person. It is for this reason that court developed the duty as being owed to the purposes of the charity.

Charitable companies are legal persons established for the furtherance of legally defined purposes,[12] and so the establishment of a duty to those company purposes is an inevitable reflection of the structure and character of charity law. Yet this broad conceptualisation of the relationship in the case led only to a more difficult issue. It opened the door to the question of whether the new obligation to further the purposes is objectively or subjectively realisable.[13] This is a very important distinction. If the duty to further the purposes of the charity were to be subjectively realisable, then the court could not direct the decision-making processes of any particular member. The concrete manifestations of the duty (e.g. whether or not a specific grant is the best way to further an organisation's purposes) would be left up to the member to decide. The court would have to defer to her individual-level view. So long as the member made her decision in good faith, then the court would have to accept it.

The Court did not take that subjective tack. The Supreme Court decision in *Lehtimäki* is striking because, by a majority and departing from the position of the Court of Appeal, it holds that the duty of members can be objectively realised. The Supreme Court was prepared to make the abstract fiduciary duty objectively concrete. For this reason, it was possible to direct Marko Lehtimäki how to vote in line with a court-determined understanding of what his duty entailed. The court determined that it was his duty to vote for the transfer. To threaten not to vote as the court directed would be also to threaten a breach of fiduciary duty.[14]

The development of this objectively determinable duty was essential to the reasoning of the majority. It made it possible to develop a practical procedure for resolving the case, which has the potential to be used again in later decisions. This procedure, as it was developed by Lord Briggs,[15] requires a member to be adjoined to a case in circumstances where the directors have surrendered their own decision-making discretion to the court. Doing so, brings both the member and the directors under the purview of the court at the behest of the directors. Then, a judge can determine the duty of the member and compel both that the member obey the court and that the directors should accept the court-determined outcome.

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[11] See generally, R Pearce & W Barr, *Pearce & Steven's Trusts and Equitable Obligations*, 7th edn (Oxford, OUP, 2018) 672.
[12] For a long time the product of case-law alone, the catalogue of legal purposes is found in s 3, Charities Act 2011. All charitable organisations, whether incorporated or not, must conform with the list.
[13] *Lehtimäki* (n1) [232].
[14] *Lehtimäki* (n1) [228].
[15] *Lehtimäki* (n1) [223].

In this manner, the process binds together the directors of the company and its members. They must all follow the same direction. This is the case even though unity between the members and directors is not part of the ordinary governance structure in company law. Charitable companies have a dual structure which is comprised of members and directors, precisely because it is expected that those two organs might operate in tension with each other. This structural tension is in fact at the heart of the case. The reason that Marko Lehtimäki was required to vote in order to make the transfer is because the statute envisages him as acting as a 'check' upon the motives of the charity management. Or as Lord Briggs put the point: 'the obvious risk that directors may be swayed by inappropriate motives in deciding upon such payments...'[16]

In a concise but conceptually deep judgment, Lord Briggs presented a sophisticated line of reasoning to explain how these two organs of the company, which are separate and sometimes opposed, could be bound together. His position relies strongly on the new objectively realisable obligations of members towards the purposes of the charity. He reasoned, in the charitable context, that both the charitable members and the charitable directors are bound by exactly the same duty. Where the court determines the nature of the duty, it effectively unites the two organs into one. [17]

This approach is of significant interest at the level of principle. The reasoning puts clear blue water between the charitable company and the ordinary commercial company. In the commercial context it is well acknowledged that members have a right to resist the directors, and that they will likely vote in their own self-interest. This is because the commercial share is: 'a right of property which the member can in general vote as he pleases.'[18]

The contrast to the commercial trading company, brought out by *Lehtimäki*, is that charitable members can be made to vote selflessly, and even more significantly, that the court can determine what that selflessness might mean in practice. The essential practical point for Lord Briggs was once a court has concretely decided what the best fiduciary action is – e.g. that there is a duty to make the transfer – then the fiduciary ought not to have a subjective right of veto. [19]

Yet a problem with Lord Briggs' view is that the court-led realisation of an otherwise abstract duty will not always come from a position of knowledge. The court is not necessarily better informed than a member who is well acquainted with the workings a particular charity. Nor can the court ever properly understand the full human context for decision-making within a particular organisation. In consequence, there will be cases where the practical realisation of the duty of good faith should be left in the hands of the individual member for the simple reason that she will be better informed.

