The legal structure of a typical unincorporated association such as a club is simple. The founders agree, probably informally, to form it and adopt a set of rules, which is the contract between the members. The association is not and cannot be a party to the contract, because it is not a legal person. The members elect some of their number to be a committee to manage it and, as (again) the association is not a legal person but just a body of natural persons, they, or sometimes the committee, appoint trustees to hold its property and investments. The members of the committee or some of them could also be the trustees, but it is not uncommon for the trustees or some of them not to be members. As a simplistic description, an association of this kind consists of three components, supporters and participators (members), doers (committee) and trustees. (Of course the members of an unincorporated association may be or include legal persons.)

The structure is not quite so simple if an association with members is a charity under the Charities Act 2011. The scope for confusion is that charities have charity trustees and might also have trustees. Although part 9 (charity trustees, trustees and auditors etc) shows that the ChA 2011 recognises that these terms (trustees and charity trustees) are not synonymous, it is not always apparent to trustees (or perhaps even to some of the Charity Commission's own employees) that the terms are not synonymous. The ChA 2011 s177 defines charity trustees as

> "the persons having the general control and management of the administration of a charity".

In my above simplistic description, for the doers in the case of a charity substitute "charity trustees" for "committee".

The distinction is unlikely to be a problem for charities without a separate trustee or board of trustees, but if a charity has a sperate trustee body, it is important to distinguish those who are charity trustees from those, if any, who are trustees but not charity trustees. Until the definitions are clarified by the courts, my starting point when assessing the distinction is to assume that:

(a) the committee members and officers of a typical unincorporated charity, are charity trustees and similarly the persons, who, in an incorporated charity, normally a Charitable Incorporated Body (CIO) registered under the ChA 2011 or a company registered under the Companies Acts 2004 (or earlier legislation), might have been called directors, are charity trustees;

(e) trustees who are merely custodians of the charity's investments and property and are accountable to the charity for them are trustees but not charity trustees; and

(g) charity trustees, where the charity's property and investments are held by trustees are, on the face of it, not trustees of the property and investments.

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One area in which the difference can be important is investment. The ChA 2011 is silent on the general duties of trustees in relation to investments and the duty to take advice, which are governed by the Trustee Act 2000. The 2000 Act however applies to trustees in normal sense of the word, which can but does not necessarily include charity trustees.

Another area in which the difference is in charity mergers, including, eg, a transfer from one charity to another. By the ChA 2011, s310, a pre-merger vesting declaration, the use of which is not compulsory, can be (or seem to be) attractive, because its effect is to vest, with a few exceptions, all the transferor's property in the transferee. The declaration is made by a deed executed by the charity trustees, or, if enabled by s333 only some of them on behalf of all.

scope for fraud

Volunteer trustee of charities, particularly of small and medium sized trustees tend to lack much aptitude for "corporate housekeeping" and are sometimes antipathetic to it as a distraction from their charitable purposes, which makes them vulnerable to fraud. It is not unknown for established charity trustees to welcome "new blood", whose willingness and efficiency results in the latter, sooner or later, taking control, but who have ulterior motives, not always for personal gain but for the benefit for some other charity, in with which the newcomers were already active. In the two such cases in which I have and am still acting, the change of control in one was gradual over five or six months, while the other was achieved as many months.

In this kind of situation the pre-merger vesting declaration is a gift to fraudsters, because the automatic vesting effected by it overrides not only the charity's own trustees, in whom its property might be vested, but also any independent custodian, including the Official Custodian for Charities (ChA 2011, s21).

So how did the trustee and charity trustee dichotomy come about?

The Nathan Report (1952, Cmd 8710), many of the findings and recommendations of which influenced or were incorporated into the ChA 1960, does not use the term "charity trustees", but defines "trustees" on p208 as

> The body of governors or trustees responsible for the administration of a charitable trust. In the recommendations made in the Report, it is assumed that they will act on a majority vote: that unanimity is not necessary, e.g. in reaching a decision to apply for a scheme.

This recommendation, the linking of trusteeship and administration, appears to be the origin of s64 of the ChA 1960 (now s177 of the ChA 2011), namely that the trustees of a charity are the body responsible for its administration. It is likely therefore that, in the drafting of the ChA 1960, the word "charity" was added to the word "trustees" in order to distinguish the trustees of a charity from trustees in the normal sense of the word, rather than to codify the meaning of the expression "charity trustees" when used in the existing law.

END

(reduced from an article first published in New Law Journal on 25 June 2021.)