

Neutral Citation No: [2019] NICH 6

Ref: McB10932

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

Delivered: 16/05/2019

2017/59063

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

\_\_\_\_\_  
CHANCERY DIVISION

Between:

TREVOR McKEE AND JOSEPH HUGHES

First Appellants

and

THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Second Appellant

and

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Respondent

and

THE DEPARTMENT FOR COMMUNITIES

Intervener

\_\_\_\_\_  
2017/129608

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

\_\_\_\_\_  
CHANCERY DIVISION

Between:

THE CHARITY COMMISSION FOR NORTHERN IRELAND

Appellant

and

**SEAN CAUGHEY**

**First Respondent**

**and**

**THE ATTORNEY GENERAL FOR NORTHERN IRELAND**

**Second Respondent**

\_\_\_\_\_

**2017/129444**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

\_\_\_\_\_

**CHANCERY DIVISION**

\_\_\_\_\_

**Between:**

**ROBERT CRAWFORD**

**First Appellant**

**and**

**THE ATTORNEY GENERAL FOR NORTHERN IRELAND**

**Second Appellant**

**THE CHARITY COMMISSION FOR NORTHERN IRELAND**

**Respondent**

**and**

**TREVOR McKEE**

**Intervener**

\_\_\_\_\_

**McBRIDE J**

**Introduction**

- [1] The three appeals under consideration all raise 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 Charities Act (Northern Ireland) 2008 (“the 2008 Act”) can lawfully be discharged by employees of the Commission, acting alone.
- [2] The Attorney General, Mr McKee, Mr Hughes, Mr Crawford and Mr Caughey each submitted that employees of the Commission acting alone could not lawfully discharge the functions attributed to the Commission under the 2008 Act.

- [3] In contrast the Commission and the Department for Communities (“the Department”) each considered that the functions in question could lawfully be discharged by employees of the Commission.
- [4] The appeal brought by Mr Crawford raises an additional question relating to the lawfulness of the institution of a statutory inquiry pursuant to section 22 of the 2008 Act. Although the parties made some written submissions in respect of this question, the court directed with the consent of the parties, that this question should be addressed after the court determined the key issue.
- [5] Before considering the key issue it is first necessary to set out the background in respect of each of the three appeals under consideration.

### **Appeal by Mr McKee and Mr Hughes**

#### **Background**

- [6] On 3 September 2013 Ms McGahey, a casework officer employed by the Commission, made a decision, (“the impugned decision”) under section 96 of the 2008 Act whereby she gave consent on behalf of the Commission to alterations in the constitution of the charity Lough Neagh Rescue Limited. Both Mr McKee and Mr Hughes appealed the impugned decision to the Charity Tribunal (“the Tribunal”). The appeal was heard on 10 and 16 November 2016 and the Tribunal heard oral evidence from Mr McKee, Mr Hughes, Mr Burke and Ms McGahey.
- [7] On 7 April 2017 the Tribunal concluded that Ms McGahey, an employee of the Commission, was lawfully authorised to make the impugned decision and further held that she did not err in law or in fact in granting consent to alterations in the constitution of the charity, Lough Neagh Rescue Limited, pursuant to section 96 of the 2008 Act.
- [8] The reasoning of the Tribunal in respect of the key issue is set out at paragraph 37 of its decision as follows:

“After considering the parties’ submissions, this Tribunal has concluded that the appellant’s contention that the consent could only be given by the respondent – e.g. by its Board or by a Committee with delegated authority – is incorrect. It is true to say that paragraph 9(1) of the Schedule to the 2008 Act provides that the respondent may make provision for the discharge of its functions by committees. But that paragraph does not say that the respondent shall or must make provision for the discharge of its functions by committees. Indeed, it is notable that the paragraph begins by recognising and

providing that the respondent may “[determine] its own procedure”. The Tribunal’s conclusion in this regard is supported by the Interpretation Act, Section 19 of which provides (so far as relevant) that a body corporate enjoys “the right to regulate its own procedure in business”. The Tribunal heard evidence that the respondent had at the Board meeting in November 2011 approved a case work manual setting out the procedures by which decisions could be taken. That is to say, the respondent had determined its procedures for the discharge of its functions. Accordingly, the Tribunal rejects the appellant’s contention that, unless the consent was given by the respondent – e.g. acting by the Board, or by a committee – that such a consent is invalid. The Tribunal does not consider it necessary to refer this matter to the Attorney General.”

- [9] Mr McKee and Mr Hughes sought leave to appeal the Tribunal’s decision. In addition, on 24 April 2017 the Attorney General, pursuant to section 14(1) of the 2008 Act and Rule 35(1)(b) of the Charity Tribunal Rules 2010 requested permission from the Tribunal to appeal its decision dated 7 April 2017 to the High Court. On 6 June 2017 the Tribunal granted Mr McKee, Mr Hughes and the Attorney General leave to appeal to the High Court on the basis that there was a point of law upon which guidance of the High Court would be welcome.
- [10] Notices of Appeal were issued by Mr McKee, Mr Hughes and the Attorney General. The common ground of appeal was that the Tribunal erred in finding that an employee of the Commission could validly make the decision to grant consent to alterations of a charity’s constitution, on the ground that such consent could only be given by the Commission either acting as a whole or by a Committee of the Commission appointed to do so, (which included at least one Commissioner).
- [11] On 1 December 2017 the Department was granted leave to participate in the appeal as an intervener on the following grounds:
- (a) The Department was responsible for the legislative framework surrounding charities in Northern Ireland.
  - (b) It has an oversight role in relation to the work of the Commission, being the sponsoring Department for this non-departmental public body.
  - (c) It has three specific interests in the outcome of the appeals, namely:

- (i) to ensure that the Commission is acting lawfully in its decision making process;
- (ii) to ensure that the legislation governing the regulation of charities is effective and fit for purpose; and
- (iii) to ensure that the resources of the Commission are being used in the most efficient and economical way.

[12] On 14 May 2018 the court ordered that in the event an order for costs was made in favour of Mr McKee against the Commission, “costs shall be recovered by Mr McKee in respect of outlay only (specifically not to include any legal costs or preparation time) and the amount of costs recovered shall not exceed £1,000 inclusive of any VAT. In the event that the appeal brought by Mr McKee was unsuccessful no order for costs shall be made as between Mr McKee and the Commission.”

[13] Mr McKee appeared as a litigant in person. Mr Hughes acted as a litigant in person before the Tribunal but was represented by Mr Sean Doran QC and Mr McGowan of counsel before this court. The Attorney General appeared with Ms Wolesley of counsel. Mr Humphreys QC appeared on behalf of the Department. The Commission was represented by Dr McGleenan QC and Mr McAteer of counsel.

## **Appeal by Mr Crawford**

### **Background**

[14] On 14 February 2014, pursuant to section 22 of the 2008 Act the Commission initiated a statutory inquiry into the affairs of the Disabled Police Officers Association of Northern Ireland. Mr Crawford served as a trustee of this charity.

[15] On 22 January 2015, pursuant to section 33 of the 2008 Act the Commission ordered the removal of Mr Crawford as a trustee of this charity (“the impugned decision”).

[16] As appears from section 33(2) the institution of a valid statutory inquiry is a necessary pre-condition to the exercise of any power to remove a trustee and therefore the power to remove Mr Crawford as a trustee of the Disabled Police Officers Association of Northern Ireland only exists if the statutory inquiry was lawfully initiated.

[17] At a board meeting in 2011 the Commission approved an Inquiries Manual. The manual provided that:

“The Commissioners will review the risk assessment/evidence and decide whether a statutory inquiry is the most appropriate method to progress the inquiry.”

...

“The Inquiry Manager will contact all Commissioners and ensure a minimum of three Commissioners are available to meet with the HCE and Inquiry Manager to make a decision on the institution of statutory inquiry.”