This problem in relation to knowledge distribution can be illustrated from the facts of *Lehtimäki* itself. It cannot be thought to be objectively obvious or beyond question that the

[16] *Lehtimäki* (n1) [209].
[17] *Lehtimäki* (n1) 222.
[18] Per Lady Arden *Lehtimäki* (n1) [88].
[19] *Lehtimäki* (n1) [218].

grant was the best way to further the purposes of The Children's Investment Fund. This was acknowledged in the litigation. At First Instance, the Chancellor of the High Court, deciding that the transfer should be made, stated that: 'I am not saying that no reasonable trustee or fiduciary could disagree with my view.'[20] The transfer of $360m out of the organisation comes at a significant and measurable cost to the practical furtherance of its purposes. It is not possible to know objectively whether or not a defeat of that transfer would have led to a solution which better protected the interests of the fund, such as a resignation of a director.

The question as to where knowledge is best found should be kept in mind when reading the dissenting part of Lady Arden's judgment. She opposed the development of an objectively concretisable duty as the basis for breach and compulsion. In order to do so, she drew attention to what she considered to be a long-standing 'non-intervention principle'. She said: 'the court will not seek to intervene or hold [the trustee] liable if he turns out to have been wrong in fact.'[21] This approach would mean that so long as Marko Lehtimäki was acting in good faith, then there would be no breach of his duty.

This is an important conceptual debate, but it might be thought that the practical consequences of the case are more important than their theoretical underpinning. With this in mind, it should be noted that Lord Briggs attempted to take the sting from the tail of the directed voting procedure. He emphasised that that there would be no negative consequences for Lehtimäki. If the member did not feel able to vote as directed, then all he would have to do is resign in order to avoid the breach. The judge said expressly that: 'no-one is suggesting that Dr Lehtimäki should punished.'[22]

On the specific facts of the case, Lord Briggs is clearly correct, but at the more general level, Lord Brigg's practical assurances as to non-punishment ought to be read with caution. While the facts of *Lehtimäki* appear unusual and context-specific, the judgment, being the first extended exposition of charity principles for a very long period, is likely to have far-reaching implications in the voluntary sector. When the case is considered as a precedent, or as a judgment that will have a life in future decisions, then the consequences of the objectively realisable duty ought to be brought into centre view. It is at the core of the ordinary concept of fiduciary status that the fiduciary will be held to account when they are in breach. It is not possible to separate the fiduciary role from the negative consequences of breach.

With this in mind, the key practical question ought not to be whether or not there is a risk of negative consequences for fiduciaries, as they are part and parcel of the concept of fiduciary obligations. Instead, the most important point is whether the new objectively realisable duty for members has been developed in such a way that it is likely to be unduly burdensome for members. Key to this issue, is that the new duty of loyalty is not unbounded. Insofar as Lady Arden's exposition of the fiduciary relationship was adopted by the majority, a highly tailored type of duty has been developed, which it is possible for members to adapt. It is a duty that can be curtailed.

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[20] *Children's Investment Fund* (n7) [135].
[21] *Lehtimäki* (n1) [100].
[22] *Lehtimäki* (n1) [233].

Although they rejected her opinion on subjectivity and breach, Lord Briggs and the majority still broadly accepted Lady Arden's wider working through of key principles.[23] It is true that Lord Briggs said that his opinion on objectivity and the applicability of breach depended on: 'no deep consideration of the law of trusts and charities of the type which both the parties and my Lady have considered it necessary to undertake,'[24] but he nevertheless expressly adopted her summary paragraphs, themselves linked to an extended analytical overview of the law of charity.

