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Ref: WEA10054

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 12/10/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN
IRELAND
(CHANCERY DIVISION)**

BETWEEN:

CHARITY COMMISSION FOR NORTHERN IRELAND

Appellant.

-and-

ATTORNEY GENERAL FOR NORTHERN IRELAND

Respondent;

Morgan LCJ, Gillen LJ and Weatherup LJ

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal by the Charity Commission for Northern Ireland ("the Commission") against the decision of Horner J dated 4 December 2015 by which he held that a single trustee had standing, under section 22 of the Charities Act (Northern Ireland) 2008, to seek a review of a decision of the Commission to hold a statutory inquiry into the governance of a charity. Mr O'Donoghue QC appeared for the Commission and the Attorney General appeared in person.

[2] The charity concerned is the Disabled Police Officers' Association Northern Ireland ("the Association"). William Allen served as chairman of the Association for a number of years up to June 2013. He was then elected as vice chairman and was also treasurer and welfare officer. In January 2014 he was again elected chairman. Throughout this time he was also a trustee.

[3] The Commission was established by section 6 of the 2008 Act and one of its functions is to identify and investigate apparent mismanagement in the administration of charities and to take remedial or protective action in connection with misconduct or mismanagement. Under section 22(1) of the 2008 Act the Commission may institute inquiries with regard to charities or a particular charity or class of charities either generally or for particular purposes.

[4] On 14 February 2014 the Commission sent a letter to the Association indicating that it had received notice of a concern relating to the governance and financial control of the Association and had decided to institute a section 22 inquiry.

[5] The letter also indicated that there was a right to make an application to the Charity Tribunal for a review of the decision of the Commission. The Charity Tribunal Rules (NI) 2010 provide for an application for review within 42 days, with power to the Charity Tribunal to extend time.

[6] By Order dated 8 August 2014 the Commission suspended William Allen as a trustee of the Association and made other orders in relation to the administration of the Association. By notice dated 4 September 2014 William Allen appealed against the decision that he be suspended as a trustee and further applied for extension of time for a review of the decision to institute the section 22 inquiry.

[7] In March 2015 the application to extend time for a review of the decision to initiate the inquiry was heard by the Charity Tribunal, Adrian Colmer BL presiding. The first issue considered was whether William Allen had standing to bring an application for a review of the decision to institute a statutory inquiry (regardless of the time limits). The Charity Tribunal concluded that Mr Allen did not have standing. Nevertheless the Charity Tribunal proceeded to consider the application to extend time for a review of the decision of the Commission to initiate the statutory inquiry and that application was dismissed.

The power of review under Schedule 3 of the Charities Act (NI) 2008

[8] The provisions in relation to review of decisions to institute a statutory inquiry are contained in Schedule 3 of the 2008 Act. A decision to institute a statutory inquiry is a "reviewable matter" for the purposes of Schedule 3. This appeal concerns the interpretation of the wording in paragraph 4 and the Table in the Schedule. Paragraph 4 and the relevant parts of the Table provide as follows (*with the operative words in italics*) -

“(1). An application may be made to the Tribunal for the review of a reviewable matter.

(2). Such an application may be made by –

(a) The Attorney General.

(b) *Any person mentioned in the entry in column 2 of the Table*

[Column 2 of the Table provides –

The persons are –

(a) *the persons who have control or management of the institution, and*

(b) *(if a body corporate) the institution itself].*

(3) The Commission shall be the respondent to such an application.

(4) In determining such an application the Tribunal shall apply the principles which would be applied by the High Court on an application for judicial review.

(5) The Tribunal may –

(a) dismiss the application, or

(b) if it allows the application, exercise any power mentioned in the entry in column 3 of the Table

[Column 3 of the Table provides –

Power to direct the Commission to end the inquiry.]”

[9] An application to extend time for bringing an application for a review of the Commission’s decision to institute a statutory inquiry had previously been made by another trustee, Robert Crawford, and the Charity Tribunal had held that Mr Crawford was not entitled to make such an application. The Charity Tribunal had noted that under column 2 of the Table the application was to be brought by the

“persons” who have control or management of the institution, which the Charity Tribunal had interpreted to mean persons in the plural, who comprised the governing body of the institution and did not extend to an individual trustee.

