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Neutral Citation Number: [\[2008\] EWCA Crim 1970](#)

Case No: 200800623 B5

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
TAUNTON CROWN COURT
This Honour Judge
Overend
T2007010**

Royal Courts of Justice
Strand, London, WC2A 2LL
28/08/2008

B e f o r e :

**LORD JUSTICE HUGHES
MR JUSTICE DAVID
CLARKE
and
MR JUSTICE BLAIR** _____

Between:
The Queen **Appellant**
- and -
RL
-and-
JF **Respondents**

**(Transcript of the Handed Down Judgment of WordWave
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**Mr G Lucie (instructed by The Environment Agency) for the The
Crown Mr N Fryer (instructed by Morgan Cole and CIP
Solicitors) for the Respondents Hearing date : 22nd April 2008**

HTML VERSION OF JUDGMENT

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Lord Justice Hughes :

This appeal by the Crown under section 58 Criminal Justice Act 2003 raises questions relating to the criminal liability of an unincorporated association and of its individual members.

An underground pipe taking heating oil from its storage tank to the boiler was fractured when independent building contractors carried out work on the ground above. The heating oil escaped through the ground and some 1500 litres or more found its way into a nearby watercourse, polluting it. The land on which tank, boiler and pipe all lay was occupied by an unincorporated

association, namely a members' golf club. The club also owned those several installations.

The Environment Agency initiated a prosecution against two members of the club, selected because at the time of the escape the first (L) was the club chairman and second (F) was both the club treasurer and also chairman of the 'special building committee' which, within the club, oversaw the building work in question carried out by the contractors. By the time of the ruling by the Judge with which we are now concerned, the prosecution had abandoned any allegation that either defendant was personally culpable in any manner, nor was there any allegation that either had done anything to make him criminally liable beyond being a member of the club which maintained the tank and pipe. The club had 900 or so members. Any one or all of those members would have been in an identical legal position.

The offence charged was that created by section 85 of the Water Resources Act 1991. That section provides as follows:

"(1) A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter...to enter any controlled waters." Here the charge was causing, rather than knowingly permitting. Liability for this offence is, if not absolute, extremely strict, notwithstanding its juxtaposition in the statute with the neighbouring offence of knowingly permitting. On the authority of the decision of the House of Lords in Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [\[1999\] 2 AC 22](#), and of other authorities there reviewed, it may be committed by maintaining a tank containing a polluting substance which escapes into a watercourse even if the immediate occasion of the escape is the unforeseeable act of a third party, providing that that intervening act can be described as a normal fact of life as distinct from an extraordinary and abnormal event. Even an intervening interference by a trespasser may lead to the criminal

responsibility of the tank owner. The decision in that case was that in such circumstances maintaining the tank causes the pollution.

By section 85(6) a person convicted on indictment of the offence is liable to imprisonment for up to two years and/or to a fine.

At the outset of the trial the Defendants sought a ruling from the Judge upon motion to quash the indictment. He ruled in their favour, deciding: (i) that the golf club could have been prosecuted as an unincorporated association for this offence and (ii) that, at least in the absence of some personal culpability, the two individual defendants could not be so prosecuted.

Against that ruling, the Crown seeks leave to appeal. It complied at the time with the procedural requirements of section 58 Criminal Justice Act 2003, in that it notified the Court under s 58(4) of its intention to appeal and gave the section 58(8) acquittal agreement. The Judge declined to give leave himself, taking the view that leave should be a matter for this court.

Does section 58 apply ?

The defendants submit that the Crown cannot appeal under section 58 because the prosecution was not terminated; the Crown, it is said, could perfectly well bring a prosecution against the club as an unincorporated association, for that is what the Judge ruled could be done. Says Mr Fryer, the defendants merely asked the Judge for clarification of who could be prosecuted.