The Manual makes further provision in relation to the procedure to be followed for the removal of a charity trustee. In particular, it provides that this can be carried out by a member of the Inquiries Team.

- [18] As appears from the evidence before the Tribunal a risk assessment form was completed by Mr Henry, the investigating officer. This form was then approved by Mr Myles McKeown, Head of Corporate Compliance and Inquiries, and was endorsed with the signature of three Commissioners in the following terms:

“We the Commissioners confirm our authorisation of a statutory inquiry.”

- [19] After the institution of the statutory inquiry Mr Henry completed his investigations and made a recommendation to his senior officer regarding the removal of Mr Crawford as a trustee. Ms McCandless in her affidavit evidence to the Tribunal stated that an order to remove a trustee is only “made when the Head of Charity Services, Head of Monitoring and Compliance, Head of Corporate Services or the Chief Executive signs and seals the order”.

- [20] On 9 October 2014 the Commission notified Mr Crawford of its intention to remove him as a trustee and invited him to make representations. After considering his responses the Commission wrote to Mr Crawford on 22 January 2015 stating that the Commission had concluded that it had sufficient grounds to exercise its power to remove him from acting as a charity trustee. It enclosed a copy of the Commission’s order and statement of reasons and the Commission’s guidance on challenging the decision.

- [21] The order dated 22 January 2015 was attached to the letter dated 9 October 2014. It bore the seal of the Commission being sealed by Mr Myles McKeown, Head of Compliance and Enquiries. The order stated as follows:

“Mr Robert Crawford of [address] being a charity trustee of the Disabled Police Officers Association of Northern Ireland is hereby removed as a trustee, officer and agent of the Charity, to include your position as Chair and member of the Audit Committee, from the date of this order.”

- [22] The order was signed by Mr Henry “a member of staff of the Charity Commission for Northern Ireland authorised to act on behalf of the Charity Commission”.
- [23] Mr Crawford appealed the decision to remove him as a trustee, dated 22 January 2015 (“the impugned decision”) to the Tribunal.
- [24] On 19 October 2015 the Tribunal upheld the Commission’s decision.
- [25] The Attorney General appealed the Tribunal’s decision and the High Court remitted the case for hearing to a differently constituted Tribunal.
- [26] On 20 October 2016 Mr Crawford asked the Tribunal to determine as a preliminary issue the lawfulness of the impugned decision. He challenged the lawfulness of the impugned decision on the grounds that:
- (a) it was made by staff of the Commission and not by the Commission itself; and
  - (b) the statutory inquiry under section 22 was not lawfully initiated and accordingly the impugned decision was unlawful as the institution of a lawful statutory inquiry was a necessary pre-condition to the exercise of the power to remove him as trustee of the charity.
- [27] The preliminary issue was heard by the Tribunal on 27 March 2017. On 16 November 2017 the Tribunal issued its determination and for reasons set out at paragraphs 19-50 of its decision it accepted the Commission’s submission that it could delegate its decision making functions to staff and accordingly held that the impugned decision was lawfully made.
- [28] On 12 December 2017 the Tribunal granted permission to Mr Crawford and the Attorney General to appeal its decision to the High Court.
- [29] On 22 February 2018 Mr McKee was given leave to intervene in relation to the question whether the Commission acted lawfully in respect of the institution of a statutory inquiry.
- [30] On 14 May 2018 the court ordered that in the event that an order for costs was made in favour of Mr Crawford against the Commission, “costs shall be

recovered by Mr Crawford in respect of outlay only (specifically not to include any legal costs or preparation time) and the amount of costs recovered shall not exceed £1,000 inclusive of any VAT in the event that the appeal brought by Mr Crawford was unsuccessful no order for costs shall be made as between Mr Crawford and the respondent.”

- [31] The key issue arising in this appeal is the same as that arising in the appeals of McKee and Hughes, namely whether the functions attributed by the provisions of the 2008 Act to the Commission can be lawfully discharged by employees of the Commission. In this appeal the specific factual issue is whether the decision taken to remove Mr Crawford as a trustee of the charity was lawful, given that this decision was made by a member of staff of the Commission.
- [32] A second issue arises in this appeal, namely whether the decision to institute the statutory inquiry was lawfully made in circumstances where this decision was taken by only three Commissioners.
- [33] The Commission submitted that the second issue did not fall to be determined in these proceedings as no challenge was brought to this decision within the prescribed time limit. In the alternative it submitted that the challenge was based on an erroneous factual and legal basis.
- [34] With the consent of the parties I directed that the question whether the decision to institute a statutory inquiry was lawfully made should be deferred until after the determination of the key issue. This was because there was a dispute as to whether the second issue was a live issue in the present appeal hearing and because consideration of this second question, if a live issue, more appropriately fell to be considered after determination of the key issue.
- [35] Accordingly, I directed that I would hear counsel’s submissions in respect of the second question after determination of the key issue when counsel could, if required, make submissions in respect of the following matters:
- (i) Whether the lawfulness of the institution of the statutory inquiry was a live issue in the appeal; and
  - (ii) If so, whether the decision was lawfully made.
- [36] Mr Crawford appeared as a litigant in person and provided a written skeleton argument and also made oral submissions.



## Appeal by Commission against Mr Caughey

### Background

- [37] On 14 October 2016 the Commission made an order pursuant to section 33(1)(vi) of the 2008 Act to restrict the transactions of the charity, Newry and Mourne Carers Limited, together with a further order made under section 33(1)(vii) appointing an interim manager for the Charity.
- [38] On 17 February 2017 the Commission discharged the orders it made on 14 October 2016 pursuant to section 33(10) and made an order pursuant to section 33(1)(vii) to appoint a joint interim manager for the Charity (“impugned decision 1”).
- [39] On 12 April 2017 the Commission discharged its order dated 17 November 2017 when it appointed a joint interim manager pursuant to section 33(10) (“impugned decision 2”).
- [40] Mr Caughey appealed both impugned decisions and the Attorney General exercised his statutory right to intervene in both appeals.
- [41] The Tribunal on 3 November 2017 held that the Commission could not delegate the discharge of its decision making functions to a member of staff. At paragraph 18 of his determination the President stated as follows:

“18. While the Commission is perfectly entitled to regulate its own procedures, by use of the provisions of Section 10 of the Act or Section 19 of the 1954 Act, if required, this cannot extend to the making of actual decisions that the legislature has decided shall be made by the Commission or, since there is express statutory provision in the Act permitting it, by a committee established by the Commission for these purposes so long as that committee contains at least one member of the Commission in its composition. There is abundant precedent for this in general administrative law and it is demonstrated in the decision making process as dictated by statute in innumerable corporate bodies established by statute.

19. The Commission in its submissions referred to my decision in the case of *Caughey v The Charity Commission for Northern Ireland* (Reference No: 8/16) in support of its submissions. However, that case was actually decided on other grounds, albeit, on a proper reading, I did express a view on the preliminary point at

issue in instant appeals. With the benefit of detailed submissions from the parties in the instant appeals those views were incorrect in law.”

- [42] In accordance with its reasoning the Tribunal discharged the impugned decisions and remitted the matter of appointing an interim manager back to the Commission for fresh determination on a lawful basis.
- [43] On 12 December 2017 the Tribunal granted permission to the Commission to appeal the decision of the Tribunal dated 3 November 2017 to the High Court.
- [44] The Commission issued a Notice of Appeal on the ground that the Tribunal erred in law in concluding that an employee of the Commission could not make the relevant decisions as the Commission was entitled to regulate its own procedure pursuant to *inter alia*, sections 6-10 and section 33 of the 2008 Act and section 19 of the Interpretation Act (Northern Ireland) 1954 and accordingly could act through an employee pursuant to procedures provided for by the Commission.
- [45] Mr Caughey acted as a litigant in person. On 14 May 2018 the court ordered that “in the event that the appellant’s appeal is allowed no order for costs shall be made as between the first respondent and the appellant, in the event that the appeal is dismissed costs shall be recovered against the appellant by the first respondent in respect of outlay only (specifically not to include any legal costs and preparation time) and the amount of costs so recovered by him shall not exceed £1,000 inclusive of any VAT”.
- [46] The same key issue arises in this appeal as arises in the other two appeals of *McKee/Hughes* and *Crawford*.

