

## Non-Corporate Voluntary Associations

A leading academic lawyer has detected in unincorporated associations evidence of the English talent for avoiding detailed inquiry into institutions and concepts which seem to work, for fear of exposing their rampant irrationality: Professor Roger Rideout "Limited Liability of Unincorporated Associations" (1996) CLP 187. But unincorporated associations might also be seen as reflecting a further idiosyncrasy, the ability of English law to create a juridical whole which is less than the sum of its parts.

The unincorporated association is a curious anomaly which remains under-explored in English law. It can consist wholly of incorporated bodies. It frequently co-exists with a trust, as where trustees of the association hold its money or property in trust for its members in accordance with the rules of the association, and it can be either charitable or non-charitable. In theory, its lack of incorporation means that the unincorporated association "has no legal entity": Halsbury, *Laws of England* (4th ed.) "Contract" vol 9 para 344. Indeed, no formalities would seem to be necessary to the foundation of an unincorporated association at all, other than in relation to its name. And yet it seems to possess at least one of the advantages of incorporation without inflicting on its members the formality of that process. That advantage is the limited liability of its members (discussed further below). The point was powerfully made by Lord Lindley in *Wise v Perpetual Trustee Co* (1903) AC 139:

"Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognised."

But this apparent immunity is bought at a heavy price. The disadvantages of unincorporated associations include their inability to sue (or be sued) in their own name, their contractual disability, and the difficulties which attend their ownership of property. These drawbacks may well make the unincorporated association an unfit vehicle for heritage management and protection.

### Central feature

The essence of the unincorporated association has been long debated, but it now seems clear that it lies in the existence of a system set up by a group of individuals with the object of pursuing certain common aims (Rideout, 190). On that analysis, neither a common purpose nor a common fund or common property would appear *per se* determinative. A com-

mon purpose is crucial but not by itself sufficient; a common fund is neither. Thus it was that in *Conservative Central Office v Burrell* (1982) 2 All ER 1 at 7, CA, Brightman LJ spoke of an unincorporated association as an organisation having "an identifiable membership bound together by identifiable rules". These rules had to define the "bond of association" among members and show where control rested; and they would need to have been made on an identifiable occasion. Money, such as donations to the body in question, can be pooled for purposes, and through legal vehicles, other than that of an unincorporated association.

Closely allied to the notion of a common system is that of alliance by contract. An unincorporated association is said to depend vitally on contract, whether express or implied; the requirement is so pervasive that it is said that the courts will readily perceive a contract where they wish to find an unincorporated association. It is important to emphasise that the relevant contracts are purely among the members *inter se*; there is no such thing as a contract by each member separately with the association. The 'inter se' contract represents about the only occasion where members may be fully liable, and even then only for wrongs against the aggrieved member. It is not unlikely that the contract in question will represent one of those instances where English law waives the normal formality of a matching offer and acceptance: see *Clarke v Dunraven, The Satanita* (1897) AC 59. The trust concept may be a common characteristic of unincorporated associations but it is not (in comparison to contract) fundamental.

### Typical instances

Members' clubs are a paradigm case: groups of members which meet for social, recreational or educative purposes and accept uniform rules for the governance of their activities. Other examples are unincorporated charitable institutions and campaign groups. Certain other collective groups have, however, attained the status of a quasi-corporation by law, sharing some of the qualities of conventional corporations, such as the ability to be sued in the association's name: registered friendly societies, trustee savings banks and (until the abolition of this status by statute) trade unions. Literary and scientific societies are a further special class with certain statutory privileges, considered below.

### Litigation status

As already noted, unincorporated associations cannot under English law sue or be sued in their own name: *London Association for the Protection of Trade v Greenlands* (1916) 2 AC 15, HL. By the Rules of the Supreme Court, however, (Order 15 rule 12, for which there is a County Court equivalent)

