

# Charitable trusts and cryptoassets: opportunity, or the asset of discord?

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## Abstract

In written evidence submitted to Parliament in 2022, the Charity Commission for England and Wales outlined three types of “cryptoasset-related risk exposure” that can directly affect charitable trusts. These include: (i) fundraising donations; (ii) moving funds internationally; and (iii) investment. This article’s purpose is to demonstrate that, out of these forms of risk exposure, “investment” is currently the greatest issue for charities. Charity trustees possess a broad investment power and may be tempted to invest in crypto to financially benefit their funds. However, extreme caution should be heeded before investing in cryptoassets, given their complexity and volatility.

This article evaluates the risks that may arise for charitable trusts through their charity trustees’ investment in cryptocurrencies or cryptoassets. In written evidence submitted to the UK Parliament in September 2022, the Charity Commission acknowledged that ‘There are multiple ways that charities could engage with cryptoassets and each pose different risks and potential opportunities.’<sup>2</sup> While the Commission continues to evaluate the emerging risks and issues surrounding crypto, it has nevertheless identified three main ways in which charitable organisations may be exposed to crypto risks and issues.<sup>3</sup> According to the Charity Commission, the principal forms of risk exposure include, *viz*:

- Fundraising.
- Moving funds internationally.
- Investments.<sup>4</sup>

## Introduction

Over the course of human history, there have been several developmental leaps in the way in which people trade and exchange. Each has opened the door to transformational benefits, but also created new challenges and risks for society to navigate.<sup>1</sup>

It is interesting that charities may be somewhat more at risk from cryptocurrencies than some other types of trusts. Not only can charity trustees use their general power of investment to purchase the different types of virtual currencies (as can other types of trustee),<sup>5</sup> but charities are additionally exposed to further risks

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1. Sam Jackson, ‘Cryptocurrencies: what are they, and should charities use them?’ (*gov.uk*, 12 July 2022) <<https://charitycommission.blog.gov.uk/2022/07/12/cryptocurrencies-what-are-they-and-should-charities-use-them/>> accessed 16 April 2023.

2. ‘CAI0059: Written evidence submitted by the Charity Commission for England and Wales’ (UK Parliament, 1 September 2022) <[https://committees.parliament.uk/writtenevidence/111461/html/#\\_ftn6](https://committees.parliament.uk/writtenevidence/111461/html/#_ftn6)> accessed 16 April 2023.

3. *Ibid*.

4. *Ibid*.

5. Trustee Act 2000, s. 3.

through cryptocurrency donations and the need to move money internationally.<sup>6</sup> It appears that crypto is increasing as a means for donors to make charitable donations for various causes. For instance, with respect to charities' reliance on cryptocurrency donations, Jackson has stated that "The Ukrainian government has raised millions of dollars for its war effort via cryptocurrencies in recent months."<sup>7</sup>

Given the exponential growth of cryptoassets in the last few years, crypto-related risks have become a reality for charitable trusts and trustees. And these risks are likely to increase further still if the use of crypto becomes ever more prevalent in society. An assessment of all the different types of crypto risks and issues would be far beyond the scope of this article. Thus, for want of space and time, this work is primarily focused on the Charity Commission's final form of risk exposure listed above—that is, the risk created by investment in cryptoassets.

The Charity Commission's latest annual report of the sector demonstrates why charities are exposed to investment risk from cryptoassets. The data from the 2021–22 financial year suggest that there are some 169,029 charities listed on the register, with 928,688 trustee positions.<sup>8</sup> Furthermore, the Commission has acknowledged in its report that it has regulated a total of £83.8 billion worth of charity income in the 2021–22 year.<sup>9</sup> It may be argued, therefore, that the risks from crypto are somewhat compounded for the charity sector, given that charities hold a significant capitalisation within the financial markets. The charity sector is further complicated by the range of extant purpose trusts, all of which have different needs.<sup>10</sup>

This work seeks to expand on a previous article that was written by the present author and published in *Trust*

& Trustees in 2023.<sup>11</sup> That earlier submission assessed the risks that cryptocurrencies create for trusts and trustees generally; it looked specifically at how cryptoassets are now considered to be a form of legal "property" and are therefore capable of forming the subject matter of a trust.<sup>12</sup> Although, that being the case, further questions have arisen.<sup>13</sup> While this article was written for private express trusts in general, the legal principles discussed and conclusions drawn similarly apply to charities. The author's previous research developed a "risk profile", to demonstrate the range of risks that were created by cryptoassets for trust funds and their trustees.<sup>14</sup> This risk profile developed in the author's previous work showed that there are three main risks for trustees, i.e.:

- Regulatory risk.
- Market risk.
- Reputational risk.<sup>15</sup>

This risk profile applies equally to charities. When the above listed risks are considered in charity trustee investment, it assists in demonstrating why investment is the greatest form of risk exposure out of the three identified by the Charity Commission.

