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

Delivered: **10/01/08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL BY WAY OF CASE STATED

IN THE MATTER OF THE MAGISTRATES COURTS (NI) ORDER 1981 ARTICLE 146 RULE 158

AND IN THE MATTER OF THE INDUSTRIAL RELATIONS (NI) ORDER 1982

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BETWEEN:

THE NORTHERN IRELAND CERTIFICATION OFFICER FOR TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

Complainant/Appellant;

AND

FRANK CUNNINGHAM, JANICE GAULT AND ALISTAIR GOOD

Defendants/Respondents.

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GIRVAN LJ

Introduction

[1] This matter comes before the court by way of a case stated by a Magistrates' Court. It raises the question as to the proper interpretation and effect of provisions of the Industrial Relations (Northern Ireland) Order 1992 ("the 1992 Order"). The two questions posed by the deputy resident magistrate are as follows:

"(1) Was I correct in holding, on the facts admitted, proved and found by me, that the Northern Ireland Hotels federation was not at any relevant time an employers association within the meaning of the 1992 Order?

(2) Was I correct in holding that none of the Respondents had any duty to comply with the provisions of Article 12B(3) or (4) of the 1992 Order?"

[2] The three respondents were prosecuted for alleged offences under the 1992 Order. The appellant ("the Certification Officer") laid complaints against each of the respondents in respect of offences alleged to have been committed contrary to Article 13 of the 1992 Order. That provision makes it an offence to refuse or wilfully to neglect to perform a duty imposed on a trade union or employers' association under any of the provisions of Articles 10 to 12 or Schedule 1 to the Order. By summons dated 17 January 2005 it was alleged that the respondents as officers of the Northern Ireland Hotels Federation ("the Federation"), an employers' association, refused or wilfully neglected to produce relevant documents or to attend before an inspector appointed by the Certification Officer, as required by Article 12B(4) of the Order. The Certification Officer contends that the Federation is an employers' association for the purposes of the Order. The respondents contend that it is not and that in consequence they have not committed any offence under Article 13. This contention was accepted by the magistrate who dismissed the summonses against the respondents.

[3] The Federation was incorporated on 26 March 1999. Its Memorandum of Association in paragraph 3 set out the objects of the Federation in the following terms:

> "3. The Federation's objects are:
>
> (i) to promote, to protect and safeguard the common hotel interests of members;
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> (ii) to regulate the relations between the members and members and between members and their employees;
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> (iii) to provide an advisory service for members in relation to legal, labour, insurance, economic development, public relations, publicity, promotion, advertising, purchasing and other such matters, and as feasible act as a central agency for members in such matters;
>
> (iv) to facilitate the exchange of information and ideas and matters of general interest affecting members."

[4] The Federation was placed on the list of employers' associations maintained by the certification officer in accordance with Article 5(1) of the

1992 Order. At an extraordinary general meeting held on 21 April 2004 it was unanimously resolved that paragraph 3(ii) of the memorandum should be amended by the deletion of that sub-paragraph. By letter dated 29 April 2004 the Federation wrote to the certification officer requesting that its name be removed from the list of employers' associations.

[5] By letter of 30 June 2004 Mr Rafferty on behalf of the Certification Officer stated that the Certification Officer agreed to the request that the Federation be removed from the list of employers' associations in accordance with Article 5(7)(a). In that letter it was pointed out that removal of the association from the list did not of itself constitute conclusive evidence that the Federation was not an employers' association. On the evidence available to the Certification Officer he considered that the Federation met the statutory criteria for an employers' association and therefore had to continue to meet its statutory obligations.

[6] On 29 June 2004 the Certification Officer appointed Kay Linnell in pursuance of the powers conferred on him by Article 12A(2) of the 1992 Order "to produce any relevant documents which he may specify". By letter of 20 July 2004 Mr Rafferty on behalf of the Certification Officer informed the Federation that the Certification Officer had appointed an inspector to investigate the financial affairs of the Federation and by separate letter Ms Linnell informed the Federation that she had been appointed to undertake an investigation under Article 12B of the Order into financial affairs of the Federation from January 1999 to date.

