

DIOCESAN BOARDS OF FINANCE: CONFLICTS OF INTEREST

1. A Diocesan Board of Finance ('DBF') is a company incorporated under the Companies Acts (section 1 Diocesan Boards of Finance Measure 1925 as amended). It must be registered under the Companies Act 2006, and any change in its constitution must similarly be registered. It is constituted by the Diocesan Synod, and its memorandum and articles must provide (*inter alia*) that the Bishop of the Diocese is a member, and that the majority of the members shall be lay persons. Subject to complying with the provisions of the Measure, the Diocesan Synod has considerable discretion as to the constitution of its DBF. Details of DBF constitutions seen by the Commission show a wide variety of provisions governing the membership of a DBF and the persons who, for the purposes of the Companies Act 2006, are considered to constitute the directors.
2. A DBF is also a charity. As a DBF will in practice meet the minimum requirements for registration, it must be registered under the Charities Act 2011. Once registered, a DBF must notify the Charity Commission of any change to its governing document or any of its other registered particulars (see section 35(3) Charities Act 2011). Experience suggests that in many cases changes to the memorandum and articles of association of DBFs, or to their other registered particulars, have not been registered. This is a matter to which attention should be given.
3. For the purposes of the Charities Act 2011, the persons having the general control and management of the administration of a charity are known as its 'charity trustees', even if, as in the case of a DBF, the charity is constituted as a company and not as a trust, and as such are subject to similar 'fiduciary obligations' to those of trustees in the strict sense – including the duty to act in the best interests of the charity. In the case of one form of DBF constitution seen by the Commission, where the DBF comprises all the members of the Bishop's Council, all the members of the DBF are both directors and charity trustees. In the case of the other models seen, only those members who form the board of directors, by whatever name it is known, are considered to be the charity trustees.

Functions of the DBF

4. Under the Diocesan Stipends Funds Measure 1953, one of the functions of a DBF is to keep a capital account and an income account for the diocesan stipends fund. Section 4 of the Measure provides that money standing to the credit of the capital account may be applied (*inter alia*) in the provision or improvement of parsonage houses. Section 5 of the Measure provides that moneys standing to the credit of the income account of the diocesan stipends fund shall be applied (*inter alia*) in providing the stipends of incumbents and assistant curates in the diocese, and in meeting expenses incurred in repairing and maintaining parsonage houses. These are perhaps the matters in relation to which a member of the DBF who is a parish priest is most likely to have an interest, whether personally or on behalf of his or her parish, which may conflict with his or her duty to act in the best interests of the DBF. But the potential for conflicts of interest to

arise is by no means confined to parish priests, or to the exercise of functions under the Diocesan Stipends Funds Measure.

Conflict of Interest

5. It is a general principle applicable to trustees and others in a fiduciary position that a person must not put him- or herself in a position where his or her duty to the relevant body may conflict with some personal interest (a 'conflict of interest') or some duty owed to another body (a 'conflict of loyalty'). There are clearly many decisions taken by a DBF which may affect the clergy members, and possibly other members, of the DBF, in which such a conflict of interest or conflict of loyalty may arise.
6. In the case of directors the duty to avoid conflicts of interests and conflicts of loyalty is set out in statutory form in sections 175 to 181 of the Companies Act 2006. However, section 181 contains modifications of the principle applied to other companies to meet the case of companies which are charities. With those modifications, section 175 provides as follows:

“175. The duty to avoid conflicts of interest

- (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
- (2) ...
- (3) This duty does not apply in relation to a conflict of interest arising in relation to a transaction or arrangement with the company if or to the extent that the company's articles allow that duty to be so disapplied, which they may do only in relation to descriptions of transaction or arrangement specified in the company's articles.
- (4) This duty is not infringed -
 - (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
 - (b) if the matter has been authorised by the directors.
- (5) Authorisation may be given by the directors where the company's constitution includes provision enabling them to authorise the matter, by the matter being proposed to and authorised by them in accordance with the constitution.
- (6) The authorisation is effective only if -
 - (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and
 - (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.”
7. Exceptions to the duty to avoid conflicts of interest can therefore be made

