Investing for impact after Butler-Sloss – what charity leaders need to know

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CC14 and the Butler-Sloss Case

2011 - CC14 originally published

2020 – “Listening Exercise” by Commission, identifies issues with current CC14

2021 - Charity Commission consultation on revised guidance

2021/22 - *Butler-Sloss* case

Consultation on hold

2023 – “User-testing” of revised CC14 post Butler-Sloss judgment

1 Aug 2023 – Revised CC14 published

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Butler-Sloss v Charity Commission

Claimants: the Ashden Trust and the Mark Leonard Trust

Charitable purposes:

- Environmental protection or improvement
- Relief of those in need
- Prevention or relief of poverty

IPCC "Global Warming of 1.5⁰C" report in 2018

Previous case was 30 years ago: "…important, not only for the charities concerned, but also for charities generally, that there should be clarity as to the law on investment powers of charity trustees."

Claimants sought an order confirming that their proposed 'Paris-aligned' investment policies were consistent with their legal duties, despite excluding a significant portion of the investment market and therefore increasing the risk of lower returns

Investing for a financial return

Case concerned potential conflicts

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Court Blessed Investment Policies

"The Claimants have decided, reasonably in my view, that there needs to be a dramatic shift in investment policies in order to have any appreciable effect on greenhouse gas emissions and for there to be any chance of ensuring that there is no more than a 1.5°C rise in pre-industrial temperature. The only question is whether they have sufficiently balanced that objective with any financial detriment that may be suffered as a result. In my view they have and the performance of the portfolio will be tested regularly against recognised benchmarks and will seek to provide the financial return specified in the Proposed Investment Policy.

Accordingly I consider that the Claimants have exercised their powers of investment properly and lawfully, having taken account of all relevant factors and not taken into account irrelevant factors."

The Judgment - Paragraph 78(1)-(5)

1. *Trustees' powers of investment derive from the trust deeds or governing instruments (if any) and the Trustee Act 2000.*

2. *Charity trustees' primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes.*

3. *That is normally achieved by maximising the financial returns on the investments that are made; the standard investment criteria set out in s.4 of the Trustee Act 2000 requires trustees to consider the suitability of the investment and the need for diversification; applying those criteria and taking appropriate advice is so as to produce the best financial return at an appropriate level of risk for the benefit of the charity and its purposes.*

4. *separate powers than the pure power of investment. Social investments or impact or programme-related investments are made using*

5. *Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made.*

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The Judgment - Paragraph 78(6)-(8)

6. *But where trustees are of the reasonable view that particular investments or classes of investments <u>potentially conflict</u> with the charitable purposes, the trustees have a <u>discretion</u> as to whether to exclude such investments and they <u>should</u> exercise that discretion by reasonably balancing all relevant factors including, <u>in particular, the likelihood and seriousness of the potential conflict</u> and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.*

7. In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries.

8. *However, trustees need to be careful in relation to making decisions as to investments on <u>purely moral</u> grounds, recognising that among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues.*

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The Judgment - Paragraph 78(9)-(10)

9. *Essentially, trustees are <u>required to</u> act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity <u>and its purposes</u>. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees <u>need to</u> exercise good judgment by balancing <u>all relevant factors</u> in particular the extent of the potential conflict against the risk of financial detriment.*

10. *If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.*

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CC14 – Duty to Further Purposes

- *"As trustees, when you make investment decisions, <u>your principal duty is to further your charity's purposes</u>. This means that <u>you must make your investment decisions to further those purposes</u>"*
- *"Acting in your charity's best interests means always doing what you decide <u>will best help your charity to carry out its purposes</u>, both now and for the future. <u>It is not about preserving your charity for its own sake</u>."*
- *"You can delegate some decisions about investments to others, but as trustees <u>the responsibility remains yours</u>."*

CC14 – Potential Approaches to Impact

- Potential investment approaches include, alongside target financial return:
  - avoiding investments that conflict with charity's purposes. For example… …an environmental charity deciding to avoid investment in fossil fuels
  - avoiding investments that reduce support for your charity or harm its reputation, particularly amongst supporters / beneficiaries. For example, avoiding fossil fuel investment to avoid damage to reputation / fundraising
  - alongside the financial return you are aiming for, avoiding <u>or making</u> investments in companies because of their practice on environmental, social and governance (ESG) factors such as: climate, human rights, sustainability, community impact and board accountability. Taking this approach could be in your charity's best interests if it could protect or enhance the financial value of your investments or returns over time, <u>or because it will support delivery of your charity's purposes more directly</u>
  - using your shareholder position to influence practice at companies