The argument based upon whether the ruling is a 'terminating' one is in any event misconceived. Such an expression does not appear anywhere in the Act: see [R v Y \[2008\] EWCA Crim 10](#), at paragraph 20 and [R v R \[2008\] EWCA Crim 370](#) at paragraph 24. This ruling undoubtedly related to the count on the indictment and is a proper subject for appeal under section 58. As it happens, in the present instance the ruling did also

terminate the case, although that is not the test. The only persons prosecuted on the indictment were these two defendants and the Judge ruled that in the absence of some personal culpability that prosecution could not succeed. That the Crown could (if his ruling be right) start again against the club would not mean that the prosecution which was in hand survived.

We are quite satisfied that the Crown was entitled to invoke section 58. We are also satisfied that the ruling raises one or more questions of law which are both arguable and suitable for consideration by this Court. Accordingly we give leave.

Unincorporated Associations

There are probably almost as many different types of unincorporated association as there are forms of human activity. This particular one was a club with 900 odd members, substantial land, buildings and other assets, and it had no doubt stood as an entity in every sense except the legal for many years. But the legal description 'unincorporated association' applies equally to any collection of individuals linked by agreement into a group. Some may be solid and permanent; others may be fleeting, and/or without assets. A village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association, but so are a number of learned societies with large fixed assets and detailed constitutional structures. So too is a fishing association and a trade union. And a partnership, of which there are hundreds of thousands, some very large indeed, is a particular type of unincorporated association, where the object of the association is the carrying on of business with a view to profit.

At common law, an unincorporated association is to be distinguished from a corporation, which has a legal personality separate from those who have formed it, or who manage it or

belong to it. The most numerous species of corporation is the limited liability company, but there are of course other types, such as chartered professional associations, local government bodies and indeed bishops. At common law, as the Judge succinctly held, an unincorporated association has no legal identity separate from its members. It is simply a group of individuals linked together by contract. By contrast, the corporation, of whatever type, is a legal person separate from the natural persons connected with it.

This is an apparently simple legal dichotomy duly learned by every law student in his first year. But its simplicity is deceptive. It conceals a significantly more complicated factual and legal position.

As to fact, many unincorporated associations have in reality a substantial existence which is treated by all who deal with them as distinct from the mere sum of those who are for the time being members. Those who have business dealings with an unincorporated partnership of accountants, with hundreds of partners world-wide, do not generally regard themselves as contracting with each partner personally; they look to the partnership as if it were an entity. The same is true of those who have dealings with a learned society, or a trade union, or for that matter with a large established golf club. Frequently, as Lord Phillips CJ pointed out in R v W Stevenson & Sons [2008] EWCA Crim 273 (at paragraph 23) third parties will simply not know whether the organisation being dealt with is a company or some form of unincorporated association.

As to the law, it no longer treats every unincorporated association as simply a collective expression for its members and has not done so for well over a hundred years. A great array of varying provisions has been made by statute to endow different unincorporated associations with many of the characteristics of

legal personality. Examples selected at random include the following. The detailed special rules for partnerships contained in the Partnership Act 1890 scrupulously preserve the personal joint and several liability of the partners (see sections 5-12), and the Law Commission recommendation in November 2003 that a firm should have legal personality has not been implemented, but the partnership can sue or be sued in its firm name: see Civil Procedure Rules 7.2A and 7PD5A.3, repeating a rule which has existed for more than a century. A Trade Union is, by statute, not a corporation: Trade Union and Labour Relations (Consolidation) Act 1992 section 10(1). But by the same section it can make contracts, sue and be sued in its own name, and commit a criminal offence. In the case of learned societies and institutions, their property (if not vested in trustees) is by section 20 of the Literary and Scientific Institutions Act 1854 vested in their Governing Body, albeit that neither the institution nor the governing body is a corporation. Nor are these developments confined to the statutory. As long ago as 1901 the House of Lords held in Taff Vale Railway v Amalgamated Society of Railway Servants [1901] AC 426 that a trade union (unincorporated) could be sued in its own name despite the absence of any statutory provision permitting it. Lord Lindley observed (at 442) that the problem of how to adapt legal proceedings to unincorporated societies consisting of many members was by no means new, and that the rules of common law had had to be altered to meet them. Those several examples relate largely to civil liability, but as will be seen, there is a similar variety of provision dealing with criminal liability in the case of unincorporated associations.