Given the unique nature of charitable purpose trusts, the author felt compelled to build upon and apply the foundations of his previous research to this diverse sector of purpose trusts. Therefore, the writing of this article has been greatly inspired by the author's own previous contribution, together with the recent work that has been undertaken by the Charity Commission on cryptocurrencies and cryptoassets. Most interesting for this work is the Charity Commission's evaluation of the ways that charities can be specifically exposed to crypto-related risks, as shown above.

6. n 2.

7. n 1.

8. Charity Commission for England and Wales, 'Charity Commission Annual Report and Accounts 2021–22' (*gov.uk*, 14 July 2022) 6 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1090647/Charity\\_Commission\\_Annual\\_Report\\_and\\_Accounts\\_published.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090647/Charity_Commission_Annual_Report_and_Accounts_published.pdf)> accessed 16 April 2023.

9. *Ibid.*

10. *Ibid.*

11. Lloyd Brown, 'Cryptocurrencies and trustees: what are the risks?' (2023) 29(3) *Trusts & Trustees* 186.

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*, 194–196.

15. *Ibid.*

This research area is relatively new and, as such, there is scope to undertake future research on the charity sector and crypto risks and issues. The author believes that future literature should focus on and attempt to propose regulatory solutions for the new and emerging crypto-related risks. This will be important as the government has proposed that it intends to create a clearer regulatory regime for cryptocurrencies.<sup>16</sup> Forthcoming regulation will aim to better incorporate cryptoassets into the UK's financial services.<sup>17</sup> Ultimately, the regulatory framework governing this unique asset is yet to be fully realised, and there are inevitable regulatory gaps that must be identified and filled.<sup>18</sup>

The following section provides a definition of “cryptocurrency” and “cryptoasset”. Thereafter, the paper turns to show why, out of the three forms of risk exposure identified by the Charity Commission, investment is the greatest crypto threat for charities at the present time of writing. The article looks at the law governing charity trustees' investment power and duties, including the new case of *Bulter-Sloss v The Charity Commission for England and Wales* [2022] EWHC 974 (Ch).<sup>19</sup> The article ends by questioning whether charity trustees should invest in cryptoassets at this time: in short, the advice is that the sector should proceed with caution.

## Defining “cryptocurrency” and “cryptoasset”

Before continuing any further it is important to provide a note on terminology. This article uses the terms “cryptocurrencies” and “cryptoassets” interchangeably and without prejudice. However, at a very specific level they mean different things, and that shall be explored in

this section. To begin, a simple, but nonetheless useful, definition of “cryptocurrencies” is provided by Weinberg. He states, for instance, that cryptocurrencies are:

[D]ecentralized virtual currencies that use cryptographic processes to carry out transactions. They are not controlled by a central authority. A cryptocurrency is a digital or virtual currency secured by cryptography and built on a blockchain, a decentralized peer-to-peer network, or ledger.<sup>20</sup>

Weinberg has suggested that ‘Cryptocurrency and crypto-assets have the same meaning in accounting terms.’<sup>21</sup> In that sense, he suggests that both terms appear “on the balance sheet”.<sup>22</sup> Jackson, writing for the Charity Commission's blog, has defined “cryptoassets” as:

[D]igital representations of value or rights that use blockchain technology. They are unregulated, peer-to-peer exchanges of value that rely on encrypted digital data.<sup>23</sup>

Weinberg and Jackson's definitions are useful for gaining an understanding of the nature of crypto. Such assets are often hailed as revolutionary because they are, as Weinberg states, decentralised.<sup>24</sup> However, because they are not controlled by central banks (and are therefore “decentralised”), they are not regulated or controlled to the same degree that other issued currencies are.<sup>25</sup> While some may see this form of decentralised financing as liberating, others may similarly find it irksome. The above definitions further suggest that cryptoassets are held on a “ledger” or “blockchain”.