one or more of the members of the association may sue or be sued on behalf of all members having the same interest in the action, provided they are fairly representative of the general body of members. This is substantially no more than a reflection of the general rule permitting class actions. But the device is clumsy and largely ineffective. Rideout (op cit supra) has said that the difficulty exists solely in the judicial mind and could be resolved by a simple enabling or permission-giving statute. He also suggests that a way around the general immunity/disability problem might be found by suing the committee (and/or any trustees) where the rules permit the committee to contract on behalf of members. But not all rules so provide. (Contrast the recent decision of the Federal Court of Australia in *Abrook v Peter R Bennett Investment Services Ltd* (1997) unreported 1st August, where O'Loughlin J held that the company law principle in *Foss v Harbottle* (1843) 2 Hare 461 is not confined to incorporated companies, but may apply to any association of persons which is bound by common purpose and collective management and which can be described as a separate legal entity (in this case, an unincorporated friendly society whose member investors sought the right to commence action directly against the society's investment advisers)).

### Property

Unless its purposes are charitable, an unincorporated association cannot hold property in its own name otherwise than by virtue of a contract among the members for the time being: *Re Recher's Will Trusts*, *National Westminster Bank Ltd v National Anti-Vivisection Society Ltd* (1972) Ch 526. It follows that where a testator makes an absolute gift to an unincorporated association this cannot take its literal effect. Rather, the gift will take effect as a gift to the Treasurer to be held by him on a bare trust for, or as a fiduciary agent for, the members acting in a general meeting or via their committee, as laid down in the association's rules, which bind the members in contract. Gifts of shares or land will take effect as gifts to the association's trustees, equivalently restricted.

The property position goes some way towards explaining what appears to be a judicial policy of reluctance to interfere in the affairs of unincorporated associations. Certainly this appears so where members fall out among themselves. It has been held that a member who seeks an injunction against the unincorporated association has no sufficient property right because he has at most only a residual interest in funds or other property held in the name of the association, and that the unavailability of an injunction spells an absence of jurisdiction to intervene in the association's affairs: cf. *Dawkins v Antrobus* (1881) 17 Ch D 615.

### Power to contract

Lacking legal personality, unincorporated associations cannot enter into, or sue or be sued upon, contracts and are not bound by the acts of their supposed 'agents'. Nor can unincorporated associations authorise an officer to sue or be sued on such contracts on their behalf unless this power is expressly conferred by statute (eg, the Friendly Societies Act 1896 s 94); the mere existence of rules purporting to give the association this power is not enough: *Gray v Pearson* (1870) LR 5 CP 568.

### Limited liability

The members of an unincorporated association, unlike the partners in a partnership, are not, by virtue of their membership alone, liable for the debts incurred "by" the association. The general rule is that, unless they are trading (in which event the principles of partnership law seem inevitably to apply) all unincorporated associations and their members enjoy limited liability. Apart from partnerships, the rule of limited liability applies to associations generally; it is to be compared with the joint and several liability of trustees. The liability of each individual member is (like that of the shareholder in a corporation/company) generally limited to that member's agreed subscription. In the words of Rideout (op cit, 188):

"As with shareholding so with association membership, one pays a subscription and allows the purposes which one wishes to pursue to be carried out without any risk unless one is so ill-advised as to take a direct hand in that pursuit."

Any more extensive liability on the part of the individual member would have to be based on agency (in a case of contract) and vicarious liability (in a case of tort).

### Contract

An outside party who claims in contract must show a sufficient bond of authority between the person who created or undertook the obligation and the member who is sued on it. In general, the latter is answerable only where he personally gave the order for the incurring of the liability, or expressly or impliedly authorised its being given on his behalf (though here, as in general, later ratification of an unauthorised order will suffice: *Bradley Egg Farm v Clifford* (1943) 2 All ER 378, CA).

Joining in a resolution to place the relevant order, or pledging one's personal liability on the association's behalf, would probably suffice, but short of such conduct there is probably little that would involve the member in liability. The suggestion that courts would imply a general authority on the part of members in such circumstances is arguably subject to the following objections:

1. To imply authority, it may be necessary to satisfy the normal common law test for the implication of terms in fact, that the implication is essential to lend commercial efficacy to the relationship. It is hard to detect this element in the situation under debate.
2. The implication of a general authority could potentially mean that every individual member could sue (as well as be sued) as a principal on the contract, a situation which could prove awkward for the outside party;
3. The implication could also mean that the committees themselves could not sue or be sued because they are merely agents, unless there is a prospect of an action against them for breach of warranty of authority, or unless it were agreed that they should contract both as principals and agents. But the latter may well be too complex an implication to gain credence.