Lady Arden's understanding of the member's duty is of considerable practical interest. She put forward what she described as a contract-and-statute approach.[25] By this term, the judge meant that the scope of the new fiduciary duty must, in any given case, be interpreted in the light of what she called the, 'mosaic',[26] of existing charity and company law provisions, as well as the constitution of the particular charity in question. Lady Arden's contract-and-statute model permits members to alter the constitution of their own charity so as to make the boundaries of members' duties explicit.

This view is itself in line with wider equitable principles. It is already well established that: 'fiduciary duties [can] be diminished by an appropriate means and to an appropriate extent.'[27] So, for example, in this particular context, the no-conflict rule could be circumscribed to a so that members might benefit from use of the charitable services themselves, or from fundraising inducements and special offers. The ability to contract out of fiduciary obligations is of central importance to the future development of the law. If Lady Arden's contract-and-statute approach finds wider approval, it will mean that that alterations of the company constitution will enable members to take shelter from obligations imposed upon them by their new fiduciary relationship to the purposes of the charity.

It is not yet possible to tell how the future law will develop. *Lehtimäki* should be understood as setting out an initial framework for the fiduciary duties of the members of charitable companies, but many issues are left unresolved. Notably, the ruling in *Lehtimäki* gives no guidance on the extent to which members of mass membership charities, such as the National Trust, are subject to an objectively realisable fiduciary duty, or whether they can be compelled to vote in a certain way by the court. Lord Briggs avoided the question entirely, saying: 'I would prefer to leave these issues to a case where they might affect the outcome.'[28] His reticence is understandable. The facts of *Lehtimäki*, where the vote of only a single member was in question, must be thought to be the wrong terrain on which establish any rule about charities which might have very many thousands of members.

Even accounting for the inherent flexibility in Lady Arden's contract-and-statute model, if the reasoning in *Lehtimäki* was ever stretched to cover mass membership organisations, it would find itself in need of considerable clarification. As a general position, the larger the charity,

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[23] *Lehtimäki* (n1) [205].
[24] Ibid.
[25] *Lehtimäki* (n1) [200].
[26] *Lehtimäki* (n1) [65].
[27] *Lehtimäki* (n1) [82]. See also, *Armitage v Nurse* [1997] EWCA Civ 1279.
[28] *Lehtimäki* (n1) [215].

the less selfless the membership,[29] and in turn, the less appropriate it is to start with a *prima facie* duty of loyalty to the purposes. For example, while members of the National Trust are undoubtedly committed to the organisation, it is also the case they are motivated by the provision of discounts and special deals. It is only reasonable, and realistic, that they should vote with those arrangements in mind.

The Duties of Members of Charitable Incorporated Organisations Require Clarification

One key rationale for establishing the fiduciary duty for members of charitable companies must be to align the judicial regulation of charitable companies with wider rules of Equity. But from a perspective concerned with alignment and coherence, the judgment in *Lehtimäki* is surprising in one important respect. Despite containing an extensive exposition of fundamental principles, the duties of members of the Charitable Incorporated Organisation (CIO) receives only quite limited judicial consideration, and what attention CIOs do receive, serves not to align the law, but potentially to create fresh distinctions.

The CIO, established for the first time under the Charities Act 2006,[30] is now the most common type of newly registered charity. In common with the ordinary charitable company, the CIO has a member structure. Also in common with the ordinary charitable company, it provides a vehicle through which the directors can avoid liability. The new legal form was developed in order to simplify the law, and the experience of members, expanding access to these core features of the ordinary charitable company. Its main innovation was a technical one; CIOs are established without registering or maintaining filings at Companies House.[31]

In view of this linked conceptual heritage, the charitable company and the CIO ought to be understood as very closely related types of legal structure. Yet there is one difference between the two types of incorporated form, which is of direct relevance to questions of obligation. The Charities Act 2011 states that the members of CIOs have a duty to exercise their powers in good faith, so as to further the purposes of the organisation.[32] In the Court of Appeal, it was held that the duties of members of CIOs and charitable companies should be treated as identical.[33] The approach of that lower court has much to commend it. In the light of the similarities between the legal forms, aligning the nature of the duty across the two has the potential to avoid future artificiality.

