

Judicial Communications Office

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COURT DECIDES CHARITY COMMISSION CANNOT DELEGATE DECISION MAKING FUNCTIONS TO STAFF

Summary of Judgment

Madam Justice McBride, sitting today in the Chancery Division of the High Court, held that the Charity Commission cannot lawfully delegate its decision making functions to its staff acting alone.

The Court was dealing with three appeals all of which raised the same question of law (“the key issue”) namely whether the functions attributed to the Charity Commission for Northern Ireland (“the Commission”) by the provisions of the Charity Act (Northern Ireland) 2008 (“the 2008 Act”) can lawfully be discharged by employees of the Commission acting alone¹. The appeals had been determined by the Charity Tribunal (“the Tribunal”). In two of the appeals, the Tribunal found that employees of the Commission could make decisions but in the third appeal, it held that the Commission could not delegate the discharge of its decision making functions to a member of staff. Madam Justice McBride commented that it was therefore vitally important, not only for the workings of the Commission, but also for the work of charities in Northern Ireland and for the public at large that the key issue is now determined by the High Court.

The Commission was established as a non-departmental public body sponsored by the Department for Communities (“the Department”) and became operational from 1 June 2009. Seven part-time Commissioners have been appointed. The statutory background and relevant legislative provisions in Northern Ireland are set out in paragraphs [50] – [62] of the judgment. As well as the provisions of the 2008 Act, the judgment also considers section 19 of the Interpretation Act (Northern Ireland) 1954 (“the 1954 Act”) which deals with the interpretation of words in legislation establishing or providing for the establishment of a body corporate (such as the Commission). The 2008 Act provides the Commission with very wide and extensive powers, including certain functions which were previously the sole preserve of the High Court.

The Court considered the legislative provision establishing the Charity Commissioners for England and Wales (the Charities Act 2011 (“the 2011 Act”). It was not in dispute that the decisions which are the subject of the appeals in this jurisdiction can lawfully be made in England and Wales by a member of the Commission’s staff who is duly authorised. This is because the Act establishing the Commission in E&W made a number of specific provisions in respect of staff and the Commission’s power to regulate its own proceedings which are not specifically provided for in the 2008 Act.

Submissions of the Parties

Counsel for the Commission submitted that section 19 of the 1954 Act by explicitly empowering it to regulate its own procedure and business and by giving it power to employ such staff as it finds necessary for the performance of its functions, thereby enables the Commission to delegate its decision making functions to staff. It was claimed there is nothing in the 2008 Act which evinced a contrary intention or otherwise constrained the Commission from adopting internal processes which

¹ The appeals were: *Trevor McKee and Joseph Hughes v Charity Commission*; *Charity Commission v Sean Caughey*; and *Robert Crawford v Charity Commission and Trevor McKee*

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permitted regulation of its procedures to allow staff to discharge its decision making functions. Counsel further submitted that, in the event that the court found the legislative provisions did not give the Commission an explicit power to delegate its decision making functions to staff, the court should find that there was an implied delegation in accordance with a number of authorities.

The Attorney General, however, submitted that upon a plain interpretation the statutory provisions do not grant an express power to the Commission to delegate its decision making functions to a member of staff acting alone. In particular the right to regulate its own procedure and to employ staff granted by section 19 of the 1954 Act does not encompass a right to delegate decision making. Further even if section 19 did encompass such a wide power of delegation it was constrained by the provisions of Schedule 1 to the 2008 Act which expressly limited delegation to a Committee comprising at least one Commissioner. The Attorney General contended that a power of delegation should not be implied and that the fundamental nature of a statutory corporation is not such that discharge of functions by the staff is inherently lawful.

Determination

Madam Justice McBride said that determination of the key issue is first and foremost a question of statutory interpretation.

She firstly considered **section 19 of the 1954 Act**. Section 6(8) of the 2008 Act applies section 19 of the 1954 Act to the Commission and as a consequence all the rights and powers set out in section 19 are vested in the Commission, being a body corporate. This includes the right of the Commission to regulate its own procedure and business and the right to employ such staff as may be found necessary for the performance of its functions. Madam Justice McBride noted that one of the objects of the 1954 Act was to reduce the “gobbledygook” in other Northern Ireland Acts so that they can be “confined to essentials without the tedious repetition of phrases which are only necessary to avoid misunderstanding”. Accordingly, she rejected the submission that the court should only have regard to section 19 in the event that the provisions of the 2008 Act were ambiguous or there is a gap in its provisions. Despite researches by counsel, they were unable to find any relevant authority in relation to the interpretation of the provision of section 19.