[10] Accordingly, when the issue arose again on the application of William Allen, the Attorney General intervened to contest the approach that the Charity Tribunal had adopted in the Crawford application and to argue that, under the wording of paragraph (4) and the Table, a single trustee could apply for review. In addition the Attorney General contended for a broader interpretation based on concerns about dealing with the actions of an oppressive majority.

The decision of the Charity Tribunal

[11] Before the Charity Tribunal the Attorney General relied on the Interpretation Act (Northern Ireland) 1954 which provides as follows -

“37(2) In an enactment

(a) Words in the singular shall include the plural; and

(b) Words in the plural shall include the singular.”

“2(1) Every provision of this Act shall extend and apply to every enactment, whether passed or made before or after the passing of this Act, unless a contrary intention appears in this Act or in the enactment.

2(2) In addition, any provision of this Act which refers to statutory provisions shall, unless the contrary intention appears in the statutory provisions, have, in relation to those provisions, such effect as is stated in that provision of this Act.”

[12] Accordingly, the Attorney General contended that the reference to “persons” in the Table in the 2008 Act may be interpreted in the singular and that there was nothing in either the 2008 Act or the 1954 Act that indicated any contrary intention.

[13] The Charity Tribunal concluded that there were a number of aspects of the 2008 Act which did militate against the reference to “persons” being interpreted in the singular. First, that the “persons” referred to were those who had control or management of the institution, indicating collective control or management by the

absence of reference to a person and by the reference to the institution. Secondly, other entries referred to “any other person affected”, which wording is absent from the right of review. Thirdly, the statutory inquiry is against the charity as a collective whole which is where the right of review should lie. Fourthly, other entries in the Act use the phraseology “person or persons”. Fifthly, any prospect of abuse is dealt with by the role given to the Attorney General.

[14] In addition, the Charity Tribunal relied on what were described as the practical outworking of the construction of the statute as advanced by the Attorney General. First of all, it was stated that if every person who had any control or management had a right of review that right might be exercised regardless of the prevailing collective view of the charity. Secondly, it might lead to multiplicity of proceedings. Thirdly, a Charity Manager might apply for review contrary to the views of the trustees or governing body of the charity.

[15] While the issue of the right of review had become academic, as the Charity Tribunal refused William Allen’s application to extend time, the Charity Tribunal nevertheless gave leave to the Attorney General to appeal to the High Court pursuant to section 14(1) of the 2008 Act, as the issue was considered to be of general importance.

The decision of the High Court

[16] Horner J gave judgment on the appeal on 4 December 2015. He reversed the decision of the Charity Tribunal and held that a single trustee did have standing to apply for a review of a decision to institute a statutory inquiry under section 22 of the 2008 Act.

[17] Horner J referred to the definition of a charity trustee in section 180(1) of the 2008 Act as “the persons having the general control and management of the administration of a charity” being the same as the wording in the Table in the Schedule relating to the power of review, with the plural including the singular by the application of the Interpretation Act. It was stated that each and every trustee of a Trust legally holds the property or rights on trust for another or others. Secondly, the right to review was stated to be in effect an alternative statutory remedy to judicial review. There was stated to be no doubt that, as a trustee, William Allen would have the necessary standing to seek a Judicial Review. If a single trustee was not permitted to seek a review from the Charity Tribunal that trustee would have to apply for Judicial Review, a result which, it was stated, the draftsman could not have intended. Thirdly, the justice of the case supported the broader interpretation as a majority of trustees could otherwise disadvantage a minority.

The Grounds of Appeal

[18] The Commission appeals against the judgment of Horner J on the grounds -

- (1) That he erred in his construction of paragraph 4(2)(b) of Schedule 3 of the 2008 Act by permitting any individual trustee to apply to the Charity Tribunal for a review.
- (2) That he erred in holding that an individual trustee in all circumstances is a person having control or management of an institution.

[19] By Respondent's Notice the Attorney General sets out additional grounds on which the decision of Horner J should be affirmed -

- (1) That the Charity Tribunal erred in not applying the expression "any person" in paragraph 4(2)(b) to the interpretation of "the persons" in the Table.
- (2) That the Charity Tribunal erred in finding a contrary intention to the application of section 37(2)(b) of the Interpretation Act.