- (a) under subsection (3) if the DBF’s articles allow the duty of its directors to be disapplied in relation to descriptions of transactions and arrangements specified in the articles; and
 - (b) under subsection (5), in relation to any particular matter in which the duty would otherwise arise, if the exception to the duty has been authorised by the directors, where the DBF’s articles include a provision enabling them to authorise the matter, by a decision in which those affected by the duty refrain from voting.
8. So far as company law is concerned, therefore, it is important that the articles of a DBF should include provisions which:
- (a) allow the duty to avoid a conflict of interest to be disapplied in relation to descriptions of transactions and arrangements specified in the articles, and
 - (b) permit the directors to authorise the duty to be disregarded in relation to any particular matter, provided that the directors with an interest in the matter refrain from voting on the decision to give such authorisation.
9. Many (indeed perhaps most) DBFs will have had provisions in their memorandum of association for many years; and in such cases they will continue to have effect in so far as their terms are consistent with section 175(3 or (5). (Although section 175(3) of the 2006 Act refers to the company’s “articles” qualifying the normal duty to avoid conflicts of interest, provision in its memorandum of association will be equally effective for that purpose if it antedates 2009: the transitional provision contained in paragraph 1(3) of Schedule 1 to the Companies Act 2006 (Commencement No.3, Consequential Amendments, Transitional Provisions and Savings) Order 2007¹ made it clear that references in the Companies Act to a company’s articles included the company’s memorandum.)
10. However, DBFs will no doubt wish to satisfy themselves that their constitution contains provision having the effect described in paragraph 8 above. In that connection they may wish to note that the Charity Commission has published model articles which include an article which would give partial effect to the position described in paragraph 8(b) by authorising conflicts of loyalty in some circumstances.² It reads as follows:
- “Conflicts of interests and conflicts of loyalties
- (1) If a conflict of interests arises for a director because of a duty of loyalty owed to another organisation or person and the conflict is not authorised by virtue of any other provision in the articles, the unconflicted directors may authorise such a conflict of interests where the following conditions apply:

¹ SI 2007/2194.

² It, and the associated note, can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269508/gd1textc.pdf .

- (a) the conflicted director is absent from the part of the meeting at which there is discussion of any arrangement or transaction affecting that other organisation or person;
 - (b) the conflicted director does not vote on any such matter and is not to be counted when considering whether a quorum of directors is present at the meeting; and
 - (c) the unconflicted directors consider it is in the interest of the charity to authorise the conflict of interests in the circumstances applying.
- (2) In this article a conflict of interests arising because of a duty of loyalty owed to another organisation or person only refers to such a conflict which does not involve a direct or indirect benefit of any nature to a director or to a connected person.”

11. The Charity Commission’s note on this article is as follows:

“This article permits unconflicted directors to authorise a conflict of interests arising from a duty of loyalty owed by a director to another organisation or person provided that there is no direct or indirect benefit of any nature received by the director in question or by a connected person. Such a procedure is permitted by section 175(4) and (5) of the Companies Act 2006 (as modified for charitable companies by section 181) where provision is made for it in the articles. The Commission considers that such a procedure should be limited to conflicts arising from a duty of loyalty to another organisation or person where there is no direct or indirect benefit of whatever nature to the director or to a connected person. In other circumstances involving a situation leading to a conflict of interests on the part of a director, the Commission is able to authorise the director to act notwithstanding the conflict where it is satisfied that this would be expedient in the interests of the charity (section 105 of the Charities Act 2011).”

12. The model article could be useful if the matter under discussion involves a parish of which the director is the incumbent. It does not, however, meet the point that matters under discussion may involve conflict of interest on the part of some or all of the clergy who are directors of the DBF. This situation, which is unlikely to be so common in the case of commercial companies, can best be met by an article which disapplies the duty where the decisions of the DBF, for example relating to stipends, affect some or all of the clergy directors of the DBF generally. A suggested form of such an article is as follows:

“The duty to avoid conflicts of interest is disapplied in relation to all transactions and arrangements which apply generally throughout the Diocese or some part of the Diocese or with regard to relations between the Diocese and any other organisation or institution in the Church of England, provided that this does not extend to any transaction or arrangement which may directly or indirectly benefit an individual director differently from the other directors.”

Declaration of directors' interests

13. Section 177 of the Companies Act 2006 provides that “If a director is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.” However “a director need not declare an interest (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest, or (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware).”
14. Much of the ordinary business of a DBF or its directors may, directly or indirectly, affect the interests of its members; but that is something of which the other members are likely to be already aware; and the duty to declare an interest is therefore most likely to arise if a proposed transaction or arrangement affects an individual cleric or benefice rather than the Diocese as a whole.
15. The Charity Commission again provide a model article which might be adopted by a DBF.³ It reads as follows:

“A director must declare the nature and extent of any interest, direct or indirect, which he or she has in a proposed transaction or arrangement with the charity or in any transaction or arrangement entered into by the charity which has not previously been declared. A director must absent himself or herself from any discussions of the charity directors in which it is possible that a conflict will arise between his or her duty to act solely in the interests of the charity and any personal interest (including but not limited to any personal financial interest).”
16. The Charity Commission also provides a detailed guide to handling conflicts of interest and conflicts of loyalty in its publication *Conflicts of interest: a guide for charity trustees* (CC 29): see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343408/C29- PDF.pdf .
17. Not all the sections of the guidance are likely to be relevant to DBFs, but the relevant principles which apply can be readily seen, and regard should be had to those that are capable of applying to DBFs.

³ It can again be found at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269508/gd1textc.pdf .