### **Key Issue**

- [47] The determination of the key issue, as appears from the rulings of the Tribunal, has given rise to a number of conflicting decisions including in the *Caughey* appeal a change in the President’s views.
- [48] It is 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 this court.
- [49] I am grateful to all counsel including the litigants in person for their diligent researches, carefully crafted skeleton arguments and detailed analysis of the relevant legal provisions. Both the written skeletons and, in particular, the oral submissions of counsel proved to be of invaluable assistance to the court in its determination of the key issue.

## **Statutory Background**

- [50] Immediately prior to the 2008 Act charity law in Northern Ireland, was governed largely by the Charities Act (Northern Ireland) 1964, the Charities (Northern Ireland) Order 1987 and the inherent jurisdiction of the High Court exercising its traditional protective powers in relation to charities. After the introduction of significant charity law statutes in England and Wales and Scotland the legislative framework in Northern Ireland became the most outdated legislative framework in the United Kingdom and was ripe for reform. As a result the Charities Act (Northern Ireland) 2008 (“the 2008 Act”) was enacted. It established a new integrated system of registration, regulation, supervision and support for registered charities.
- [51] The overall scheme set out in the 2008 Act is very similar to that adopted in England and Wales although there are three significant differences, relating to:
- (a) The public benefit test.
  - (b) The requirement that all charities in Northern Ireland be registered, and
  - (c) The financial thresholds.

### **The overall scheme of the 2008 Act**

- [52] Sections 6-11 and Schedule 1 to the 2008 Act provide for the establishment of a body corporate to be known as the Charity Commission for Northern Ireland (“the Commission”). Sections 7-10 deal with the Commission’s objectives, functions, general duties and incidental powers.
- [53] Sections 12-15 and Schedules 2, 3 and 4 deal with the creation of a Charity Tribunal for Northern Ireland (“the Tribunal”) to hear appeals against some types of decisions made by the Commission.

### **Relevant Legislative provisions**

#### **Section 6**

- [54] Section 6 provides:

“6—(1) There shall be a body corporate to be known as the Charity Commission for Northern Ireland (in this Act referred to as “the Commission”).

- (2) The Commission shall consist of a chair, a deputy chair and at least 3, but no more than 5, other members.
- (3) The members shall be appointed by the Department.
- (4) The Department shall exercise the power in subsection (3) so as to secure that –
- (a) the knowledge and experience of the members of the Commission (taken together) includes knowledge and experience of the matters mentioned in subsection (5), and
  - (b) at least 1 member is legally qualified.
- (5) The matters mentioned in this subsection are –
- (a) the law relating to charities,
  - (b) charity accounts and the financing of charities, and
  - (c) the operation and regulation of charities of different sizes and descriptions.
- (6) A person is not legally qualified for the purposes of subsection (4)(b) unless the person is a barrister or solicitor of not less than 7 years' standing.
- (7) Schedule 1 makes further provision with respect to the Commission.
- (8) Subject to Schedule 1, section 19 of the Interpretation Act (Northern Ireland) 1954 (c. 33) applies to the Commission."

#### **Schedule 1 - paragraphs 4 and 9**

[55] Paragraph 4 under the heading "Staff" provides:

"4–(1) The Commission may with the approval of the Department and the Department of Finance and Personnel as to numbers and as to remuneration and other terms and conditions of employment –

- (a) employ such staff as the Commission considers necessary;
- (b) employ the services of such other persons as the Commission considers expedient for any particular purpose.”

[56] Paragraph 9 of Schedule 1 under the heading “Procedure” provides as follows:

“9–(1) In determining its own procedure the Commission may, in particular, make provision about –

- (a) the discharge of its functions by committees (which may include persons who are not members of the Commission);
- (b) a quorum for meetings of the Commission or a committee.”

## **Section 9**

[57] Section 9 imposes general duties on the Commission. It provides:

“9- (2)...

3. In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way.

4. In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).”

## **Section 10**

[58] This sets out the Commission’s incidental powers and provides:

“10–(1) 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.

- (2) However, nothing in this Act authorises the Commission –
  - (a) to exercise functions corresponding to those of a charity trustee in relation to a charity, or
  - (b) otherwise to be directly involved in the administration of a charity.”

**Section 19 – Interpretation Act (Northern Ireland) 1954 (“the 1954 Act”)**

[59] Section 19 of the 1954 Act provides as follows:

**“19 Effect of words of incorporation.**

(1) Where an Act passed after the commencement of this Act contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate –

(a) to vest in that body when established –

...

(v) the right to regulate its own procedure and business; and

(vi) the right to employ such staff as may be found necessary for the performance of its functions;

...

(2) Without prejudice to sub-section (1) of section two, the application of this section to a body corporate shall not –

(a) prevent additional powers being conferred by any enactment on that body; or

(b) prevent the powers conferred by virtue of such application being limited by any enactment; or

(c) prejudice or affect any liability of any member of that body to be surcharged with the payment of any amount which may be disallowed, by an

auditor acting in pursuance of any statutory provision, in the accounts of that body.”

### Section 96 of the 2008 Act

[60] The appeals under consideration relate to a number of specific functions of the Commission. In the *McKee/Hughes* appeals the relevant section is section 96 which deals with the alteration of a charity’s objects. It provides as follows:

“96 –

(1)...

(2) Where a charity is a company, any regulated alteration by the company –

- (a) requires the prior written consent of the Commission, and
- (b) is ineffective if such consent has not been obtained.”

### Section 33

[61] In the *Caughey* appeal the relevant section is section 33 which in so far as relevant provides as follows:

“33 – (1) Where, at any time after it has instituted an inquiry under section 22 with respect to any charity, the Commission is satisfied –

- (a) That there is or has been any misconduct or mismanagement in the administration of the charity; or
- (b) That it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to the charity,

the Commission may of its own motion do one or more of the following things-

...

- (vii) by order appoint (in accordance with section 35) an interim manager, who shall act as receiver and manager in respect of the property and affairs of the charity.

...

(10) The Commission shall, at such intervals as it thinks fit, review any order made by it under paragraph (i), or any of paragraphs (iii) to (vii), of subsection (1); and, if on any such review it appears to the Commission that it would be appropriate to discharge the order in whole or in part, the Commission shall so discharge it (whether subject to any savings or other transitional provisions or not)."

## Section 22

[62] In the *Crawford* appeal the relevant sections are sections 22 and 33. Section 22 in so far as relevant provides as follows:-

"22—(1) The Commission may institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes.

(2) The Commission may either conduct such an inquiry or appoint a person to conduct it and make a report to the Commission."

Section 33 in so far as relevant provides as follow:-

"33—(1) Where, at any time after it has instituted an inquiry under section 22 with respect to any charity, the Commission is satisfied—

- (a) that there is or has been any misconduct or mismanagement in the administration of the charity; or
- (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to the charity,



the Commission may of its own motion do one or more of the following things –

- (i) by order suspend any person who is a trustee, charity trustee, officer, agent or employee of the charity from the exercise of that person's office or employment pending consideration being given to that person's removal (whether under this section or otherwise);

...