[20] In the course of his judgment Horner J referred to the power to suspend a trustee. The Commission expresses its particular concern about this reference as indicating a fundamental misunderstanding of the statutory scheme of the 2008 Act, which misunderstanding may have infected the subsequent reasoning of the Court. The Commission points out that the power under section 22 of the 2008 Act to institute inquiries is distinct from the power under sections 33 of the 2008 Act to suspend a trustee and that, in the latter case, the trustee has a right of appeal as opposed to a right of review. The Attorney General contends that Horner J was correct in conveying that a statutory inquiry under section 22 may affect individual trustees carrying out charity governance. We are not satisfied that, in referring to the power to suspend a trustee, Horner J was doing other than referring to a possible consequence of a statutory inquiry so as to demonstrate that individual trustees may be affected, as opposed to confusing separate powers. However, for the avoidance of doubt we would reiterate that the power to institute an inquiry under section 22 is an entirely discrete statutory power to that which arises under section 33 to suspend a trustee and in respect of the former there is a right of review and in respect of the latter there is a right of appeal by the trustee concerned.

[21] The Commission contends that the statutory provisions provide a right to apply for review to those who collectively are responsible for the control and management of the charity. It is recognised by the Commission that in exceptional circumstances, where there is only one person responsible for the control and management of a charity, that the statutory provisions would be interpreted to refer to that individual, by the application of section 37(2) of the Interpretation Act. However, it is contended that an individual dissenting trustee has no right to apply for a review of the decision to institute the inquiry. Further, the Commission contends that the consequences of an individual trustee applying for a review of a

decision to institute an inquiry would place an undue administrative burden on the Commission and the Charity Tribunal.

[22] The Attorney General supports the decision of Horner J and contends further that the reference in paragraph 4(2)(b) to “any person” is significant because of the use of the singular and that a single trustee is within the wording contained in the Table. Further, the Attorney General contends that when section 37(2) of the Interpretation Act is applied it is clear that a single trustee comes within the wording contained in the Table. In addition the Attorney General contends that the reference in the Table is to the right of review for persons who have control or management of the institution and in the case of a body corporate, the institution itself. Thus those in control and those in management and the institution itself may apply for review.

The decisions of the Charity Tribunal of England and Wales

[23] Two decisions of the Charity Tribunal in England and Wales addressed this issue and lend support to the broader approach proposed by the Attorney General and adopted by Horner J. In David Jennings v The Charity Commission for England and Wales, a decision of Judge Alison McKenna dated 16 December 2014, the applicant challenged the decision of the Charity Commission to open a statutory inquiry into a charity known as the Greenfinch Charitable Trust. Mr Jennings had been a trustee but at the opening of the statutory inquiry in January 2013 he was no longer a trustee. On the application of equivalent statutory provisions under the Charity Act 2011, where the right of review was granted to those with control or management of the relevant institution, the Charity Tribunal rejected the application on the basis that the applicant was not a trustee at the relevant time, namely at the opening of the statutory inquiry. It is clear from the decision of the Charity Tribunal that, had the applicant been a trustee at the opening of the inquiry, he would have been treated as satisfying the statutory requirement.

[24] The second decision is Thrift Urban Housing Limited and Peter Allman v The Charity Commission for England and Wales, a decision of Judge Peter Hinchcliffe dated 15 May 2015 on applications to review the decision of the Charity Commission to open an inquiry into Thrift Urban Housing Limited, which applications were made by both the charity itself as a corporate body and Peter Allman, the Chief Executive of the charity. In referring to the statutory requirement that a review may be brought by persons who have control or management of the institution and by the institution itself, Judge Hinchcliffe stated that the applicants appeared to the Charity Tribunal to satisfy the requirements. The Charity Tribunal concluded that the Charity Commission’s decision to open a statutory inquiry was lawful and the applications for review were dismissed.