Referring to the definitions of “to regulate” and “to delegate”, Madam Justice McBride said she was satisfied that the powers given to the Commission by section 19(1)(a)(v) “to regulate” its own procedures do not give the Commission an express power “to delegate” any of its decision making functions to staff. Further, she considered that the power given by section 19(1)(a)(v1) to “employ such staff as may be found necessary for the performance of its functions” is not a provision which gives the Commission an express power to delegate functions to staff: “Rather it simply provides that the Commission has power to employ staff to assist it in carrying out the functions of the Commission. I therefore reject the Commission’s submission that this provision gives it an express power to delegate its functions to staff.”

Madam Justice McBride commented that even if section 19 were to be interpreted in the manner contended by the Commission and the Department, it would mean that the Commission would have a “blank cheque” to delegate all the functions entrusted to it by the 2008 Act to other persons or bodies when it so wished. Effectively this would mean that the Commission could abdicate all its decision making responsibilities in favour of other persons or bodies:

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“I consider that the language used in section 19 does not accord with such a broad interpretation. I further consider that it was not the legislature’s intent that the Commission should be able, pursuant to the provisions of section 19, to delegate all its decision making functions to its staff.”

Core to the Commission’s case was the submission that section 19 was equivalent to the provisions in England and Wales which everyone accepted permitted staff acting alone to make decisions. Madam Justice McBride however did not agree. She referred to paragraphs 8 and 9 of Schedule 1 to the 2011 Act which expressly permit the performance of the Commission’s functions by staff and the delegation of functions to a Committee and said these would not have been necessary if it had been considered that section 19 permitted such an interpretation. The judge commented that the provisions of the 2011 Act, rather than supporting the Commission’s case actually lend further support to the view that the 2008 Act does not grant the Commission an express power to delegate its functions to staff. She said this was consistent with the presumption against superfluous drafting.

Madam Justice McBride then considered the express provisions relating to delegation granted by Schedule 1 to the 2008 Act. Paragraph 9 makes express provision for delegation of the Commission’s functions by Committees which may include persons who are not members of the Commission and provides that it can set a quorum for meetings of the Commission or a Committee. The judge considered that to be a provision which prescribes or limits the powers given by section 19. She said the use of the word “may” in paragraph 9 simply means this procedure is not mandatory. The Commission, if it so wishes may discharge its functions through the entire Commission or it may choose to discharge its functions through a Committee. Madam Justice McBride said she was satisfied that the provisions of Schedule 1 paragraph 9, being express powers, set the high water mark of the extent to which the Commission can delegate its powers. She was also satisfied that the provisions of Schedule 1 paragraph 4 regarding the employment of staff do not make any express provision for delegation of statutory functions to them including the delegation of the Commission’s decision making functions.

The Commission submitted that **sections 9 and 10 of the 2008 Act** were consistent with its interpretation of section 19, namely that it had been granted wide powers to regulate its own procedure. Section 10 states that the Commission has power to do “anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties”. Madam Justice McBride commented that section 10 therefore permits the Commission to take any steps which would have the effect of assisting, helping or otherwise easing the Commission in the discharge of the functions entrusted to it. She did not consider, however that section 10 could be interpreted as a general “escape” clause from the other statutory controls set out in the 2008 Act and could not be otherwise interpreted to overrule the express provisions in the 2008 Act which deal with delegation. She concluded that section 10, being general and incidental in nature, must yield to the specific and express powers granted by paragraph 9 of Schedule 1. The judge further commented that section 10 speaks to “what” the Commission can and cannot do in making the performance of its functions easier: “It says nothing about “who” carries out the functions. I am therefore satisfied that section 10 being silent on the issue of “who” discharges functions cannot assist the Commission in the case it seeks to make.”

Section 9 of the 2008 Act imposes general duties on the Commission including that in performing its functions it must have regard to the need to use its resources in the most efficient, effective and economic way and to be accountable and consistent. The Commission claimed that in order to do

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this it was not only empowered but obliged to delegate decision making functions to staff. Madam Justice McBride rejected this argument. She said it was difficult to see how consistent and accountable decisions could be made if the Commissioners were not themselves involved in decision making. She considered that the only way in which consistency and the oversight required by section 9 could be met is by Commissioners being involved in decision making either as a body corporate or by delegating these decisions to a Committee which must include at least one Commissioner or to a quorum of Commissioners. Reading the provisions of the 2008 Act separately and in its entirety, Madam Justice McBride found that the Commission does not have power to delegate its statutory functions to staff acting alone.