(2) Where, at any time after it has instituted an inquiry under section 22 with respect to any charity, the Commission is satisfied –

- (a) that there is or has been any misconduct or mismanagement in the administration of the charity; and
- (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to the charity,

the Commission may of its own motion do either or both of the following things –

- (i) by order remove any trustee, charity trustee, officer, agent or employee of the charity who has been responsible for or privy to the misconduct or mismanagement or whose conduct has contributed to it or facilitated it;
- (ii) by order establish a scheme for the administration of the charity."

[63] A survey of the 2008 Act demonstrates the nature and breadth of the functions and powers of the Commission. It has, *inter alia*, the power to do the following:

- By section 16 – To keep a register of charities
- By section 22 – Power to institute inquiries
- By section 23 – Power to call for documents and search records.

- By section 29 – Power to make schemes, without financial limit for the application of property cy-près schemes
- By section 33 – Powers to act for the protection of charities including the power to remove a Charity Trustee under section 33(4)
- By section 34 – Power to suspend or remove trustees from membership of a charity
- By section 47 – Power to authorise ex gratia payments
- By section 50 – Power to determine the membership of a charity
- By section 52 – Power to enter premises
- By section 84 – Power to dissolve corporate body

[64] As appears from this non-exhaustive list the Commission has very wide and extensive powers. Of particular significance is the power of the Commission to carry out certain functions which were previously the sole preserve of the High Court, including its power to approve cy-près schemes without financial limit and its power to remove trustees.

### **The Commission**

[65] As appears from the affidavit of Frances McCandless, CEO of the Commission, sworn on 20 February 2017 the Commission is a non-departmental public body sponsored by the Department. It was established under the 2008 Act and came into effect on 27 March 2009. It became operational from 1 June 2009 and seven part-time Commissioners have been appointed.

[66] The Board of Commissioners has approved a number of manuals which set out the procedures to be followed when decisions are made by staff on behalf of the Commission. The manuals in particular specify the level of staff seniority at which each kind of decision is taken. For example the Inquiries Manual Version 2.0 states that a decision to remove a charity trustee can be made by members of the Inquiry Team. Further under its Standing Orders at Clause 7 under the heading:

“Involvement of members of the Commission in day to day operational casework” it states at clause 7.3 as follows:

“...the members of the Commission may exceptionally and in appropriate cases, at their discretion, decide collectively to:

- Make some casework decisions themselves...”

From this it appears that under the Standing Orders it will only be in exceptional cases that the members of the Commission make day to day operational case work decisions.

### **Legislative Scheme in England and Wales**

[67] It is not in dispute that the impugned decisions which are the subject of the present appeals can lawfully be made in England and Wales by a member of the Commission's staff who is duly authorised.

[68] The law governing charities in England and Wales is now found in the Charities Act 2011 ("the 2011 Act"). Under the Charities Act 1993, the regulation of charities was the responsibility of the Charity Commissioners for England and Wales. The 1993 Act made provision for specific staff to be designated as "Assistant Commissioners" and for them to be able to act in the name of the Charity Commissioners – see Schedule 1 paragraph 3(3).

[69] In 2006 the Charities Act 2006 ("the 2006 Act") created the Charity Commission for England and Wales as a body corporate and all the property rights and liabilities of the Commissioners were transferred to the Commission. The 2006 Act made a number of specific provisions in respect of staff and the Commission's power to regulate its own procedures. The relevant provisions are as follows:

#### ***"Schedule 1 - Paragraph 5 Staff"***

(1) The Commission –

(a) shall appoint a chief executive, and

(b) may appoint such other staff as it may determine.

(2) The terms and conditions of service of persons appointed under sub-paragraph (1) are to be such as the Commission may determine with the approval of the Minister for the Civil Service.

#### ***Schedule 1 - Paragraph 7 Procedure etc***

(1) The Commission may regulate its own procedure (including quorum).

(2) The validity of anything done by the Commission is not affected by a vacancy among its members or by a defect in the appointment of a member.

Schedule 1 – Paragraph 8 *Performance of functions*

Anything authorised or required to be done by the Commission may be done by –

- (a) any member or member of staff of the Commission who is authorised for that purpose by the Commission, whether generally or specially;
- (b) any committee of the Commission which has been so authorised.”

[70] In addition section 20 provides:

**“Power to give specific directions for protection of charity**

After section 19 of the 1993 Act insert –

“19A Power to give specific directions for protection of charity

- (1) This section applies where, at any time after the Commission has instituted an inquiry under section 8 above with respect to any charity, it is satisfied as mentioned in section 18(1)(a) or (b) above.
- (2) The Commission may by order direct –
  - (a) the charity trustees,
  - (b) any trustee for the charity,
  - (c) any officer or employee of the charity, or
  - (d) (if a body corporate) the charity itself, to take any action specified in the order which the Commission considers to be expedient in the interests of the charity.
- (3) An order under this section –
  - (a) may require action to be taken whether or not it would otherwise be within the powers exercisable by the person or persons concerned, or by the

charity, in relation to the administration of the charity or to its property, but

(b) may not require any action to be taken which is prohibited by any Act of Parliament or expressly prohibited by the trusts of the charity or is inconsistent with its purposes.

(4) Anything done by a person or body under the authority of an order under this section shall be deemed to be properly done in the exercise of the powers mentioned in subsection (3)(a) above.

(5) Subsection (4) does not affect any contractual or other rights arising in connection with anything which has been done under the authority of such an order.”

[71] These powers of the Commission remain unchanged in the 2011 Act.

## **Submissions of the Parties**

### **A. The Commission**

[72] Dr McGleenan in a very well researched and carefully analysed skeleton argument, in summary, made the following submissions:

(i) Section 19 of the Interpretation (Northern Ireland) Act 1954 by explicitly empowering the Commission 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. Such an interpretation of section 19, he submitted accords with the other provisions of the 2008 Act. In particular it accords with the provisions of sections 9 and 10 of the 2008 Act. Section 10 gives the Commission, subject only to the exceptions set out in section 10(2) untrammelled incidental powers to do “anything which is calculated to facilitate or is conducive or incidental to the performance of any of its functions or general duties”. Further, in accordance with section 9(2)(1)(b) and section 9(2)(3), the Commission must in performing its functions, act in a way which it considers most appropriate for the purpose of meeting those objectives; and have regard to the need to use its resources in the most efficient, economic and effective way. Accordingly, Dr McGleenan submitted that the Commission is not only empowered but obliged to make its decisions with an eye to effective use of resources, efficiency and economy in accordance with section 9. Therefore, in the

discharge of its functions the Commission is not only entitled but enjoined to adopt internal processes, such as those set out in its various manuals, which, *inter alia*, permit staff acting alone to discharge the decision making functions of the Commission.

- (ii) Dr McGleenan further submitted that there was nothing in the 2008 Act, in particular, which evinced a contrary intention or otherwise constrained the Commission from adopting internal processes which permitted regulation of its procedure to allow staff to discharge its decision making functions. In particular there was nothing in Schedule 1 to the 2008 Act which restricted the Commission's powers of delegation. Accordingly, he submitted that the impugned decisions taken in all three appeals under consideration were lawfully made notwithstanding the fact these decisions were made by Commission staff acting alone.
- (iii) Dr McGleenan further submitted that in the event that the court found that 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 implied delegation in accordance with a number of authorities including *Noon v Matthews* [2014] EWHC 4330.
- (iv) Finally, Dr McGleenan submitted that the Commission like other bodies corporate, could act through its employees and is bound by the actions of its employees who act with actual or ostensible authority.

## **B. Submissions of the Department**

[73] Mr Humphreys adopted the submissions of Dr McGleenan and in his excellent skeleton elaborated upon the relevant case law. In his oral submissions he dealt with the body corporate argument and also made specific submissions in respect of the impugned decision in the *McKee* and *Hughes* appeals.