16. HM Treasury, ‘Future financial services: regulatory regime for cryptoassets’ (February 2023) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1133404/TR\\_Privacy\\_edits\\_Future\\_financial\\_services\\_regulatory\\_regime\\_for\\_cryptoassets\\_vP.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133404/TR_Privacy_edits_Future_financial_services_regulatory_regime_for_cryptoassets_vP.pdf)> accessed 16 April 2023.

17. Ibid.

18. Ibid.

19. *Bulter-Sloss v The Charity Commission for England and Wales* [2022] EWHC 974 (Ch).

20. Rick Weinberg, ‘Difference Between Cryptocurrency And Cryptoassets’ (no date) California Business Journal <<https://calbizjournal.com/difference-between-cryptocurrency-and-cryptoassets/>> accessed 16 April 2023.

21. Ibid.

22. Ibid.

23. n 1.

24. n 20.

25. Ibid.

This is the “cryptographic” side of these virtual currencies.<sup>26</sup> In his definition, Jackson goes on to define the “blockchain” in the following way:

[The blockchain is] a shared unchangeable record that tracks the exchange of assets. The benefits of blockchain are that it is extremely fast, as information is updated instantly, and immutable, in that the information it contains about past transactions cannot be easily falsified, because it is shared. No single organisation or individual holds the ‘key’ to the blockchain. Proponents of blockchain argue that it is secure, but what is clear is that the cryptoassets it facilitates are volatile. Their value can increase dramatically, and crash suddenly. Holders of cryptoassets may also face difficulties when they are stolen or misused.<sup>27</sup>

There are some differences between the “cryptocurrency” and “cryptoasset” that should be noted. As a term the latter is somewhat broader than former. Weinberg, for instance, describes cryptocurrency as “nothing more than a form of money”.<sup>28</sup> However, cryptocurrency can turn into a cryptoasset where it begins “to include features such as smart contracts, payment gateways, content monetization, and so on, if it has combined the functions of a crypto asset”.<sup>29</sup> Therefore, “Crypto assets include not only cryptocurrencies, but also non-currency assets such as non-fungible tokens, security tokens, and utility tokens, which are all stored on a distributed ledger”.<sup>30</sup> HM Treasury has shown the difficulty of providing a definition of “cryptoassets”. In a 2023 consultation paper the Treasury stated that:

There is no universal definition of a “cryptoasset” or related terms such as “digital asset” or “virtual asset”,

but there is increasing consensus on the basic elements of the definition in UK and overseas legislation.<sup>31</sup>

The Treasury thereafter cites the definition of “cryptoassets” as provided in the Financial Services and Markets Bill (FSMB) 2023 (which, at the time of writing, has passed into the report stage at the House of Lords).<sup>32</sup> The FSMB 2023 defines cryptoasset as:

[A]ny cryptographically secured digital representation of value or contractual rights that –

- a. can be transferred, stored or traded electronically, and
- b. that uses technology supporting the recording or storage of data (which may include distributed ledger technology).<sup>33</sup>

The Treasury suggests that this definition has purposefully been “drawn broadly” in order “to capture all current types of cryptoasset”.<sup>34</sup> The risks and challenges posed by crypto to the financial markets and its institutions are demonstrated by the following excerpt of the Treasury’s report:

Over recent years cryptoassets and the activities underpinning their use (or ‘crypto’) has evolved into an extensive, complex, and rapidly evolving ecosystem. It features a myriad of different activities and business models, each generating different types of opportunities and risks for the actors involved.<sup>35</sup>

Crypto comes with many opportunities. However, hidden within these opportunities are inherent risks that must be appropriately identified and managed.

26. Ibid.

27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid.

31. n 16.

32. Ibid.

33. Ibid, para. 2.1.

34. Ibid.

35. Ibid, para. 1.1.

For instance, the volatility of the sector should not be taken lightly, as the recent collapse of FTX has profoundly demonstrated.<sup>36</sup> As the Treasury suggests, ‘this continues to be a very volatile sector, with cryptoasset price volatility significantly exceeding that of many transitional asset classes such as equities or commodities’.<sup>37</sup>

Interestingly, recent decisions from the courts have established that crypto is a valid form of legal “property”.<sup>38</sup> This matter was looked at in detail in the author’s previous article.<sup>39</sup> Thus, it would not be right to indulge in a further reiteration of that legal analysis again here; but, succinctly, cryptoassets have been determined as a form of legal property and are capable of forming the certain subject matter of a trust.<sup>40</sup>

### **“Investment”: the greatest form of crypto-related risk exposure for charities**

This section explains why trustee investment should be seen as the greatest form of crypto-related risk exposure currently facing the charity sector. It does this by analysing investment in the light of the other forms of risk exposure identified by the Charity Commission and set out in the introduction.