The Judge's first decision; Interpretation Act 1978.

By section 5 of the Interpretation Act 1978:

"In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule."

Schedule 1 contains a long list of definitions. Amongst them appears the following:

"'Person' includes a body of persons corporate or unincorporate. (1889)"The relevance of the bracketed date, 1889, is explained by Schedule 2, paragraph 4(1)(a). It means that the definition applies to the word 'person' in any Act passed after that year. That is because the same definition of 'person' previously appeared in section 19 of the Interpretation Act 1889.

The Judge rested his first decision, that the golf club could be prosecuted in its own name, upon this statutory definition. He held that the club was, by this definition, a 'person' for the purposes of the offence-creating section, s 85 of the Water Resources Act (for which see paragraph 4 above).

We should mention Schedule 2, paragraph 4(5) of the Interpretation Act 1978. That provides:

"The definition of 'person' so far as it includes bodies corporate, applies to any provision of an Act whenever passed relating to an offence punishable on indictment or on summary conviction."The explanation for that paragraph is this. The 1889 Act had treated corporations differently from unincorporated associations to this extent. It had stipulated by section 2 that 'person' included corporations, for the purpose of criminal liability, *whenever the statute creating the offence was passed*. By contrast, the inclusion of unincorporated associations in the word 'person' by section 19 of that Act was (a) general and not limited to criminal offences and (b) applied only to Acts passed after 1889. This distinction is faithfully preserved in the 1978 Act. Schedule 2 of the 1978 Act deals with the application of definitions to pre-existing statutes. It follows that paragraph 4(5) is of no assistance in construing the breadth of the definition of 'person' in Schedule 1. That was also the view taken by the Divisional Court in R v Clerk to Croydon Justices ex p Chief Constable of Kent (1989) 154 JP 118.

The argument before us has revolved, correctly, around the question whether in reading section 85 of the Water Resources Act, the "contrary intention appears" within the meaning of section 5 of the 1978 Act, so that the Schedule 1 definition of 'person' does not apply.

Contrary Intention ?

The Crown submits that the Water Resources Act demonstrates such a contrary intention, viz that 'person' in section 85 does not include an unincorporated association, because the Act does not contain a specific provision making such an association criminally responsible in its own name. In the absence of such a specific provision, says the Crown, the ordinary common law principle that an unincorporated association is no more than a collective noun for its members must prevail. There are, it is suggested, too many practical difficulties in the Judge's decision to the contrary. In particular, this Act does not, we are reminded, contain any provision for adapting the procedure of the courts to a non-natural person, so that there would be difficulties, it is suggested, in taking a plea, or in committing the association to the Crown Court for trial, or in enforcement of a penalty if convicted.

Specific statutory provisions for criminal liability of unincorporated associations

Notwithstanding the generality of the definition in Schedule 1 to the Interpretation Act, there is no doubt that several statutes do make specific provision for the criminal liability of unincorporated associations. However, on inspection, these provisions vary so greatly that there is no settled policy which can be discerned from them, and we find it impossible to draw from them any general proposition that there is a form of enactment which is to be expected if an unincorporated association is to be criminally liable, and of which the absence signals a contrary intention for the purposes of section 5 of the Interpretation Act.

The most comprehensive form of provision is to be found in sections 76 and 77 of the Health Act 2006. We take section 77 first. It provides as follows:

