

Assessing damages for charities - what have you lost?

The recent case *Hackney Empire v Aviva Insure (2013)* involved the claimant charity pursuing the defendant insurer for payment of the interest due on a sum under a bond. It was held that, when calculating the interest rate due to the charity, regard should be had to the fact that most of its funds were received from grants and private donations, rather than by way of a loan on the open market. As a 'typical small to medium-sized charity' Hackney Empire Limited was 'likely to be an organisation which would probably have to borrow money on the open market to make up a proportion of any shortfall in funds, whilst looking to private donors and grant giving bodies to provide the rest by way of either gift or interest free loan'.

As such, it was held that to award interest at a rate that would be appropriate for a small business 'would be to give it a substantial windfall', and the charity was accordingly awarded 2% interest rather than the usual 4-5%. The windfall comment is probably fair in the circumstances: the basis of damages in this country is that they are supposed to compensate a party for what they have actually lost. What the case highlights, though, is that charities cannot, because of the way they operate and are funded, claim exactly the same remedies as commercial organisations when it comes to litigation. Another example, which we consider here, is what a charity could claim for business interruption.

Let's say you operate from a property, whether providing service user services, fundraising, or running the operational side of your charity from there. Due to some fault of someone else – whether in breach of a contract or through negligence—your premises is rendered unusable for a period of time. In this situation, what could you claim in recompense?

You would of course be able to claim damages for the cost of putting right any physical damage done to your property (subject to proving your loss and establishing both that it was caused by the fault of the other party and that the damage suffered was not too remote from that fault). These would be the direct (or 'incidental') damages under 'special' (quantifiable) damages: for example the cost to repair the property or replace any equipment, or the cost of the loss of irreplaceable items. It has also been possible to claim for inconvenience caused, for example in *Bolton v Mahadeva (1972)* where a price was put on the inconvenience caused by faulty installation of a central heating system.

However, you not only have to put right any damage, but if that damage is severe enough you will not be able to operate from the premises. Special damages can normally also include 'consequential' losses for things which follow on from the event. In a commercial context, this would include the lost profits that the claimant could have been expected to make in the period whilst its factory was out of use. However, you are a charity. Your service has been disrupted, but you can't claim 'lost profits' as such, as you are not in the business of making any.

It would be helpful at that point to consider the definition of 'loss'. This has proved hard to define over the years and judicial definitions of loss are not uniform, which is perhaps unsurprising given the range of cases in which judges are required to assess losses (for example, the range of losses that can be claimed in personal injury and employment cases – 'hurt feelings' etc). In property cases, courts have at times strayed from the pure 'compensatory' principle, for example in the *Linden Gardens v Lenesta Sludge case (1994)*,

where the claimant had not actually suffered loss because someone else had paid for the repairs needed to put right the damage caused by the defendant, but the court still held that it was correct for them to be able to claim damages against the defendant without technically having 'lost' anything (thereby allowing damages to slide into the 'restitutionary' realm of punishing a wrongdoer, rather than the 'compensatory' realm of simply compensating the claimant for their loss).

However, something which is generally understood is that damages compensate you for any kind of pecuniary loss, not necessarily just 'lost profits'. In both contract and negligence claims it is, for example, possible to claim for the loss of a valuable opportunity and/or loss of chance to receive a particular benefit, or avoid a particular risk. In the charity context, it might be possible to quantify how much money would normally have been received in fundraising activities which might have been interrupted by the damage to your premises, during the period that they were out of use. Or you could point to the grant or other funding stream you had been preparing a bid for and the likelihood that you had lost out on funding due to not being able to finalise and send in your application (subject of course to the normal principles of causation etc outlined above – which could prove difficult in this kind of case).

If you run services under a payment by results contract with the government or a local authority, then your loss could be the failure to receive (or reduction in) payment under that contract due to the disruption of your services and your inability to deliver the desired outcomes to your commissioner, and receive payment for them. Similarly, if you work under a social impact bond, your loss could be the amount you are required to pay back to investors or the government if the project does not work. In both these scenarios it might prove hard to quantify exactly what qualitative impact business disruption had had on your services – it would be a question of duration and severity of the interruption.

However, there may still be situations where there is not a clearly defined amount that you can be said to have lost out on. In that situation, we submit that 'social impact' generally could prove useful to charities. It is increasingly gaining ground as a way to measure charities' effectiveness, and it has the useful effect that it allows some calculation of the cost of social problems and quantification of the value of charitable action in fixing them. We suggest that it might now be possible, in the situation outlined above, to calculate the damage caused by the period of interruption by way of reference to the lost social impact during that time, especially if you have previously carried out and used social impact assessments when bidding for funding.

The shift of emphasis from outputs (particular measurable actions by a charity) to outcomes (the results those actions bring) can bring risks for charities, especially when they work in an area where the outcomes of a particular action are never entirely predictable. However, as well as allowing charities to target resources at 'what works', and to demonstrate their achievements, when it comes to litigation the new *quantification* of the value of charities' work inherent in assessments of social impact could prove useful.

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Hackney Empire –v- Aviva Insurance [2012] EWCA Civ 1716; [2013] BLR 57; 146 Con LR1

Linden Gardens Trust Ltd –v- Lenesta Sludge Disposals Ltd [1993] UKHL4

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