As previously stated, the Charity Commission has identified three main means of sectoral exposure to crypto: the “investments” made by trustees together with “fundraising” and “moving funds internationally”.<sup>41</sup> This article agrees with these identified risks but would nevertheless go further by classifying the greatest extant threat, that being investment.

With respect to “moving funds internationally”, it is likely that the use of cryptoassets would only occur in a

limited number of circumstances, and for very specific countries and/or causes. This type of crypto-related risk is only largely problematic for specific charities. For instance, a charity that provides humanitarian aid for countries that do not have a stable government or legal tender would indeed be exposed if it used cryptoassets to transfer funds.<sup>42</sup> This is a very specific type of market risk. In comparison, the potential for a charity to be exposed to crypto-related risks through trustee investment is far more wide-ranging and is a blanket risk, applying to the sector.

As for cryptoassets being used for “fundraising” as part of the donation process, this is perhaps a greater issue than the movement of funds between countries. But it is contended that this is still not as significant a risk as investment. For instance, the Charity Commission has suggested that “The highest reported single donation is less than £100k”.<sup>43</sup> All things considered, cryptoassets are not currently being widely used to make charitable donations. Furthermore, any cryptoassets that are donated can be readily converted into FIAT currency soon after the donor has made the transfer.<sup>44</sup> Also, a donation is different to an investment, as it carries less credit risk. A donation is an accretion to the trust fund, whereas an investment is a process whereby the trustees use the fund to make greater financial gains. It is clear, however, that donation, as a form of risk exposure, has the potential to become a significant issue in the future, should crypto donations become widely used in the charity sector.<sup>45</sup> At the moment, however, it seems to be relatively uncommon for donors to make donations to charities using cryptoassets. Of course, future regulation needs to consider crypto donations as a growing threat and legislate accordingly.<sup>46</sup>

36. *Ibid.*, para. 1.8. See also, n 11 (Brown), 187.

37. *Ibid.*, para. 1.6.

38. n 11, 189–192.

39. *Ibid.*

40. *Ibid.*

41. n 2.

42. *Ibid.*

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. *Ibid.*

In light of the above, this article argues that at the present time of writing charities are more likely to be exposed to crypto risks pursuant to the law governing the trustees' investment power.<sup>47</sup> The law in this area is explained in the following section. This is because trustees have, by virtue of their office, a wide-ranging power of investment that permits cryptoassets' investment.<sup>48</sup> However, given the complexity and volatility surrounding crypto markets, the serious question arises as to whether the trustees' power should be, to some extent, limited. Importantly, such a thought is supported by the Charity Commission, i.e.:

Trustees may lack expertise to safely handle and mitigate risks associated with cryptoassets. Given the complexity of the cryptoassets market and that using cryptoassets may be new for many charities, there may be risks for how equipped charity trustees are to make informed decisions about handling of cryptoassets.<sup>49</sup>

The following section discusses the trustees' investment power and duties in greater detail, to assist in demonstrating the article's central thesis. These powers and duties are similarly held by trustees in general, but there is an important difference to bear in mind for charity trustees when it comes to investment as meaning the maximisation of financial benefit.

## Trustee investment

It is shown in this section that trustees (including charity trustees) have a significantly broad power of investment under the Trustee Act 2000.<sup>50</sup> As such, trustees are capable of treating trust property as if they were

absolutely entitled to it.<sup>51</sup> When carrying out their investment function, trustees are subject to the statutory duty of care, as outlined at section 1 of the Trustee Act 2000.<sup>52</sup>

Cryptoassets are not subject to any specific investment restrictions, and ultimately, trustees can use their power of investment to purchase these assets. A "portfolio" approach is taken to appreciate investment risks.<sup>53</sup> Under this approach, high-risk investments can be made so long as there is diversification within the portfolio as whole.<sup>54</sup> As with high-risk investments assets that are deemed to be low risk (and which bring low returns) can be equally problematic.<sup>55</sup>