The Supreme Court did not adopt this unified approach. The opposite tack was taken. Lady Arden took the view, albeit *obiter*, that the duties of members of charitable companies might be different from those of CIOs. By way of justification, Lady Arden said that: ‘the CIO is not a vehicle incorporated under the Companies Acts and therefore there may be good reason for the difference in the duty of members which I have identified.’[34] But this point is not at all obvious. The particular structure chosen by founders is very often a matter of chance. It is not

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[29] For criticism of the role of altruism in charity participation, see, R Atkinson, ‘Altruism in Nonprofit Organizations’ (1989) 31 *Boston College Law Review* 501.
[30] Schedule 7, Charities Act 2006. Now, ss 204 – 250, Charities Act 2011.
[31] See, *Modern Company Law for Competitive Economy* (2001) [4.63].
[32] S 220, Charities Act 2011.
[33] *Children’s Investment Fund* (n9) [48].
[34] *Lehtimäki* (n1) [101].

at all self-evident that when it comes to the duties of members, that the distinction between the charitable incorporated organisation and the charitable company is a meaningful one.

Lady Arden's position appears to be based in the proposition that the statutory duty of members of charitable incorporated organisations might potentially, in her view, be more expansive than the contract-and-statute model she developed for members of charitable companies. She also rejected alignment because it was not clear, in her view, whether or not the duties of members of charitable CIOs were fiduciary.[35] Neither of these points received expansive consideration in her judgment.

Her opinion is open to criticism on this point. Lady Arden's propositions have the air of speculation, but this is an instance where clarification is much more useful than the raising of doubts. The answer to the question of whether the contract-and-statute model might apply, or whether the duty of members of CIOs is fiduciary is not an abstract query. Instead is a question of importance to the voluntary sector which should be answered through a weighing of policy implications. Once this over-arching view is taken, it is difficult to think of reasons why the two types of charitable form should be treated separately.

Given that the charitable company and the CIO are very similar legal structures, the best view is that the development of fiduciary membership in one ought to lead to fiduciary membership in the other. Equally, if the contract-and-statute model is well-fitted to the charitable company, then it is *prima facie* also well fitted to the CIO. Developing different standards in like cases has the potential to lead to artificial reasoning in future decision-making and confusion in an area of law directly impacting on members.

The Courts' Jurisdiction over Charitable Companies has Solidified

A jurisdiction of the court over an internal, semi-private, dispute in relation to a charitable company is not intuitive or obvious. Insofar as it affirms that jurisdiction, *Lehtimäki* should be understood as solidifying an existing legal norm to the effect that the courts are able to intervene in the governance of charitable companies. It clarifies that there is an, 'inherent jurisdiction in relation to the company as a charity.'[36]

Lehtimäki is not the first time that a jurisdiction has been assumed over the ordinary charitable company. In *Liverpool and District Hospital for Diseases of the Heart v Attorney General*,[37] Slade J found that even while charitable companies do not routinely hold their assets on trust, the company constitution created a set of binding obligations, sufficiently analogous to a trust, to give rise to a court jurisdiction.[38] However, even accounting for this authority, *Lehtimäki* is undoubtedly the highest-level and most expansive assertion of jurisdiction.

In order to assess the likely impact of the case in relation to jurisdiction, it is instructive to reflect on the courts' broad powers over charitable trusts. As is well known, the rules relating

[35] *Lehtimäki* (n1) [95], [101].
[36] Per Lord Briggs, *Children's Investment Fund* (n9) [221].
[37] *Liverpool and District Hospital for Diseases of the Heart v Attorney General* [1981] Ch 193.
[38] Ibid 209.

to charitable trusts developed in Equity. In consequence, it has always been the case that judges could bring about far-reaching changes to trust constitutions. So, for example, in *Varsani v Jesani*,[39] the court sought to resolve an acrimonious dispute between different sides of a Hindu faith-group. That group had split into two causing a total break-down in governance. Despite the obvious difficulties in adjudicating on issues that touch on faith and doctrine, a jurisdiction to alter the constitution of the charitable trust was assumed.