"77. Offences committed by partnerships and other

unincorporated associations(1) Proceedings for an offence alleged to have been committed by a partnership shall be brought in the name of the partnership (and not in that of any of the partners).(2) Proceedings for an offence alleged to have been committed by an unincorporated association (other than a partnership) shall be brought in the name of the association (and not in that of any of its members).(3) Rules of court relating to the service of documents shall have effect as if the partnership or unincorporated association were a body corporate.(4) In proceedings for an offence brought against a partnership or an unincorporated association, the following provisions apply as they apply in relation to a body corporate –(a) section 33 of the Criminal Justice Act 1925 (c 86) and Schedule 3 to the Magistrates Courts Act 1980 (c 43)....[Scotland and Northern Ireland]...(5) A fine imposed on a partnership on its conviction for an offence is to be paid out of the partnership assets.(6) A fine imposed on an unincorporated association on its conviction for an offence is to be paid out of the funds of the association." Additionally, section 76 contains a number of clauses which extend criminal liability to individuals in cases of personal culpability ("officers' liability clauses"). Subsection (6) demonstrates their form:"(6) If an offence committed by an unincorporated association (other than a partnership) is proved – (a) to have been committed with the consent or connivance of an officer of the association or a member of its governing body, or(b) to be attributable to any neglect on the part of such an officer or member,the officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly."Substantially identical provisions are contained in the other subsections of section 76 to

provide for the cases of officers of bodies corporate, and of partners.

It can thus be seen that the Health Act contains five different provisions relating to the case of criminal liability of an unincorporated association:

- i) stipulating that the association shall be prosecuted in its own name and that the members shall not be prosecuted;
- ii) limiting the criminal liability of members to cases where they have personal culpability ("officers' liability clauses");
- iii) making any fine payable from the funds of the association, as distinct from those of any member personally;
- iv) providing for the rules of service applicable to corporations to be adapted to unincorporated associations; and
- v) applying section 33 Criminal Justice Act 1925 and Schedule 3 Magistrates Courts Act 1980, which are provisions for the taking of pleas, the conduct of mode of trial proceedings, committal for trial and the like, where a defendant is a corporation.

If, however, one inspects other statutory provisions relating to the criminal liability of unincorporated associations, one finds that many contain only some, and some contain only one, of these specific provisions. Several omit one or both of provisions (iii) and (iv); for example s 98 Banking Act 1987, s 403(2) Financial Services Act 2000, s 143 Adoption of Children Act 2002, s 285 Copyright, Designs and Patents Act 1988 and s 153 Political Parties etc Act 2000. More fundamentally, some simply assume that the association is criminally liable, by containing an officers' liability clause (type (ii)), but have none of the other provisions at all; for example sections 75, 92 and 179 Representation of the People Act 1983, section 108 Friendly Societies Act 1992 and Schedule 6 paragraph 8 Terrorism Act 2000. It is plainly the intention of Parliament that in these cases an unincorporated association is capable of bearing criminal liability, and it follows that the absence of a specific stipulation to that effect does not carry the implication that an intention

contrary to the Interpretation Act's definition is to be gathered. Even in a statute containing the whole gamut of provisions, such as the Health Act, the type (i) provision involves an assumption that an unincorporated body is capable of committing an offence, possibly on the basis of the Interpretation Act.

In R v W Stevenson & Sons [\[2008\] EWCA Crim 273](#) this court considered the criminal liability of a partnership under the Sea Fishing (Enforcement of Community Control Measures) Order 2000. The offence was a strict liability offence, created in aid of quota enforcement, of failing to submit a sales note showing the quantities and price of fish sold. Paragraph 11 of the order contained separate officers' liability clauses for each of (a) a corporation, (b) a partnership and (c) any other unincorporated association. That was held clearly to contemplate that the unincorporated association (including the partnership there in question) could be prosecuted and bear criminal liability. But apart from those type (ii) provisions, none of the other species of provision listed above in paragraph 24 had been enacted. There was no specific provision that an association could be liable in crime. There were no procedural provisions at all. It was held that the partnership was indeed criminally responsible, as in that case the Crown had asserted. This court held that the absence of procedural provisions did not carry the contrary intention. It considered that it necessarily followed from the fact that the partnership could be prosecuted that, when it was, any fine imposed could only be enforced against the assets of the partnership and not against those of individual partners. Likewise, it held that where the partnership was prosecuted, the individual partners were not 'offenders' for the purpose of any confiscation proceedings. It accepted that there might in some cases be complications as to the authority to enter pleas if the partners were in disagreement, but it was wholly satisfied that in the absence of such problem (internal to the partnership in any event) the pleas entered by counsel on behalf of the partnership

had been perfectly properly entered.