CC14 – Focus on Investment Policy

- An investment policy is a legal requirement or a regulatory expectation
- Deciding on the investment policy should include consideration of "*how you have decided your investments should contribute to your charity's financial position and <u>delivery of its purposes</u>*"
- The investment policy may include "*your charity's investment objectives, including any relevant reputational <u>and other non-financial factors</u>*" and "*<u>any sectors or organisations which you consider are in conflict</u> with your charity's purposes*"
- You may decide that it is best for your charity to achieve its purposes directly through its investments
- Risks "*<u>you should consider</u> include: <u>reputational risk</u> - reduced support for your charity or harm to its reputation as a result of your investment approach*" and "*<u>risk posed to the achievement of your charity's purposes from investments that conflict with them</u>*"

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Investments and Impact – Key Questions

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- **Impacts** – have the trustees assessed potential positive and negative impacts?
- **Investment powers and restrictions** – what does constitution say?
- **Investment policy** – have balanced all relevant factors, including potential impacts, in adopting the best investment policy for the charity and its purposes?
- **Advice** – have trustees taken independent advice, if needed?
- **Investment decisions** – do individual investment decisions reflect the process and balancing exercise set out in the investment policy?
- **Documenting compliance** – do board minutes set out the factors considered by the trustees in relation to the making of investment decisions?

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"Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment."

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CITY BRIDGE
FOUNDATION

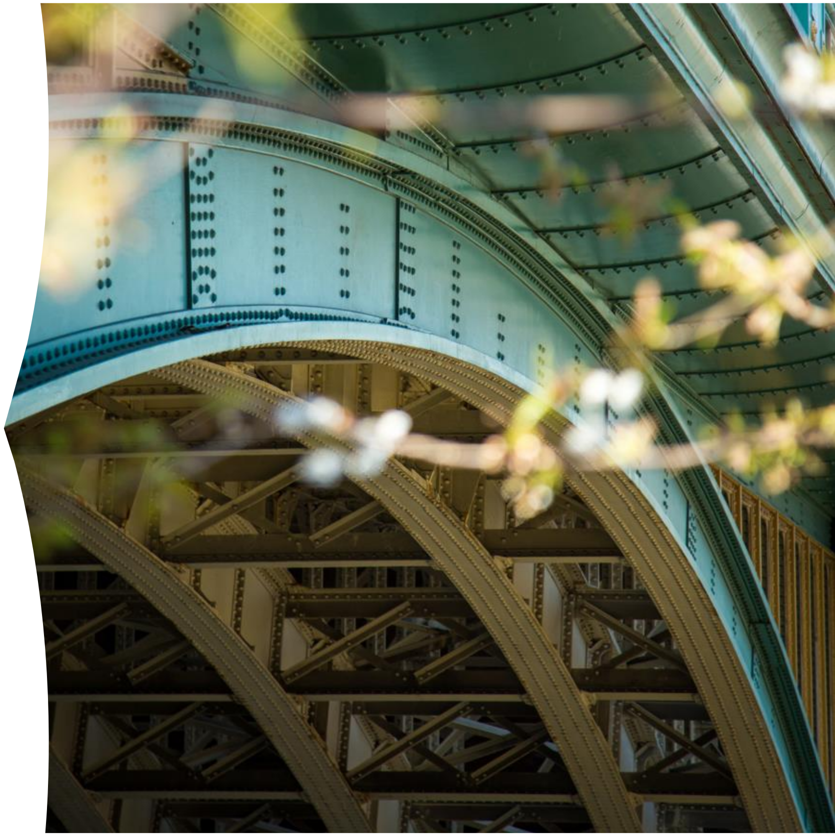
City Bridge Foundation

Bridging London,
Connecting Communities

- We are a world class bridge owner responsible for five Thames crossings, and London's biggest independent charity funder

- # Investment portfolio as at 31 March 2024

	Unrestricted Income Funds (£m)	Permanent Endowment (£m)	Total (£m)
Investment properties	-	793	793
Financial Investments	730	91	821
Social Investments	9	-	9
	739	884	1,623



• City Bridge Foundation

Our investments are the 'engine-house' of the charity, providing the financial resources to fund our activities.

We require our investments to provide financial returns but also recognise that the size of our investment holdings gives us influence which we can use to further our charitable vision and mission, in particular our commitment to a sustainable future.