As *Varsani* shows, the jurisdiction to rearrange the constitution of charitable trusts is far-reaching.[40] *Lehtimäki* unambiguously blends this trust jurisdiction into the company context. Where there is a governance crisis in a traditional charitable trust, the courts will use their scheme-making powers to find a resolution. Lord Briggs said: 'the court's jurisdiction to intervene in the affairs of charities extends beyond its trust jurisdiction more widely than just in relation to schemes.'[41] It might involve a rewriting of the charitable purposes, or the reorganisation of internal charitable affairs. Insofar as *Lehtimäki* is authority for the proposition that the inherent jurisdiction over trusts now stretches to cover charitable companies, the case might be used as a future gate-way to enable similar interventions in the company context. In this regard, the case marks a solidification of judicial power in the company sphere.

Conclusion

Charity law is sometimes said to sit on the boundary between public and private regulation.[42] It is clear that the specific facts of *Lehtimäki* fall very firmly on the private side of the line. The case is, in a sense, a family dispute. But it is important to keep in focus that it was not truly a dispute over family property. Once the funds had been applied to The Children's Investment Fund, they were dedicated to public purposes. The case, being a major exposition of charity law principles in the Supreme Court, will have a significant impact on the wider charity sector. In an area where major precedents are scarce, it will become a key element of the regulatory framework for charities.

It is not quite clear that the majority always had public impact at the forefront of their reasoning. Lord Briggs took pains to say that the facts of *Lehtimäki* are unusual, implying that the decision would not have many far-reaching consequences. This suggests that he thought that the decision would be primarily of a private significance to the parties, or of importance in the rare circumstances where a very similar case might emerge. He said directly: 'I do not think that this very unusual case will tend to shift the balance of power away from members towards management and the court.'[43]

It must be acknowledged that the dispute at The Children's Investment Fund related to very specific circumstances. Although little can be gleaned about him from the case, Marko

[39] *Varsani v Jesani* [2001] 7 WLUK 788.

[40] For analysis of the shifting focus of the courts' jurisdiction in relation to *cy-près*, see, J.Picton, 'Donor Intention and Dialectic Legal Policy Frames' in Harding (ed), *Research Handbook in Not-for-Profit Law* (Cheltenham, Edward Elgar, 2018).

[41] *Lehtimäki* (n1) [216].

[42] For a sophisticated exegis, see, K Chan, *The Public-Private Nature of Charity Law* (Oxford, Hart, 2016).

[43] *Lehtimäki* (n1) [234].

Lehtimäki appears to be an exceptional character. While his motivations are not clear from the reports, he is unusual at least insofar as he was prepared to endure years of litigation to defend his perceived entitlement to an independent vote. However, it should not be thought that the basic problem in *Lehtimäki*, being an internal dispute in a charity, is an any sense a rare occurrence.

In a dissenting part of her judgment, in a direct rebuke of Lord Briggs, Lady Arden said: 'The core facts of this case are not necessarily "very unusual": it is not infrequent to find disagreements between the trustees and members of substantial and well-known membership charities.'[44] Lady Arden is right on this point. Even if the precise facts are particular to unusual circumstances, it would be wrong to think that the precedent will not have far-reaching public impact.

One of these consequences might be future litigation to clarify the new fiduciary relationship. *Lehtimäki* brings uncertainty with it. As has been seen in this note, following the decision, there is now an open legal question on whether fiduciary duties are owed by the many thousands of members of mass membership charities. There is also uncertainty in relation to the duties owed by members of charitable incorporated organisations. Finally, despite the extended exposition by Lady Arden, there is uncertainty as to the precise meaning of the contract-and-statute model of fiduciary duty. This might mean that the long drought in Charity Law cases is about to end. Once gaps emerge in the law, there is normally litigation to fill them.

[44] *Lehtimäki* (n1) [198].