The earlier Case Stated

[7] This matter has already been before the Court of Appeal on a previous occasion. When the magistrate heard the complaints originally on 10 May 2005 he found the following (amongst) other facts proved or admitted before him:

(a) The Federation had been on the list of employers' associations maintained by the Certification Officer in accordance with the provisions of Article 5(1) of the Order until 30 June 2004. The removal of its name from that list followed written requests from the Federation to the appellant dated 29 April and 21 June 2004.

(b) One of the two witnesses called at the hearing on behalf of the appellant Kay Linnell had been appointed inspector by him.

(c) Each of the respondents had been required in writing by Kay Linnell to attend for her or to produce documents to her or both.

(d) Each of the respondents through their solicitors had declined to attend or to produce any documents.

(e) Notwithstanding the memorandum and articles of association of the Federation (which until 21 April 2004 had included as one of the purposes of the company "to regulate the relations between the members and members and between members and their employees") there was no evidence that the Federation had ever regulated relations between its members and workers or trade unions.

(f) Despite having been informed in writing by the Federation in a letter dated 18 June 2004 that it did not regulate any such regulations Mr Rafferty a witness called on behalf of the appellant conceded that he had not sought from the Federation any documentation for example minutes of meetings which would confirm this statement or otherwise.

(g) Ms Linnell who had examined the accounting records the Federation had provided to the appellant on previous years stated she could not produce any evidence that the Federation had ever been an employers' association.

(h) The appellant in a letter dated 13 January 2005 accepted that the Federation with effect from 21 April 2004 was no longer subject to the statutory obligations applicable to employers' associations. This acceptance was based solely on the fact that on 21 April 2004 the Federation had amended its memorandum and articles of association.

[8] The magistrate acceded on that occasion to an application that the respondents had no case to answer. He did so having found that the Federation had been on the list of employers' associations and that until 21 April 2004 the memorandum and articles contained a power similar to the definition of an employers' association. It had made annual returns to the appellant until 2004. He found that the Federation had never been an employers' association within the meaning of the Order and none of the respondents as officers was obliged to attend before the inspector to produce any documentation to her. He also found that the appellant had failed to provide an explanation to the respondents for the appointment of the inspector. Following correspondence from the inspector each of the respondents had sought and obtained legal advice and that their refusal to attend before the inspector or to produce documentation did not constitute wilful neglect within the meaning of the Order.

[9] The Court of Appeal concluded that the magistrate was in error in concluding that proof by the Certification Officer of actual regulation of relations between employers and between employers and workers or trade unions was required. At paragraph 13 of the judgment the court stated:

> "The magistrate appears to have concluded that evidence of actual regulation of relations between the employers or between them and workers or trade unions was required. Even if that were so we are satisfied that it would have been supplied (to a prima facie level at least) by the statement in the memorandum of association of the company that this was one of the purposes. But it is clear that no such evidence is required. Article 5(10) puts the matter beyond plausible argument. This creates at least a rebuttable presumption that presence of the name of a company on a list is evidence of the company being an employers' association. The indisputable conclusion from this is that there was evidence which, if uncontradicted, was sufficient to establish that the Federation was an employers' association …"

The instant Case Stated

[10] The magistrate reheard the matter on 5 December 2006. The case stated sets out in paragraph 6 further findings proved or admitted before him on that occasion in addition to the facts proved or admitted before him in the earlier hearing. He found that prior to the incorporation of the Federation in 1999 the future directors of the Federation had obtained from an existing organisation in the Republic of Ireland, the Irish Hotel Federation, a copy of its memorandum and articles of association. That memorandum and those articles were adopted to comply with Northern Ireland company legislation and the task of registration was performed by a partner in the firm of McKinty & Wright since deceased. Both the memorandum of the Irish Hotel Federation and the Federation contained an object power similar to the definition of an employers' association as specified in the 1992 Order. Almost immediately after the incorporation of the Federation the directors and members recognised that the employers' association provision was inappropriate as the Federation did not have and did not intend to have as one of its purposes the regulation of relations between its members or between it members and workers or trade unions. The solicitor was then asked to provide an amended memorandum and articles so that the employers' association provision was removed. While it was provided, following his death there was a failure to lodge the memorandum and articles of association at the companies registry. The magistrate found as a fact that there never had been any regulation of relations between members of the Federation themselves or between members of the Federation and workers and trade unions. The minutes of meetings of the Board of Directors of the Federation revealed no discussion, debate or even mention of the regulation of relations between members themselves or between such members and

workers or trade unions or any similar topic. It was not until late 2003 that the Federation sought legal advice from its present solicitors and in early 2004 at a general meeting the Federation altered its memorandum and articles of association by removing the employers' association provision.