Prior to investing, trustees have a duty to assess the suitability of the proposed investment and to obtain the proper advice.<sup>56</sup> This is particularly important with cryptoassets because of this asset's volatility, as the Charity Commission has explained:

The cryptoasset market is extremely volatile with values fluctuating greatly. This has been demonstrated by a recent significant and sudden reduction in the value of Bitcoin. It is considered extremely risky for charities to speculatively invest in cryptoassets or hold funds in cryptocurrency given this fluctuation in an asset/'currency' that is not regulated. If a future crash were to happen, charitable funds could be at risk. Therefore, there is a risk to charities in holding money in cryptoassets for significant periods of time, without converting into FIAT currency.<sup>57</sup>

The sub-sections below outline the general power of investment and the idea of investment as maximising financial benefit.

47. Trustee Act 2000, s. 3.

48. Ibid.

49. n 2.

50. Trustee Act 2000, s. 3.

51. Ibid.

52. Ibid, s. 1.

53. Paul S Davies and Graham Virgo, *Equity & Trusts: Text, Cases, and Materials* (3<sup>rd</sup> edn, OUP 2019) 602–603.

54. Ibid.

55. Ibid.

56. Trustee Act 2000, ss. 4–5.

57. n 2.



## The trustees' general power of investment

The trustees' power of investment is contained within the Trustee Act 2000, a legislation which further codified this area of the law when introduced. Part II of the 2000 Act deals with "investment". Section 3 outlines the trustees' "general power of investment".<sup>58</sup> This section creates a broad power that allows a trustee to "make any kind of investment that he could make if he were absolutely entitled to the assets of the trust".<sup>59</sup>

The general power of investment is somewhat limited by section 3(3), which "does not permit a trustee to make investments in land other than in loans secured on land".<sup>60</sup> Nevertheless, section 8 of the Act deals with the acquisition of land and states that "a trustee may acquire freehold or leasehold land in the United Kingdom".<sup>61</sup>

Given the breadth of this power of investment, subject to the express provision of the trust instrument or the wishes of all *sui juris* beneficiaries,<sup>62</sup> it is evident that trustees may indeed invest in cryptoassets and can thereby be exposed to the risks that are attached to this particular investment opportunity. It is necessary to point out that the Charity Commission has confirmed in its CC14 guidance that the general power of investment further applies to charity trustees.<sup>63</sup> The CC14 guidance, quoting Sir Donald Nicholls VC, states that "investment" "referred to 'property held by trustees for the purpose of generating money, whether income or capital growth, with which to further the work of the trust'".<sup>64</sup>

It is important to mention that the trustees' section 3 investment power is supplemented by two investment duties that are contained in sections 4 and 5 of the Trustee Act 2000.<sup>65</sup> These duties are also applicable to charity trustees.<sup>66</sup> Section 4 sets out the "Standard Investment Criteria" (or "SIC")<sup>67</sup> and section 5 sets out the duty of obtaining the proper advice.<sup>68</sup> Under section 4, trustees must "have regard to the standard investment criteria"<sup>69</sup> and "must from time to time review the investments of the trust".<sup>70</sup> The SIC includes, in so far as it is deemed appropriate, the need to assess the "suitability" of the investments,<sup>71</sup> together with the need for 'diversification' of investments.<sup>72</sup> As with the section 3 power, these duties apply to charity trustees when making investment choices or reviewing their investments.

## Maximising financial benefits

Important for this discussion is the fact that the Charity Commission has stated that "There is no statutory definition of investment although there is authority in case law for what is meant by the term".<sup>73</sup> It thereafter goes on to discuss what is meant by the term "investment" by looking at the concept of the need for trustees to focus on the "maximum financial return".<sup>74</sup> In trusts law the concept of an investment is one that provides for a maximum financial return for the beneficiaries.

58. Trustee Act 2000, s. 3.

59. *Ibid.*

60. *Ibid.*, s. 3(3).

61. *Ibid.*, s. 8.

62. n 53, 594–595.

63. The Charity Commission for England and Wales, 'Charities and investment matters: a guide for trustees (CC14)' (*gov.uk*, 1 October 2011) <<https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14>> accessed 16 April 2023.