## **C. Submissions by the Attorney General**

[74] The Attorney General, in a comprehensively researched and carefully crafted skeleton argument, lucidly elaborated in oral submissions, in summary, made the following submissions:

- (i) 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 its 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 to staff as appears from the cases of *In re Bell* [2000] NI 245 and *Barnard v National Dock Labour Board* [1953] 2 QB 18.

- (ii) Even if section 19 did encompass such a wide power of delegation it was constrained by the provisions of Schedule 1 which expressly limited delegation to a Committee comprising at least one Commissioner.
- (iii) Sections 9 and 10 when read in context cannot be construed so as to override the express limitation regarding delegation set out in Schedule 1. Further the provisions of sections 9 and 10 can only be read consistently with an interpretation of the 2008 Act that decision making functions cannot be delegated to staff acting alone.
- (iv) Relying on the authority of *Re Bell* a power of delegation should not be implied.
- (v) The fundamental nature of a statutory corporation is not such that discharge of functions by the staff is inherently lawful as per *Belfast Telegraph Newspapers Limited for Judicial Review* [2001] NICA unreported.

#### **D. Submissions by the Appellants**

[75] Mr Doran acting on behalf of Mr Hughes, and the other appellants - Mr McKee, Mr Caughey and Mr Crawford each acting as litigants in person, adopted the Attorney General's submissions. Mr Doran in a well-reasoned, ably argued and succinct skeleton argument also submitted that the Commission was established as a body with expertise in charity matters and therefore if the Commission could delegate its decision making functions to persons who were not Commissioners this frustrated the statutory scheme. Secondly, he submitted that as there was an express power of delegation in Schedule 1 the court should not imply a further right to delegate to staff acting alone. Thirdly he submitted that section 19 related only to "how" a decision was made and not "who" made it.

#### **CONSIDERATION**

[76] Determination of the key issue is first and foremost a question of statutory interpretation.

#### **Section 19 of the 1954 Act**

[77] Section 6(8) of the 2008 Act applies section 19 of the 1954 Act to the Commission. As a consequence all the rights and powers set out in section 19

are vested in the Commission, being a body corporate. In particular, in accordance with section 19(1)(a)(v) and (vi), the Commission has:

- “(v) the right to regulate its own procedure and business; and
- (vi) the right to employ such staff as may be found necessary for the performance of its functions.”

[78] WA Leitch and AG Donaldson, the drafters of the 1954 Act in “A commentary on the Interpretation Act (Northern Ireland) 1954” *NILQ* 1955 at page 62 state as follows:

“One of the avowed objects of the Interpretation Act (Northern Ireland) 1954 is 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.”

[79] As section 19 is a word saving device its provisions apply with the same force as if they had been written out in longhand in the text of the 2008 Act. Accordingly, I reject the submission of Mr McKee that the court should only have regard to section 19 in the event that the provisions of the 2008 Act are ambiguous or there is a gap in its provisions.

[80] The Commission and the Department both submitted that section 19 gave the Commission the right to regulate its own internal processes without any constraint and it was therefore at liberty to adopt processes and systems under which its staff could discharge all the decision making functions of the Commission, if the Commission so determined.

[81] In contrast the other appellants and the Attorney, who relied on *Re Bell* submitted that the powers given by section 19 to regulate procedure and to employ staff, did not encompass a power to delegate the decision making functions entrusted to the Commission to its employees.

[82] In *Re Bell* a pharmacist wished to relocate premises. In accordance with its statutory powers the Health and Social Services Board (“the Board”), which was established under the Health and Personal Social Services (Northern Ireland) Order 1972 (“the 1972 Order”) could authorise such a relocation. The Board was a body corporate to which section 19 of the 1954 Act applied. In addition to its powers under section 19 the Board was also given an express power under the 1972 Order to delegate some of its functions to a Committee. The Board never formulated a scheme to delegate its functions to a Committee. In the events which happened it purported to delegate its



decision making power in respect of the relocation of the premises to one of its officials.

- [83] Girvan J, as he then was, held that in the absence of a Committee, delegation by the Board of its decision making powers to a member of staff was *ultra vires*. He stated at page 255 as follows:

“... while (the 1972 Order) provides for delegation of functions to Committees by paragraph 8(2) of Schedule 1, Part II and for the appointment of sub-committees to consider and report to the Board under paragraph 9 of the Schedule the 1972 Order contains no express power to delegate functions to officers. The express but limited power of delegation of functions to Committees and the express restriction of the powers of sub-committees to considering and reporting but not deciding tends to point away from any implied power to delegate the functions to officers. Furthermore, if statute requires a Board or corporate body to make a decision the normal way in which a corporate decision is made is by a resolution of the body corporate.”

- [84] The Attorney submitted that as the statutory framework which applied to the Board in *Re Bell* is similar to that which applies to the Commission and as Girvan J in *Re Bell* ruled that section 19 did not give the Board power to delegate its functions to staff, the application of section 19 to the Commission therefore did not give it the power to delegate its decision making functions to its employees.

- [85] Whilst I accept section 19 applied to the Board in *Re Bell*, the question whether section 19 permitted delegation of decision making to officials of the Board was not argued before the court and section 19 was not referred to. Girvan J in finding that the reported delegation was *ultra vires* the Board's powers referred only to,

“the absence of anything in the regulations or the 1972 Order which point to a power to delegate such a function to an official”.

No reference was made to section 19 and accordingly, I find that *Re Bell* was decided *per incuriam* and is therefore of limited assistance to this court in interpreting section 19. Girvan J unfortunately did not elucidate upon the meaning of the provisions of section 19 and in the absence of counsel being able to find any other relevant authorities dealing with the interpretation of section 19, that task now falls to this court.

- [86] The only other authority referred to by counsel in relation to the meaning to be attached to some of the words used in section 19(1)(a)(v) and (vi) was *Barnard v National Dock Labour Board* [1953] 2 QB 18. In *Barnard* a local labour board purported to delegate disciplinary functions entrusted to it to an official called the Port Manager. The Port Manager proceeded, without reference to or any involvement by the Board, to suspend a number of dockers. The court held that notwithstanding the Board's power to "determine its procedures" the Board did not have either an express or implied power to delegate its disciplinary functions to the Port Manager.
- [87] The Attorney General submitted that *Barnard* was authority for the proposition that the right to regulate procedure given by section 19 did not equate to a right to delegate decision making powers to another person. Upon a closer reading of *Barnard*, however it is clear that the question whether the Board's power to "determine its own procedure" gave it an express right to delegate its decision making functions to a third party, was neither argued nor relied upon by counsel acting for the Board. The only issue argued before the court was whether the Board had an implied power to delegate. Accordingly, I find that *Barnard* is of limited assistance in assisting this court in interpreting the meaning of the words "a power to regulate its own procedures" contained within section 19.
- [88] Although section 19 has been in existence for quite some time, despite the industrious researches of counsel, they were unable to find any authority in relation to the interpretation of its provisions.
- [89] According to the Shorter Oxford English Dictionary "to regulate" means to "control or supervise by means of rules or regulation". Thus, regulation refers to the creation of an orderly system which would enable, for example, the Commission to supervise, oversee, police, monitor and control its functions. I do not consider that the word regulate is itself apt to describe a power to "delegate" such functions to staff. According to the Shorter Oxford English Dictionary, "to delegate" means to "assign or entrust (a duty, authority, etc) to another as agent or deputy". In light of this definition I consider that delegation is something which goes beyond the control and supervision envisaged by the use of the word "regulation". Accordingly, I am satisfied that the powers given to the Commission by section 19(1)(a)(v) "to regulate" its own procedures do not give to the Commission an express power "to delegate" any of its decision making functions to its staff.
- [90] Further, I consider that the power given by section 19(1)(a)(vi) "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.