[11] Thus the key findings made by the magistrate were, firstly, that the Federation never in fact regulated relations between members of the Federation themselves or members of the Federation and workers and trade unions and never discussed such a topic, and secondly the Federation in its memorandum of association included amongst its objects the object of regulating the relations between members and members and between members and their employees.

The Relevant Statutory Provisions

[12] Article 4 of the 1992 Order so far as material defines an employers' association as:

> "An organisation (whether permanent or temporary) which either –
>
> (a) consists wholly or mainly of employers or individual proprietors of one or more descriptions and is an organisation whose principal purposes include the regulation of relations between employers of that description or those descriptions and workers or trade unions;"

[13] Under Article 5 the Certification Officer is required to maintain a list of trade unions and a list of employers' associations containing the names of those organisations which are entitled to have their names entered therein. Any organisation of employers whose name was not in the relevant list previously maintained may apply to the Certification Officer to have its name so entered and subject to paragraph 5 the certification officer shall if satisfied that the organisation is an employers' association and that paragraph 4 has been complied with enter the name of that organisation in the relevant list. Under Article 5(7) the certification officer "shall remove the name of an organisation from the relevant list" if he is requested by the organisation to do so or if he is satisfied the organisation has ceased to exist. Under Article 5(6) he also has a power to remove from the list any organisation which is not in fact a trade union or employers' association if it so appears to the certification officer although in that event there is a right to make representations. It is thus apparent that if an organisation wishes to have its name removed from the list it is entitled as of right to require the certification officer to so remove the name. Such removal does not, however, mean that the organisation ceases to be an employers' organisation if in fact it is one. The status of a

body which is, in fact, an employers' organisation confers both responsibilities (such as obligations relating to accounting records) and certain procedural advantages such as having power to sue in its own name even if it is unincorporated. If an association is, in fact, an employers' organisation as defined it will not avoid its responsibilities if it simply opts out of listing as an employers' association.

[14] Under Article 10 an employers' association is required to keep proper accounting records with respect to its transactions and its assets and liabilities and must establish a satisfactory system of control in respect of its accounting records. It is required by Article 11 to send to the Certification Officer an annual return which is open to public inspection. Under Article 12A the Certification Officer may, if he thinks that there is a good reason to do so, give directions to an employers' association to produce such relevant documents as may be specified and he may authorise any person, on production, if required, of evidence of his authority to so require, to produce forthwith such relevant documents as may be specified. Under Article 12B the certification officer may appoint an inspector to investigate the financial affairs of an employers' association to report to him. Before exercising the power the certification officer must consider that there are circumstances suggesting (inter alia) that the association has failed to comply with the duties imposed by the Order or there has been some form of misconduct. Officials of the association must produce to the inspector all relevant documents and give assistance to the inspector. The inspector may (inter alia) require production of documents and the attendance of individuals before the inspector. As already noted Article 13 renders it an offence to fail to comply with an inspector's requirements or to refuse or wilfully neglect to perform the duties imposed under the provisions of the order.

[15] Ms McGrenera QC on behalf of the Certification Officer argued that the matter at the heart of the dispute was whether it was necessary for the Certification Officer to prove that the organisation carried out the functions de facto of an employers' association or whether it was sufficient that those functions are included in the statutory purpose for which the company was established. Clause 3(ii) of the memorandum of association amounted to a principal purpose. She argued that if the de facto exercise of a purpose is required to be proved by the Certification Officer before he could invoke his powers his powers would be deprived of meaningful content. The Certification Officer is not required to police the activities of the association. Rather he must be entitled to assume that if an association has an object in such terms that amounts to a principal purpose. The 1992 Order does not envisage that the Certification Officer has to investigate the actual activities of organisations and does not make provision for investigatory powers which this would require. There is no power to carry out an investigation whether a body is such an association. If the test can be established by an examination of articles and memorandum of association this obviates any question of the

appellant having to carry out an investigation as to the de facto functions which it is not equipped to do. The company is a legal entity and has its own purposes. In counsel's submission the magistrate was in effect lifting the corporate veil improperly. Mr O'Reilly on behalf of the respondents denied that he was suggesting there was any obligation on the appellants to prove that the Federation carried out the functions of an employers' association he accepted that the listing of the company as an employers' association shifted the burden and required the Federation to show that it did not carry out those functions. That onus, he contended, was clearly discharged. The Federation had produced more than sufficient evidence that it had never in fact had as one of its principal purposes the regulation of relations between its members or between its members and workers.

