Re Shetland Charitable Trust (Office of the Scottish Charity Regulator (OSCR) decision, 30 April 2012)

This was an enquiry decision under section 33 of the Charities and Trustees Investment (Scotland) Act 2005 (the Act). The Shetland Charitable Trust (the Trust) was given charitable status on 10 September 1997. It was established to serve the interests of the Shetland Islands community, but is intimately connected with the Shetland Islands council (local government).

From 2008 OSCR conducted inquiries into the Trust due to concerns relating to its governance arrangements. In July 2010, it was decided that the Trust's governance model presented a high risk of both systemic and specific conflicts of interest which impacted on effective and appropriate governance of the Trust, and that tailored monitoring by OSCR was required while the charity addressed this matter. This monitoring continues to date.

The Trust had invested in the Viking Energy project (a wind farm) to the extent of £3.42 million. This project involves 103 wind turbines (permission for which was granted by local government on 4 April 2012) to be placed around the Shetland Islands community. However, this investment was contentious within both the Trust itself, and within the island community which was served by the Trust, and involved numerous conflicts of interest among trustees of the Trust. Indeed, several 2012 meetings of the Trust were inquorate because of these conflicts of interest.

On 27 April 2012 the then charity trustees proposed to hold a meeting on 30 April 2012 to consider a report that recommended that they agree to make a substantial additional investment of £6.3 million in the Viking Energy project on top of the amount already invested by the Trust. This was within a few days of a new charity board of trustees taking office on 4 May 2012 after local government elections on 3 May 2012.

The OSCR said that whether or not to invest further in the Viking Energy project was a decision for the Trust's charity trustees. However, the OSCR's regulatory interest extended to whether the charity trustees were fulfilling their duties as required by section 66 of the Act, which included acting in the best interest of the charity and with appropriate care and diligence. It seemed that this could not be the case where a decision of great importance was taking place in a 'last-minute' fashion. Moreover, the investment was so contentious within the community served by the charity that special attention needed to be paid by the Trust to act with due care and diligence, and to obtain proper legal and financial advice.

The OSCR therefore acted to prevent any decision on the Viking investment being taken. On 27 April 2012, OSCR served a formal direction notice directing the charity, under section 28(3) of the Act not to make a binding decision (whether in a meeting of the trustees, by operation of regulation 9.5 of the Administrative Regulations of the Shetland Charitable Trust, or otherwise) in relation to any investment in the Viking Energy project beyond the £3.42 million previously invested by the Trust. This action was taken as a precautionary measure, and was valid until 5 May 2012 when the new board of trustees would be in place.
Implications of this decision

Conflicts of interest can be a difficult matter for governing bodies to contend with, particularly when significant matters such as investments or contracts involve members of the community who may also be on the board. Members of governing bodies must understand what these are and how to recognise their own potential conflicts; and sound procedures must be established to ensure potential and actual conflicts of interest are recognised, disclosed and dealt with properly.

In this case there is the additional issue that a person who, without reasonable excuse, refuses or fails to comply with a direction under section 28(3) of the Charities and Trustees Investment (Scotland) Act 2005 is guilty of an offence and is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500) or imprisonment for a period not exceeding 3 months, or both.