- [91] If section 19 were to be interpreted in the manner contended for by the Commission and the Department it would mean that the Commission, to use the words of the Attorney General, 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. 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.

### **Section 19 and the position in England and Wales**

- [92] 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.

- [93] Paragraphs 5 and 7 of Schedule 1 to the 2011 Act enable the England & Wales Commission to appoint staff and to regulate its own procedures. Paragraph 8 of Schedule 1 permits performance of the Commission's functions by staff. Although slightly differently worded, I consider that the provisions of paragraphs 5 and 7 to Schedule 1 of the 2011 Act are essentially equivalent to the provisions of section 19 of the 1954 Act. If these provisions had been sufficient to grant to the England and Wales Commission a power to delegate performance of functions to staff then the provisions of paragraph 8 of Schedule 1 of the 2011 Act would have been unnecessary. Hence 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 its staff.

- [94] I am further satisfied that section 19 does not grant to the Commission an explicit power to delegate its decision making functions to staff acting alone for the reasons set out below. Whilst none of these reasons when taken in isolation is conclusive, I consider that cumulatively they support my view that section 19 bears a restricted interpretation. These reasons are as follows:

- (a) If section 19 had created the extensive rights and powers contended for by the Commission it is surprising that section 19 was not relied upon in the case of *Re Bell*.
- (b) It is further surprising that the drafters of section 19 in their commentary in the Northern Ireland Legal Quarterly did not reference the fact that section 19 created such extensive powers.

- (c) If a right to determine procedure equated with delegation it is surprising that the representatives of the local Board in *Barnard* did not rely on this provision and did not seek to submit that such a power gave them an express right to delegate their functions to the Port Manager.
- (d) If section 19 created an expansive right to delegate to any person or body, the provisions of Schedule 1 paragraph 9 which provide for delegation of functions to a Committee would be superfluous. Bennion on Statutory Interpretation (6<sup>th</sup> Edition) at page 1031 states:

“On the presumption that Parliament does nothing in vain the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and should not be disregarded.”

Accordingly, I find that the existence of Schedule 1 paragraph 9 is inconsistent with an interpretation that section 19 grants an express power to the Commission to delegate all of its statutory functions to its staff.

- (e) A number of other Northern Ireland statutes make specific provision for the delegation of functions by statutory corporations to staff despite the application of section 19, for example:- The Libraries Act (Northern Ireland) 2008; The Commission for Victims and Survivors Act (Northern Ireland) 2008; The Agriculture (Northern Ireland) Order 2004; and The Probation Board (Northern Ireland) Order 1982. I am satisfied that the reason the legislature has adopted a drafting technique of making specific provision for the delegation of statutory functions of bodies corporate to staff in a large number of statutes, notwithstanding the application of section 19, is consistent with the view that section 19 does not permit delegation of statutory functions to staff and is also consistent with the presumption against superfluous drafting.

#### **Schedule 1 - paragraphs 4 and 9**

[95] If I am wrong in my interpretation of section 19 I am satisfied that any power to delegate given by section 19 is limited by the express provisions relating to delegation granted by Schedule 1 to the 2008 Act.

[96] Schedule 1 paragraph 9 provides as follows:

“9. In determining its own procedure the Commission may, in particular, make provision about –

- (a) the discharge of its functions by Committees (which may include persons who are not members of the Commission);
- (b) a quorum for meetings of the Commission or a Committee.”

[97] The Commission submitted that Schedule 1 paragraph 9 did not constrain or delimit the power of the Commission to regulate its own procedure. Rather, the Commission submitted that it was a provision which expressly recognised this power in its prefatory words and then permissively outlined its scope by expressly indicating that it could extend to discharging functions through Committees that included non-members of the Commission. Consequently, the matters set out in paragraph 9 of Schedule 1 were illustrative rather than exclusive.

[98] In contrast the Attorney General and the other appellants all submitted that Schedule 1 was not merely illustrative but provided in a limited and specific way for what would otherwise be impossible.

[99] Section 6(8) provides that section 19 is “subject to Schedule 1”. I consider that the words “subject to” introduce a condition, limitation or proviso to the powers otherwise given.

[100] Section 19(2) further recognises such a limitation when it states:

“2. Without prejudice to sub-section (1) of section 2, the application of this section to a body corporate shall not –

...

- (b) prevent the powers conferred by virtue of such application being limited by any enactment ...”

[101] I consider that paragraph 9 of Schedule 1 which makes express provision for delegation of the Commission’s functions by Committees which may include persons who are not members of the Commission and further expressly provides that it can set a quorum for meetings of the Commission or a Committee is a provision which prescribes or limits the powers given by section 19.

- [102] 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 the procedures prescribed in paragraph 9 of Schedule 1. I further find that the words “in particular” in paragraph 9, refer to the provisions of sub paragraphs (a) and (b) which, rather than being merely illustrative, actually set out the specific, particular and only ways in which the Commission can delegate its decision making functions.
- [103] Further, as section 19 is a general provision and contains no express power of delegation it must yield to the specific and express provisions of paragraph 9 of Schedule 1. I am therefore 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 functions.
- [104] In addition I am 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 staff. Accordingly, I am satisfied that this provision which allows the Commission to employ staff does not contain any provision permitting it to delegate its decision making functions to its staff.

## **Sections 9 and 10**

### **Section 10**

- [105] The Commission submitted that the interpretation to be given to section 19 and the other provisions of the 2008 Act had to be read in the context of the entire 2008 Act. The Commission submitted that the other provisions of the 2008 Act, particularly sections 9 and 10 were consistent with the Commission’s interpretation of section 19, namely that the Commission had been granted wide powers to regulate its own procedure. Section 10 recognised this, as, subject to the exceptions in section 10(2) the Commission was granted an untrammelled power “to do anything” incidental to the performance of its functions and duties. Further, the Commission was not only entitled to delegate functions to staff, but in accordance with the Commission’s general duties set out in section 9 it was under an obligation to delegate functions to staff as this represented the most effective, efficient and economic use of its resources.
- [106] In contrast the Attorney General contended that having regard to the entire 2008 Act, sections 9 and 10 could not be interpreted in the expansive way advocated by the Commission and the Department. He submitted that section 10 was an incidental power and therefore could not confer a broad power to delegate which was not otherwise expressly granted. He further submitted that the section 9 duties could only be met by the Commission itself being involved in the discharge of its functions.

[107] 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”. The word “facilitate” means to make easier. 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. Section 10 however being an incidental and general power must be read so that it is in conformity with the other provisions of the 2008 Act, including Schedule 1. In light of my interpretation of Schedule 1 paragraph 9, I find that section 10 cannot be interpreted as giving the Commission a broad power to delegate. Section 10 cannot be interpreted as a general “escape” clause from the other statutory controls set out in the main Act and cannot otherwise be interpreted to overrule the express provisions in the 2008 Act which deal with delegation. Such an interpretation is in line with the canon of construction that the general and incidental power must yield to the specific and express power. Therefore section 10 being general and incidental must yield to the specific and express powers granted by paragraph 9 of Schedule 1.

[108] In addition, I find that section 10(2) is instructive in the interpretation of section 10(1). Section 10(2) sets out certain things the Commission may not do. Thus 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.

[109] I am further fortified in my interpretation of section 10 by the following matters:

- (a) If section 10 created a wide power to delegate then Schedule 1 paragraph 9 would amount to superfluous drafting.
- (b) The 2011 Act and a number of Northern Ireland statutes contain provisions which are similar to section 10. Notwithstanding this, each of these statutes contains an express provision permitting delegation of functions to staff. This indicates that the provisions of section 10 cannot be interpreted in the expansive way contended for by the Commission.
- (c) Dr McGleenan accepted that in the event section 19 was not given the expansive interpretation the Commission contended for, section 10 in and of itself would not be sufficient to permit delegation of functions to staff.