[16] An association may be incorporated or unincorporated. An unincorporated association does not have to register a memorandum of association containing an objects clause. Where an unincorporated association of employers or individual proprietors is formed it may form the intention of regulating relations between employers and between employers and workers or trade unions. Such an intention may be expressly agreed as part of its constitution or it may be shown by its actions. It may retain a power to carry out such a function but it may not give effect to that power. Where such an association actually carries out the function it can be inferred that the regulation of relations between workers and employees represents one of its purposes. An association which exercises the function but fails to give effect to the statutory duties imposed on it as an employers' association would be in breach of its duty as such and the Certification Officer would be entitled to require the fulfilment of the duties. The suggestion that the Certification Officer has no powers or duties to investigate the affairs of an association which is de facto operating as an employers' association accordingly cannot be correct. The Certification Officer has the duty to enforce the law against a de facto employers' association which is operating as such. The onus of proof would, of course, lie upon the Certification Officer to establish that the association is an employers' association.

[17] When an association is incorporated it is required as a consequence of incorporation to spell out in its objects clause the limits of its legitimate capacity. An objects clause is designed to define the capacity of the company. As pointed out in Palmers Company Law at paragraph 2.603 there are four legal issues in relation to which a company's objects clause needs to be considered. Firstly the objects clause defines the company's capacity in relation to third parties. An act outside the objects clause is ultra vires the company. (The unfair consequences to third parties of aspects of the ultra vires principle is now mitigated by amendments to the companies legislation effected pursuant to European Company Law directives). Secondly, the objects clause defines limits on the authority of the directors. Thirdly, the memorandum forms part of the contract between the members inter se and

between them and the company. A member is entitled to know the extent of the powers of the company in which he has invested as a shareholder or member. Fourthly, it is the duty of directors to require the company to remain within its powers. In Ashbury Railway Carriage and R & Co v Riche [1875] LR 7HL 653 Lord Cairns LC speaking in the contexts of objects clauses stated:

> "…it is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

[18] The inclusion in a company's objects clause of miscellaneous objectives which may legitimately be pursued by the company within its vires may, on one view, indicate a purpose which may properly be pursued by the company but the company is not obliged to pursue that objective and may in fact decide to pursue other of its objectives set out in the objects clause. In such a situation it is difficult to see how one could say that the power to do something is properly to be considered as a real and effective purpose of the company when that power is never intended to be exercised or is never in fact exercised. Since the legislation was intended to regulate bodies which are operating as trade unions or employers' association, however they may describe themselves, the imposition of duties on bodies which do not operate as such would not serve as a means of advancing the policy of the legislation. In the context of Article 4(1) "principal purpose" must point to a real and central purpose which the association is seeking to achieve. If an unincorporated association is formed to carry out various activities and it includes as part of its constitution a power, never exercised, to regulate relations between employers and workers, it could not sensibly be suggested that the association has a principal purpose of regulating such relations. It merely has the power to do so. An incorporated association with the capacity under its object clause to regulate such relations is in an analogous situation.

[19] The fact that an association is on the list of employers' associations under Article 5 and the fact that it has a power such as that contained in clause 3(ii) of the Federation's memorandum gave rise to a clear prima facie case that the association was indeed an employers' association. However, Article 5(2) does not make the listing of an association as an employer's association conclusive evidence and the capacity under the objects clause to operate as such a body does not mean that it is an employers' association in

practice. It is, of course, for the body to rebut the presumption that it is an employers' association by adducing sufficient evidence to negative the inference that it is such association. Here the evidence adduced by the Federation satisfied the magistrate that the association did not, in fact, have the purpose of regulating such relations. Accordingly, we answer the two questions posed by the deputy resident magistrate in the case stated "Yes".