The interpretation of Schedule 3

[25] On the interpretation of paragraph 4 and the Table, the words “person” and “persons” may, by virtue of the Interpretation Act, be read in the plural and the singular respectively. We are satisfied that the word “person” in paragraph 4(b) may be read in the singular or plural and the word “persons” in the Table may be read in the singular or plural. The operative words are “control or management of the institution”. It is common case that a single trustee may have overall control or management of an institution and the Commission recognises that in those circumstances such a single trustee has the power to apply for review. The issue is whether a single trustee may apply for review when they do not have overall control or management and are not in the majority of trustees on the question of review. Again it is common case that a single trustee among a number of trustees may have a measure of control and management of the institution. The issue becomes whether the right of review is restricted to the majority of trustees who have overall control and management of the institution.

[26] We are satisfied that the statutory provision is not limited to providing a right of review to those trustees who are in the majority and thus may be said to represent the view of the “institution” but extends to each person who has control or management of the institution. Thus a single trustee among a number of trustees, who has a measure of control or management of the institution, has standing to apply for review.

[27] Further, it is to be noted that the wording provides for control “or” management. Thus there may be those in management who do not have the measure of control that may be enjoyed by one or a number of trustees, such as a charity manager who is not a trustee, who would also have standing to apply for review.

[28] The Commission’s argument and the Charity Tribunal’s contra indications to the application of section 37(2) of the Interpretation Act appear to proceed on the premise that the wording in paragraph 4 provides for review by the collective control or management of the institution, a premise that we are satisfied is ill-founded. The wording may embrace any person with control or management and that being so, the absence of any reference to ‘any other person affected’ is irrelevant. Tackling any possible abuse by a majority of the institution should not depend on the intervention of the Attorney General when the purpose of any review must include the opportunity for those within the institution to address the issue with the Charity Tribunal.

[29] That this wider interpretation has practical implications for the administration of reviews is apparent but is not such as to undermine the interpretation of paragraph 4. It does not accord with the scheme for such inquiries that the collective view of the institution should prevail. Rather, the scheme for reviews should include the views of minority trustees as well as those in

management who are not trustees. Multiple reviews may be dealt with together by the Commission and the Charity Tribunal. The Commission refers to the administrative burden of multiple applications for review but, as the decision in Thrift Urban Housing Limited indicates, the Charity Tribunal may conduct one hearing involving all applications for review. Of course there may be late applications and the Charity Tribunal has discretion as to the extension of time to apply for review, as exercised in the present case against Mr Allen.

[30] The Commission and the Attorney General took different approaches to the *locus standi* of an individual trustee on an application for Judicial Review of a decision of the Commissioners to initiate an inquiry into a charity. We are satisfied that a challenge to a decision to initiate a statutory inquiry should be governed by the statutory scheme and that entitlement to review such a decision is a matter of statutory interpretation. We have not found it helpful to that interpretation to speculate on the standing of applicants for leave to apply for Judicial Review.

[31] The Attorney General advances a broad policy ground for his wider interpretation of the power to apply for review, namely that a dominant voice should not be able to shut out what may be an oppressed or dissenting minority and that once a section 22 inquiry has been initiated individual trustees would be powerless to take action in the Charity Tribunal against what, it is said, may be a scandalous abuse of the Commission's powers. While the interests of individual trustees are protected by the trustee's right of appeal against decisions to suspend or remove a trustee, that right of appeal only arises after the Commission has undertaken an inquiry.

[32] We have no reason to suppose that in this, or in any, case the Commission would abuse its powers but the exercise of the power to initiate an inquiry may impact on anyone involved in the control or management of an institution. Issues may arise in an institution by reason of different interests within the institution. Limiting the power of review to those in overall control may disadvantage others. The right of a trustee to appeal a decision to suspend or remove a trustee may come too late in the process to address that disadvantage. Reliance on an overarching supervisory role of the Attorney General to address any such disadvantage may be unwelcome in drawing that office into all such disputes and adding an additional layer to the process when a remedy could be afforded directly to those claiming disadvantage.

[33] We have not been satisfied on either of the Commission's grounds of appeal. As to the Attorney General's additional grounds set out at paragraph [19] above, we reject the first additional ground and accept the second additional ground. Accordingly the Commission's appeal is dismissed.