64. The Charity Commission for England and Wales, 'Guidance: Charities and investment matters: Legal underpinning' (*gov.uk*, 1 August 2016) para. 3.2 <<https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14/charities-and-investment-matters-legal-underpinning>> accessed 16 April 2023.

65. Trustee Act 2000, ss. 4–5.

66. n 64.

67. Trustee Act 2000, s. 4.

68. *Ibid.*, s. 5.

69. *Ibid.*, s. 4(1).

70. *Ibid.*, s. 4(2).

71. *Ibid.*, s. 4(3)(a).

72. *Ibid.*, s. 4(3)(b).

73. n 64, para. 3.7.

74. *Ibid.*, para. 3.2.

The above legal *ratio* was famously established by Sir Robert Megarry VC in the case of *Cowan v Scargill* [1985] Ch 270.<sup>75</sup> The case of *Cowan v Scargill* is well-known by trusts lawyers. Indeed, it is a case that has been thoroughly scrutinised in the literature, including by some of the current author's previous publications.<sup>76</sup> Therefore, a significant exegesis of this case is largely unnecessary for this work. That said, the *ratio* established in this case is important to define here, since it assists in explaining to the reader the meaning of "investment" in the context of the trustee general power of investment.

In *Cowan* the Sir Robert Megarry VC was asked to decide upon an investment strategy dispute that had arisen between a board of pension trustees. One faction of the board of trustees represented the interests of the National Coal Board (NCB). On the other hand, the other trustees acted for the National Union of Mineworkers (NUM).<sup>77</sup> The NUM trustees naturally disagreed with a new investment strategy proposal introduced by the NCB trustees, given that it would have allowed the trustees to invest in industries that directly competed with coal together with investment in South Africa (a country then facing Apartheid).<sup>78</sup> Contrary to the NCB trustees and their strategy, the NUM trustees believed that the trustees' investment power should allow for the adoption of ethical considerations.<sup>79</sup> The VC disagreed with the NUM trustees and suggested that the best interests of the beneficiaries were their "best financial interests".<sup>80</sup> In modern financial markets, this decision should be seen in a different light.<sup>81</sup> Things that were once considered to be purely "non-financial"

matters (e.g., environmental and social concerns) are capable of directly impacting financial actors' finances.<sup>82</sup> For instance, investments in the oil and gas sector can create long-term financial risk for investors, as well as invoking reputational damage.<sup>83</sup>

It has already been established in this article that charitable trusts are different from traditional trusts. For one thing, they are not void for having no identifiable human beneficiaries pursuant to the "beneficiary principle";<sup>84</sup> an important trust concept established in *Morice v Bishop of Durham* (1804) 9 Ves 399.<sup>85</sup> Thus, being different from private express trusts, they must be considered in their own light. And the ruling in *Cowan v Scargill* has been interpreted within the charity sector, through the case of *Harries v The Church Commissioners for England* [1992] 1 WLR 1241, colloquially known as "the Bishop of Oxford's case".<sup>86</sup> The importance of this case to the charity sector and investment is stated in the CC14 guidance.<sup>87</sup> In *Harries v Church Commissioners*, Sir Donald Nicholls VC restated that charity trustees should act for the maximum financial return.<sup>88</sup> However, it is generally acknowledged that greater flexibility is required for charities, in that ethical considerations can be adopted within the investment strategy where a particular investment would offend a given charity's objects.<sup>89</sup> For example, it would not make sense for charity trustees to invest in the tobacco industry when their charity's purpose concerns the prevention and curing of cancer.

The flexibility afforded to charity trustees in taking into account ethical considerations in an investment strategy was recently demonstrated in the case of *Butler-Sloss v The Charity Commission for England and*

75. *Cowan v Scargill* [1985] Ch 270, 286.

76. Lloyd Brown, 'Cowan v Scargill and the fiduciary duty of investment: has the nature of the investment duty changed and what is currently driving "socially responsible investing" in pension schemes?' (2020) 26(8–9) *Trusts & Trustees* 756–766.

77. *Cowan* (n 75) 277(H).

78. *Ibid.*

79. *Ibid.*, 279(B).

80. *Ibid.*, 246(D).

81. n 76, 761.

82. *Ibid.*

83. *Ibid.*, 762.

84. n 53, 283.

85. *Morice v Bishop of Durham* (1804) 9 Ves 399.

86. *Harries v The Church Commissioners for England* [1992] 1 WLR 1241.