The Commission further contended that an interpretation of section 19 that did not permit delegation of functions would place an unacceptable workload upon the Commission having regard to the limited number of Commissioners and the breadth of functions they had to undertake. There was no evidence before the court about the workload of the Commission and the judge said she was therefore not satisfied on the basis of the evidence that the Commission is in fact overburdened. She said that if it is, there are steps it can take to deal with this including regulating its procedures so that staff can assist it in making its decisions (for example by carrying out investigations and conducting preparatory work for the Commissioners) or requesting that the legislation is changed to allow it to delegate its functions to staff.

The Attorney General relied on the provisions of section 6 of the 2008 Act in support of his interpretation of section 19. Section 6 sets out the qualifications a Commissioner should have including expertise in charities and financial matters. Madam Justice McBride commented that it was difficult to see why the 2008 Act specifically requires the Commissioners to have such expertise if they could then delegate all their functions to staff. She accepted that Commissioners in England and Wales with similar qualifications and experience are entitled to delegate their functions to staff but noted that the factual background there was different as staff previously acted as lay commissioners.

Implied Delegation

The Commission and the Department submitted that in the event that the court found that the 2008 Act did not make express provision for delegation of functions to staff, the court should find there was implied delegation. The Attorney General and the appellants rejected this submission. Madam Justice McBride considered the relevant authorities on this matter and accepted that the court can in certain circumstances find there is an implied power to delegate to staff but in so doing it must consider a number of factors:

- There is strong presumption against interpreting a grant of legislative power as empowering delegation. The judge said that in this case the Commission has been given power to carry out a number of functions and the legislature has conferred an express power to delegate some of those functions to a Committee: “In these circumstances I consider that there is a strong presumption against implying a power to delegate to staff”;
- There is a tendency to adopt a more restrictive approach to implied authority to delegate in the case of proceedings of courts and cases involving other “judicial” and “disciplinary” powers. The judge said the powers given to the Commission under the 2008 Act are very extensive and considered that many are akin to judicial and disciplinary powers;
- A strict approach is likely to be taken if the power is conferred on the holder of a public office because of the personal qualifications and experience that the office holder is expected to

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have. The judge considered that the Commissioners' qualifications and experience should contribute to the Commission's decision making functions rather than just being limited to policy making decisions;

- There is no evidence before the court that the workload is such that delegation is inevitable, indeed the evidence indicates that the workload of the Commission is "modest".

Madam Justice McBride said that for these reasons she considered that a strict approach to implied delegation should be taken and she found that there is no implied power to delegate to staff. She said that if she is wrong in this finding, the court then has to consider the extent to which the Commission would be entitled to delegate its powers and in particular whether there is an implied power to delegate the particular functions arising in the three appeals under consideration. The judge said that by introducing the 2008 Act the legislature had thought it important that there be proper oversight of changes to a charity's objects and constitution and that an implied power to delegation would not extend to such matters. She found that even if there was an implied power to delegate some functions it would not extend to the decisions in the present appeals.

Statutory Corporation

The Commission submitted that an incorporated body is a body corporate and as such can act through its directors or employees. It submitted it is bound not only by the actions of a director or an employee acting with actual authority but, in most cases, is bound even by the actions of a director or employees with ostensible or apparent authority. The Commission contended that as a body corporate it enjoyed a separate legal identity and could act through individuals at different levels or through a committee or individuals and both had the same power to act through employees. It was further submitted that every decision was the decision of a body corporate whether done by the Board or Committee or by a member of staff.

Madam Justice McBride, however, said she had found that the 2008 Act did not grant the Commission an express power to delegate to staff and that there is no implied power of delegation. Accordingly the only way in which the Commission can carry out its decision making functions is either when it meets as a complete body or acts in accordance with the powers set out in paragraph 9 of Schedule 1 to the 2008 Act.

Conclusion

Madam Justice McBride dismissed the appeal brought by the Commission against *Mr Caughey* and granted the appeals in *McKee, Hughes* and *Crawford*.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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