That decision clearly shows that the potential procedural complications relied upon by the Crown in this case do not justify the conclusion that an intention contrary to the Interpretation Act's definition is to be gathered from the absence of procedural provisions in the Water Resources Act. The same is shown, as it seems to us, by the absence of such procedural provisions in several other statutes which can only contemplate the criminal liability of an unincorporated association, including a partnership. It is true that in Stevenson the presence of the officers' liability clause meant that the court did not have to consider the case where such criminal liability depends wholly on the Interpretation Act. Like that court, we know of no reported case in which that question has been directly in point, although it does not follow that prosecutions have not been brought against unincorporated associations, and they may well have been.

We were referred to two cases where the Interpretation Act was considered. In Davey v Shawcroft [1948] 1 All ER 827 Lord Goddard CJ held that section 19 of the Interpretation Act 1889 (as to which see paragraph 17 above) meant that an unincorporated committee could be a licensed person for regulatory purposes under the Coal Distribution Order. He referred in passing to the proposition that if a partnership were to be prosecuted the partners ought to be the defendants personally, but this was incidental to the decision in the case, which was that an agent of the committee, who was personally responsible for a breach of the licence terms, was properly convicted. The court did not have to decide the question which we must address. Meanwhile, in R v Clerk to Croydon Justices ex p Chief Constable of Kent the Divisional Court held that a partnership or unincorporated association could be registered as a fine defaulter if it failed to pay a fixed penalty arising from its

ownership of a motor vehicle; that was because the statutory definition of defaulter depended on the use of the words 'any person', and thus the Interpretation Act applied to it. The facts of that case demonstrate that an unincorporated association is accepted as registered keeper of a vehicle, and thus may well be guilty of a criminal offence relating to such a vehicle, whilst the decision shows that the liability of an association to a criminal penalty is contemplated. We should, however, record, that in giving the judgment of the court, Glidewell LJ adverted to possible complications of enforcement. It follows that neither case decides the point before us.

The present is an environmental offence of strict liability, in effect making the landowner criminally responsible if his tank leaks. The natural defendant is the landowner. In this case, that is, in any ordinary language, the club rather than its 900 or more members as they were on the day of the escape of oil, excluding any one who has joined since but including anyone who has subsequently left or died. The means of a defendant are directly relevant to fixing the fine on conviction. In this case, it makes little sense to take into account the personal means of the two proposed defendants, whether they are very wealthy or very impecunious; plainly what ought to be relevant are the assets and financial position of the club. We were told that the Crown accepted both these propositions and would have been more than content to prosecute the club as an association if it had felt legally entitled to do so. It should also not be forgotten that a criminal conviction, even if for an offence of strict liability such as this, is a matter of some moment for any individual convicted. The chairman and treasurer of this club would, as a result of conviction, bear criminal records which they would have to disclose on numerous occasions, for example in any application for any kind of insurance. Whether or not it be true that the presence of differing kinds of statutory provision in some Acts has inhibited the prosecution of unincorporated

associations in their absence, the definition in the Interpretation Act is of general application. To assert that a contrary intention appears from the absence of a specific statutory provision amounts to depriving that definition of its generality. We conclude that the judge was right in his first decision. The prosecution of the club was permissible in law. The definition of 'person' in the Interpretation Act 1978 applied and no contrary intention appeared.

In that conclusion, we confine ourselves to the particular offence which we are considering. In particular we do not for a moment consider any offence which involves any element of *mens rea*, which would be likely to raise quite different questions because of the personal and individual nature of a guilty mind. In such a case, it may well be that a contrary intention appears. Attorney-General v Able [1984] 1 All ER 277, to which we were referred, was a case in which the point which we have had to consider was not in any manner argued, and the Interpretation Act was not mentioned. It is, however, not in the least surprising that Woolf J dealt with it on the assumed basis that "it must be remembered that the [Voluntary Euthanasia] society is an unincorporated body and there can be no question of the society committing the offence", when that offence was of intentionally aiding, abetting, counselling or procuring the suicide of another, thus involving *mens rea* and indeed punishable with up to 14 years imprisonment. For the same reasons, we say nothing about common law offences.