On balance, courts appear more likely to imply an indemnity among ordinary members once "front-line" liability has been incurred by the committee or other resolving members, than to enlarge the front-line liability itself by implying initial authority from every member. It seems no coincidence

that the cases on members' liability involve, almost without exception, parties to the relevant resolution.

### *Tort*

In a case of tort, the court will ask itself whether the wrong was committed in the course of the individual member's business, or possibly whether it was committed by a person to whom the member delegated any part of his duty of care towards the victim. It would be an optimistic litigant who saw here a broad avenue along which to pursue individual members for the tortious acts of the committee.

### *General*

This adds up to a fairly restrictive range of liability and supports Rideout's recommendation, *op cit*, that if one has a purpose to pursue it is advisable to form an association. Of course, the association's funds are also generally immune, although Lloyd (1953) 16 MLR 359 argues that these can be reached if the transaction is backed by all the members.

### **Literary and Scientific Institutions**

Special provision for such bodies is made by the Literary and Scientific Institutions Act 1854 (a statute which applies to both incorporated and unincorporated societies) and certain other legislation. While charitable objects are not necessary, there must be an element of instruction in an institution's purposes for it to qualify as a society within the Act; mere recreation or enjoyment are not enough. The characteristics and privileges of these institutions are fully discussed by Bamforth and Palmer in Halsbury, *Laws of England* (4th ed, reissue, 1997) vol 28, "Libraries and other Scientific and Cultural Institutions", paras 465-497.

Such societies have some (albeit limited) power to hold land and other property. If not established or conducted for profit, and if having main objects concerned with science, literature or the fine arts such as to entitle them to be regarded as charitable institutions, they may be exempt from full rates on property, from income tax and corporation tax and from other imposts.

There is also provision for actions to be brought (and defended) in the name of the president, chairman, principal secretary, clerk or (according to the society's rules) other senior officer of the society.

### **The proposed Council (EEC) Regulation on the Statute for a European Association**

This proposal, first published in 1992 and amended in 1993, aims to enable two or more certain legal entities having their central administration within different member states to

form, without losing their special national characteristics, a trans-Community association, co-operative society or mutual society in order to take advantage of the Single Market. The EA would have to be established for a purpose in the general interest or to promote its trade or professional interest and would have to devote its profits to the pursuit of its objectives rather than dividing them among its members. Those UK legal entities which would qualify for this purpose would include companies limited by guarantee, organisations incorporated by Royal Charter or Act of Parliament and all institutions established for exclusively charitable purposes. All three of the proposed new entities would have distinct legal personality, power to conclude contracts and to acquire property etc, and liability limited to their assets: Art 2(3). The proposals were considered insufficient, and a further review of legislative convergence within member states was ordered, at the 29 May 1996 Plenary Session of the Economic and Social Committee. But the proposal is clearly of interest to those involved with the work of charitable unincorporated associations and it may eventually strengthen their (hitherto tenuous) claim to adoption as the chosen model for heritage management.

### **Conclusion**

It is tempting to regard the unincorporated association as having substantial advantages over the limited liability company. Not least, it seems to offer a more extensive limitation of liability, in that outside claimants cannot attack association funds: the association, being non-existent, has no property. Further, individual members cannot dispose of their interests. And, since the unincorporated association is non-trading, its controlling personnel (in contrast to company directors) may more easily avoid the potential collision between commercial and charitable functions which has been identified in relation to companies.

The reality, one suspects, is more austere. It is unclear how far the liability of members of an unincorporated association is truly limited; in this context (as elsewhere) principles which apply to clubs may not apply in unqualified form to unincorporated associations generally. It might, in any event, be objected that limited liability is not a prime consideration in determining the appropriate structure for a transnational body committed to heritage management. On the other hand, the lack of legal entity is a serious hindrance (for example, with regard to the receipt of bequests) and suggests the need for a distinct and formally-structured recipient and/or management and/or litigant body, in support of the unincorporated association. Allied to the vague condition of the underlying law, these considerations suggest a clear need for further exploration before this model for heritage management emerges as a strong contender.