## Section 9

[110] The Commission further contended that in order to fulfil its general duties set out in section 9 and, in particular, its duties to 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 was not only empowered but obliged to delegate decision making functions to staff.

[111] I reject this argument. Section 9(4) requires decision making to be consistent and accountable. I consider that it is difficult to see how consistent and accountable decisions can be made if the Commissioners are not themselves involved in decision making. As appears in the case of *McKee* the decision was made by a case worker who was at pains to point out in her evidence that she acted independently and without reference to any other person. I consider that the only way in which consistency and the oversight required by section 9 can be met is by the 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. I am therefore satisfied that sections 9 can be read consistently with the interpretation that section 19 does not permit delegation of functions.

[112] I am further satisfied that section 9 being a provision which deals with the general duties of the Commission cannot override the express provisions set out in Schedule 1.

[113] Reading the provisions of the 2008 Act separately and in the context of the entire 2008 Act I find that the Commission does not have power to delegate its statutory functions to staff acting alone.

## Workload Argument

[114] 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 the functions they had to undertake.

[115] There was no evidence before the court about the workload of the Commission. The only available evidence was the evidence of Ms McGahey who informed the Tribunal that the Commission's workload was light, although it had increased more recently.

[116] I am therefore not satisfied on the basis of the evidence before the court that the Commission is in fact overburdened. If however, the Commission is overburdened, there are a number of steps it can take to deal with this. First, it can regulate its procedures so that staff can assist it in making its decisions,



for example by preparing reports etc. In *The matter of an application by the Belfast Telegraph Newspapers Limited for Judicial Review* [2001] NICA unreported, Carswell LCJ considered the role staff could play in assisting the members of the Equality Commission. He stated:

“[The staff] may properly be entrusted with the responsibility of carrying out much of an investigation, by delegation from the Commission as was held in *R v The Commission for Racial Equality ex parte Cottrell and Rothon* [1980] IRLR 279. They may also in my opinion conduct preparatory work for the Commissioners who have to make the decision in question, in the course of which they may well express their views. This is a well-recognised part of the work of senior officers in all branches of the public service. The deciders may be influenced by those views and may rely quite heavily upon their officers’ advice, based upon their experience and judgment. The important matter however is that in the end the deciders reach their own decision accepting whatever opinions and arguments they think fit from their officers but making up their own mind at the conclusion of the process.”

[117] As appears from *Belfast Telegraph*, whilst staff can greatly assist the Commission in decision making, this does not detract from the important distinction between staff being advisors and the Commissioners being the “deciders”.

[118] Secondly, the Commission can deal with a heavy workload by discharging its functions by committee and by fixing the quorum of members who can make decisions.

[119] Notwithstanding all the steps it can take to mitigate this risk, in the event that it becomes overburdened with work, it can then request that the legislation is changed to allow it to delegate its functions to staff.

## **Section 6**

[120] The Attorney General relied on the provisions of section 6 in support of his interpretation of section 19. Section 6 sets out the qualifications a Commissioner should have. These include expertise in charities and financial matters. The Commissioners are then selected on the basis of this expertise. Under the 2008 Act the Commission must undertake various functions including the removal of trustees and the creation of cy-près schemes. The discharge of these functions requires expertise in matters of charity law, finance and the exercise of discretion. I consider that it is therefore the

Commissioners, rather than its staff who are especially equipped to undertake these functions. I find it difficult to see why the 2008 Act specifically requires the Commissioners to have the expertise set out in section 6 if, in accordance, with the other provisions of the 2008 Act, the Commissioners could delegate all their functions to staff. In such circumstances the expertise of the Commissioners would not be utilised in decision making where the section 6 qualifications would be highly relevant. I accept that the provisions in relation to the qualifications of Commissioners is not conclusive to the interpretation of section 19, especially as Commissioners in England and Wales with similar qualifications and experience are entitled to delegate their functions to staff. Given that the factual background in England and Wales is different as staff previously acted as lay commissioners, I find the provisions of section 6 lend some support to the view that section 19 should not be interpreted so as to allow wholesale delegation to staff.

### **Miscellaneous provisions of the 2008 Act**

- [121] The Attorney General submitted that when one had regard to a number of specific provisions in the 2008 Act it was clear that it distinguished between functions which were to be carried out by staff and those which were to be carried out by the Commission. Dr McGleenan on behalf of the Commission made a number of counter arguments in respect of these various provisions.
- [122] Without setting out all of the arguments and counter arguments I am satisfied that these miscellaneous provisions are not of assistance in interpreting the relevant provisions of the 2008 Act.

### **Implied Delegation**

- [123] 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, in accordance with the principles set out in *Noon v Matthews* [2014] EWHC 4330.
- [124] The Attorney General and the appellants rejected this submission and submitted that the court should rely on the approach of Girvan J set out in *Re Bell* in relation to the question of implied delegation and further submitted that even if delegation could be implied, it would not extend to the decisions arising in the present appeals.

### **Discussion of implied delegation**

- [125] In *Re Bell* Girvan J when dealing with the question of implied delegation stated as follows at pages 15 and 17:

“[The 1972 Order] provides for delegation of functions to Committees ... The express but limited power of delegation of functions to Committees and the express restriction of the powers of sub-committees to considering and reporting but not deciding tends to put away from any implied power to delegate functions to officers ...

(After considering a number of English authorities he stated):

“Although at first sight these authorities might appear to assist the board in its contentions, on analysis I do not consider that they are authorities to support the purported delegation of the function of arriving at a relevant decision in respect of the applicant’s application for relocation. Firstly, the English law contains clear and express powers of delegation of functions to officers and the decisions in the two cases were based on that premise. Secondly, in both cases what was at issue were matters of administration. Even though in the *Mutual Provident* case the rating assistant formed an opinion which was then attributed to the authority. It was an opinion form in carrying out a purely administrative function. As already noted in the context of Northern Ireland law there is no express power to delegate functions to officers and I consider that the decision to be made did not qualify as a mere matter of administration.”

[126] The question of implied delegation of powers was then subsequently considered in *Noon v Matthews* [2014] EWHC 4330.

[127] In *Noon* one of the issues in play was whether the conservators of the River Cam could lawfully delegate their power to institute and bring prosecutions for contraventions of “by-laws”. The conservators, a body corporate, did not enjoy an express power under the statute to delegate this function. Even though it was conceded that there could be an implied power of delegation Beatson LJ nonetheless carefully analysed whether such a power could be implied and, if so, the extent of such an implied power. At paragraphs [25] and [26] he stated as follows:

“25. There are no relevant decisions concerning the power of the Conservators to delegate their powers. Accordingly, guidance must be sought from the decisions of this and other courts in other contexts. The starting point is the principle that powers conferred by statute

should be exercised by the person or authority on whom they are conferred, “even where [this] causes administrative inconvenience, except in cases where it may be reasonably inferred that the power was intended to be delegable”: Wade and Forsyth, *Administrative Law*, 11<sup>th</sup> ed., 259, and see also *de Smith’s Judicial Review* 7<sup>th</sup> ed, 5-148 ff.

26. One can only assess how strict this principle is by examining the approach of the courts to the question whether statutory provisions impliedly authorise delegation. As in many areas, this is likely to vary according to the context and the nature of the power. There is a strong presumption against interpreting a grant of legislative power as empowering delegation. There is also a tendency to adopt a more restrictive approach to implied authority to delegate in the cases of the proceedings of courts and cases involving other “judicial” and “disciplinary” powers. A strict approach is also likely if the power is conferred on the holder of a public office because of the personal qualifications and experience that those who hold the office can be expected to have. *Re Bell’s Application for Judicial Review* [2000] NI 245, the decision relied on by the District Judge, is an example of a strict or restrictive approach. But where the exercise of the power in question is not final or conclusive, where the power is given to the head of an organisation which is itself hierarchically structured, and where the responsibilities of the person or body named in the statute are such that the court considers delegation is inevitable, a less strict approach is taken and authority to delegate is likely to be implied.”

