

# The Kids Company experience and trends in charity litigation and regulation

Monday, 27<sup>th</sup> June 2022

# Your speakers

- Ceris Gardner, Partner and host
- Jennifer Emms, Partner
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- Rosalind Hetherington, Senior Associate
- Jerry Jamieson, Associate



# The Barrister's perspective

- Andrew Westwood QC,  
Barrister, Maitland Chambers



## Re Kids Company [2021] EWHC 175 (Ch)

*“It is vital that the actions of public bodies do not have the effect of dissuading able and experienced individuals from becoming or remaining charity trustees”*

Falk J at [911]

# Kids Company

- What the case was about
- What the case was not about
- What the Court decided

# Kids Company

- Relevance of Kids Co being a charity and the Court's approach to charity trustees
- Recognition of the importance of volunteers
- Regulatory issues

## Kids Co: what the case was about

- Claim under ss. 6-7 CDDA 1986
- Single allegation: Ds caused and/ or allowed Kids Co to operate an unsustainable business model from no later than 27.09.13 (i.e., for more than 20 months before KC went into liquidation)
- Were Ds “unfit to be concerned in the management of a company”?

## Kids Co: what the case was not about

- No allegation of dishonesty, bad faith, inappropriate personal gain or any other want of probity against any of Ds
- No allegation of inappropriate expenditure in respect of any of the individual children or young people assisted by KC



## Kids Co: what the Court decided

- Claim dismissed in its entirety
- Falk J:
  - *“I wish to make clear that I have reached my conclusion that the claim fails as a matter of substance, and in whatever manner the Official Receiver’s allegation – or I think more accurately allegations – are put or developed”* ( at [797])
  - *“wholly satisfied”* that the conduct alleged that has been proved does not demonstrate unfitness (at [876])
  - *“I am wholly satisfied that a disqualification order is not warranted against any of the Trustees”* (at [912])

# Kids Co a charity: relevance?

- Relevance of charitable status?
- No change in or dilution of duties nor any difference in test for disqualification.
- But important part of the context

## Kids Co: Court approach to charity trustees

- Long tradition of benevolent treatment of charity trustees in absence of dishonesty or wilful misconduct
- Good reasons of public policy for benevolent approach:
  - Reflects real risk any other approach will deter individuals who would otherwise be well suited to becoming charity trustees from doing so
  - Reflects the court's recognition of the public service that charity trustees provide

## Kids Co: importance of volunteers

- *“The charity sector depends on there being capable individuals with a range of different skills who are prepared to take on trusteeship roles.”* (at [911])
- Need for *“great caution”* before bringing disqualification proceedings
- *“The result of proceedings being brought in other than the clearest of cases is likely to deter many talented individuals who take the trouble to understand and appreciate the risks either from charitable trusteeship at all, or at least from all but the most wealthy, well endowed, charities which are likely to have the least need of their skills.”*

# Kids Co: regulatory issues

- Future use of CDDA?
- Roles of OR/SoS v. Charity Commission
- *“Whilst it is obviously the case that directors of incorporated charities are subject to the Companies Act and related legislation, including the CDDA, it might be thought that the primary means of regulating trustees’ behaviour, at least in practice, is and should be via the standards set by, and the enforcement powers of, the Charity Commission, being the regulator that has the most appropriate expertise. At the least, this might in practice reduce the risk of charity trustees being held to inappropriately different standards depending on whether the charity in question happens to be incorporated.”* (Falk J at [910])

# Re Kids Company

Andrew Westwood QC

Maitland Chambers

# The MTG perspective

- Jennifer Emms, Partner
- Rosalind Hetherington, Senior Associate
- Jerry Jamieson, Associate



# Kids Co: The Charity Commission's Inquiry

## Overview

- Commenced in August 2015; re-commenced in February 2021 (post-High Court's decision)
- Report published 2022
- Inquiry launched under s.46 CA 2011:
  - Only for the **most serious cases of abuse and regulatory concern**
  - Grants the Charity Commission additional:
    - Information gathering powers
    - Temporary and permanent protective powers



# Kids Co: The Charity Commission's Inquiry

## Differences from the court

- Different tests:
  - High Court: s.6 CDDA: Sole test of “*unfit[ness] to be concerned in the management of a company*” based on their conduct
  - Charity Commission: examination of whether there had been “*misconduct and/or mismanagement*” – terms not defined in statute
- Different findings

# Kids Co: The Charity Commission's Inquiry

## Findings

- Finding of financial mismanagement relating to payment to creditors and HMRC
- Charity Commission criticisms and recommendations include:
  - Financial planning and reserves policies : build up reserves to cope with unexpected expenses or falls in income
  - High risk business model
  - Reduction of spending on the 'top 25' beneficiaries
  - Explain the methodology for calculating beneficiary figures (e.g. in Charity's annual reports)

# Kids Co: The Charity Commission's Inquiry

## **The end?**

- No further action to be taken by the Charity Commission
- But... Judicial Review? Watch this space!

# Kids Co: The Charity Commission's Inquiry

## Practical recommendations?

- The Charity Commission's report does make some helpful practical recommendations.
- Record Keeping
- Trustee board
  - Rotation
  - Composition

# Trends in regulatory engagement?

- Policies and procedures
- Single income charities
- Appointment of interim managers
- Media influence?
- Spending on administrative costs
- More benign approach of the new chair?

# Any questions?

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