87. n 64.

88. *Ibid.*

89. *Ibid.*



*Wales* [2022] EWHC 974 (Ch).<sup>90</sup> This case concerned a joint declaration made to the High Court in relation to the investment policies of two charities.<sup>91</sup> The question before the court was whether charities could adopt an investment policy that excludes potential investments (thus making it more difficult to maximise the fund's financial benefits), where such investments conflict with a given charity's purposes.<sup>92</sup> In this case, the charity trustees sought to adopt an ethical/responsible investment policy, making investment choices that were aligned with the Intergovernmental Panel on Climate Change's Paris Agreement.<sup>93</sup> Mr Justice Michael Green used the CC14 guidance to assist his judgment, and particularly section 3.3 of that guidance which questions whether a charity can make ethical investments.<sup>94</sup> The judge decided that the trustees had "sufficiently balanced the objective with any financial detriment",<sup>95</sup> and in his view had "exercised their powers of investment properly and lawfully".<sup>96</sup> Broadway believes that the *Butler-Sloss* decision has created a need of further elaboration from the ESG guidance.<sup>97</sup> At the same time, it has been praised as "increasing the degree of trustee autonomy in the charitable trust context".<sup>98</sup> Somers-Joce and Koch, for instance, have suggested that the decision "gives trustees greater latitude to advance the charitable purposes which underpin the trust when exercising their investment functions".<sup>99</sup> For the purposes of this article at least, *Harries* and *Butler-Sloss* demonstrate the breadth of the investment power that is held by charity trustees.

## Should charity trustees invest in cryptoassets?

In short, charity trustees should proceed with caution when investing in cryptoassets. The sections above

demonstrate that charity trustees can purchase cryptoassets through their general power of investment and may indeed feel obliged to do so to maximise the fund's financial benefit. However, this article suggests that charity trustees (indeed, all trustees) should be cautious about doing so.

The Charity Commission has warned about the high risk and high volatility of the crypto markets, and that such assets can have severe consequences for charitable trusts.<sup>100</sup> Before investing, charity trustees should act in accordance with their statutory investment duties. For instance, they should make sure that they assess the suitability and diversity of their investment choices under the SIC, and furthermore seek out and obtain the proper advice. Obtaining the proper advice does not mean that they necessarily need to follow that advice. Not acting in accordance with the regulatory framework can result in a breach of duty and personal liability for trustees.

The Trustee Act 2000 investment duties, fortunately, seek to limit and control the actions of charity and other trustees. This should limit, to some extent, the exposure that is capable of being created by crypto-related investment risks. Nevertheless, this article believes that more needs to be done to protect trustees from personal liability, and to further protect charitable trust funds from future financial losses. While it is outside of the scope of this article to map out a regulatory regime, future legislation needs to deal with the regulatory gaps that currently exist in this important area.

## Conclusion

This article has been inspired by the author's previous work as well as the research of the Charity Commission.

90. *Butler-Sloss v The Charity Commission for England and Wales* [2022] EWHC 974 (Ch).

91. Cassandra Somers-Joce and Tim Koch, 'Butler-Sloss v The Charity Commission: the pursuit of charitable purposes through ESG investing' (9 July 2022, Oxford University Faculty of Law Blog) <<https://blogs.law.ox.ac.uk/blog-post/2022/07/butler-sloss-v-charity-commission-pursuit-charitable-purposes-through-esg>>

92. n 90 (*Butler-Sloss*), para. 1.

93. *Ibid.*, para. 6–7.

94. *Ibid.*, para. 39.

95. *Ibid.*, para. 87.

96. *Ibid.*, para. 88.

97. Luke Broadway, 'Butler-Sloss v The Charity Commission: ESG investment guidance in need of elaboration' (2022) 28(9) *Trusts & Trustees* 849.

98. n 91.

99. *Ibid.*

100. n 2.

It has discussed how *investment* is currently the greatest form of crypto “risk exposure” out of three ways identified by the Charity Commission. In this article, the author has demonstrated how the trustees’ investment power can transfer crypto-related risks. The work concluded by questioning whether charity trustees should

invest in cryptoassets. The advice given was that they can, but extreme caution must nevertheless be adopted. Ultimately, cryptocurrencies and cryptoassets are highly volatile and, while they can create financial profits for investors, they may also lead to significant losses.

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