He further stated at paragraph [30] as follows:

“*R (Chief Constable of the West Midlands Police) v Birmingham Justices* [2002] EWHC 1087 concerned the power in section 1 of the Crime and Disorder Act 1998 to bring an application for an anti-social behaviour order “ASBO”. The power is conferred on the relevant authority defined as the local councillor or Chief Constable for the area. It was recognised by this court (at [16]) that deciding whether to apply for an ASBO “is a problematic and sensitive task”. But it was held that the Chief Constable was entitled to delegate the decision through the hierarchy to a police sergeant. Sedley LJ (at

[12]) considered that the Carltona principle was 'sufficiently ample' to allow functions such as those under section 1 to be carried out by an officer through whom he or she is accountable, and (at [14]) could not see a good reason to differentiate "where Parliament has conferred powers on the holder of a named office, between those offices which are the apex of an organisation itself composed of officers or otherwise hierarchically structured, and those offices designated by Parliament because of the personal qualifications of the individual holder."

...

At paragraph [32] he considered *Re Bell's Application* and stated as follows:

"[32] I return to *Re Bell's Application for judicial review* [2000] NI 245. In that case, after carefully reviewing the authorities, Girvan J reached the conclusion relied on by the District Judge. He stated (at 258) that, "where a person, or body of persons is required to determine a question affecting a person's rights or entitlement the decision falls to be made by the designated person, body or body of persons." I consider that only limited assistance can be derived from that case. First, its context was very different to that of the present case. ... Girvan J considered the matter delegated could not be characterised as a mere administrative matter."

...

He then quoted Lord Phillips's statement of principle in *DPP v Haw* [2008] 1 WLR 379 at paragraph [33] as follows:-

"33. ... where a statutory power is conferred on an officer who is himself the creature of statute, whether that officer has the power to delegate must depend upon the interpretation of the relevant statute or statutes. Where the responsibilities of the office created by statute are such that delegation is inevitable, there will be an implied power to delegate. In such circumstances, there will be a presumption, where additional statutory powers and duties are conferred, that there is a power to delegate unless the statute conferring them, expressly or by implication, provides to the contrary."

Later at paragraph [35] he stated,

“Thirdly, and significantly, in the light of the decisions in *Haw’s* case and the *Birmingham Justices* case, Girvan J’s formulation appears too wide. Although these cases involve important common law freedoms, indeed fundamental rights, this court took a different and less restrictive approach than that taken by Girvan J. *Haw’s* case involved freedom of expression and of assembly, freedoms which are regarded as important by the common law are also fundamental rights protected by the European Convention of Human Rights. The *Birmingham Justices* case involved a court order which while a civil order, could have a significant effect on an individual’s freedom of movement.”

[128] After considering the authorities in respect of the question whether power to delegate could be implied, Beatson LJ then turned to consider the question of determining the extent of the implied power. He concluded at paragraphs [39] and [43]:

“39. ...I consider that the Conservators are not impliedly authorised to delegate broad policy...they can, in my judgment, however, delegate the implementation of such policies to officers who will have some discretion as to how, operationally, to execute the policy in question.

43. I consider that it is for the Conservators to set the general policy regarding prosecutions, but that, as far as individual prosecutions within such general policy are concerned, there is power in their senior officer, the River Manager, to make the operational decisions.”

[129] In accordance with *Noon* I accept that the court can in certain circumstances find that there is an implied power to delegate to staff. In determining when such a power arises however it is necessary to consider a number of factors. First, as noted by Beatson LJ there is a strong presumption against interpreting a grant of legislative power as empowering delegation. In the present 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 these functions to a Committee. In these circumstances I consider that there is a strong presumption against implying a power to delegate to staff. Secondly, 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 powers given to the Commission under the 2008 Act are very extensive. They involve, powers to give consent to amend the constitution of charities, powers to remove

trustees, powers to appoint interim managers and powers to create cy-près schemes without financial limit. I consider that many of these powers are akin to judicial and disciplinary powers. Indeed, prior to the 2008 Act the power to remove trustees and the power to create a cy-près scheme beyond a modest financial threshold were reserved exclusively to the Court of Chancery. Thirdly, *Noon* at paragraph [26] notes that a strict approach is also 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 have. Section 6 of the 2008 Act sets out the personal qualifications and experience required of Commissioners. As set out above at paragraph [117] their expertise, qualifications and knowledge is relevant to the functions which they have to discharge. I therefore consider that their qualifications and experience should contribute to the Commission's decision making functions rather than just being limited to policy making decisions. Fourthly, notwithstanding the breadth of functions the Commission has to undertake, there is no evidence before this court that the workload is such that delegation is inevitable. Unlike the case of *Haw* where there were 12,000 applications to be processed, the evidence before this court indicates that the workload of the Commission is modest. Accordingly I find that delegation is not inevitable.

[130] For all these reasons I consider that a strict approach to implied delegation should be taken in relation to the Commission and in all the circumstances I find that there is no implied power to delegate to staff.

[131] If I am wrong in finding that there is no implied power to delegate, 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.

[132] In the *McKee* case Mr Humphreys submitted that the decision to vary the constitution of the charity was something which in the past was done without any involvement by the Charities Branch of the Department.

[133] I find that the need for the consent of the Commission introduced by the 2008 Act, indicates that the legislature thought it was now important that there be proper oversight of changes to a charity's objects. Such a decision involves deciding whether the changes in the charity's constitution comply with charitable principles. I consider that this power should be exercised by the Commissioners rather than by the staff because of the qualifications and experience Commissioners have in respect of these complex aspects of charity law.

[134] Having regard to the nature of the decision making at issue in the other two appeals I consider that an implied power of delegation would not extend to

these decisions because they involve decision making of a judicial and disciplinary nature. Further, I consider that the expertise, experience and qualifications of the Commissioners is required in making these decisions. Accordingly, I find 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**

[135] The Commission submitted that an incorporated body is a body corporate and as such can act through its directors or employees and 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 employee with ostensible or apparent authority. Although the Commission being a statutory body corporate did not fall within the normal definition of a company it was submitted that it was otherwise similar and that both being bodies corporate enjoyed a separate legal identity and could act through individuals at different levels and could act through committee or individuals and both had the same power to act through employees. Similarly, Mr Humphreys submitted that every decision was the decision of the body corporate whether done by the Board or Committee or by a member of staff.

[136] Mr Humphreys did however accept that both had to act in accordance with their "rule book". For an incorporated company this is the Memorandum and Articles of Association. For a body corporate it is the statute creating it.

[137] Girvan J in *Re Bell* when considering the precise legal characteristics of health boards and other bodies corporate such as education and library boards, held at page 9 that they are,

"... separately structured creatures of statute which can only act in accordance with the express or implied powers conferred by statute".

[138] Therefore to determine the Commission's powers to delegate it is necessary to look at the express and implied terms of the statute creating the Commission. I have found that the 2008 Act did not grant the Commission an express power to delegate to staff. I have further held 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.

### **Conclusion**

[139] I therefore dismiss the appeal brought by the Commission against Mr *Caughey* and I grant the appeals in *McKee*, *Hughes* and *Crawford*.



[140] I will hear counsel in respect of the question of costs in light of previous court orders made in respect of costs. I will also hear counsel on whether the court is required to consider any further submissions in respect of the second question which arises in the *Crawford* appeal.