The Judge's second decision; the officers' liability clause

The Judge's second decision was that whilst the club could be prosecuted, the individual members of it could not be, in the absence of personal culpability. He rested that decision on section 217(1) of the Water Resources Act. That section contains what we have called an officers' liability provision but it relates only to the officers of a corporation. The section

provides:

"Where a body corporate is guilty of an offence under this Act...and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, then he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."There is, in this Act, no officers' liability provision affecting an unincorporated association. If there had been, it is accepted that neither the chairman nor the treasurer would have fallen within its terms, because there was, by the time of the trial, no suggestion that either had consented, or connived at, the leakage, nor that either was in any manner negligent or otherwise culpable.

The Judge concluded that there was no reason why the criminal liability of officers of unincorporated associations should be greater than that of their counterparts in a corporation, and that Parliament cannot have intended that it should. In effect, he read into the statute an equivalent of section 217(1) applicable to the officers of this club.

In this the Judge went further than he was entitled to go. It is one thing to say that Parliament ought to have included a further provision in the statute, but it is quite another to re-write the Act as if it had. The Interpretation Act contains no justification for such an insertion. Nor do we think that it is correct to say that there is no reason why the criminal liability of officers (or members) of an unincorporated association should exist on a basis different to that of the officers of a corporation. Although many statutes make it possible to prosecute an unincorporated association, and although we have held that this is perfectly possible under section 85 Water Resources Act, it does not follow that such an association is for all purposes the same as a

company or other corporation. It is not. A corporation has, for all legal purposes, independent legal personality. It is also regulated, often heavily. It must have a registered address and registered directors and secretary. An unincorporated association may indeed look very like a corporation in some cases, and it may have standing and *de facto* independence, but equally it may not. A prosecution which could only be brought against an informal grouping of building workers, or sportsmen, or campaigners would be likely to be wholly ineffective. It is a necessary consequence of the different nature of an unincorporated association that all its members remain jointly and severally liable for its actions done within their authority. In the present case, the 900-odd members of the club were indeed all maintainers of the tank and, on the law as explained in Empress Car Co all guilty of the strict liability offence of causing the leakage.

This is not vicarious liability for the offence of the club, as was suggested in argument before the Judge. Vicarious liability, when it exists, arises out of the employment by the defendant of another person to act for him. There is no sense in which the chairman, treasurer, or any other member of this club employed the club to do anything for them. The criminal liability of the members of the club, including the chairman and the treasurer, is primary liability, not vicarious liability. It arises because, as Empress Car Co holds, each person jointly maintains the tank and has thus caused the leak.

It follows that the correct position under section 85 of the Water Resources Act 1991 is that a prosecution for the strict liability offence of causing polluting matter to enter controlled waters may be brought, on the facts of this case, against either the club in its own name, or against individual members. It is for the Crown in any individual case to determine the defendant(s) whom it seeks to prosecute. The court would interfere only in

the very limited case of oppression involving abuse of process. No doubt relevant considerations will include the extent of the association's stability and assets and the nature of the act or omission said to constitute an offence. We have heard no argument on whether in exceptional circumstances it could be permissible for the Crown to seek to proceed against both the club and individuals, but there are no such exceptional circumstances here.

Order

The consequence of this is that this appeal must be allowed in part. The Judge was correct in his first decision but erred in his second. Insofar as he ruled that the individual defendants could not be prosecuted, he fell into error.

As we have said, the Crown accepts in this case that if it is permitted to proceed against the club that is the correct course to take. We agree. It follows that whilst we allow the appeal in part, it is not in the interests of justice to order under section 61(4)(b) of the Criminal Justice Act 2003 that a fresh trial of the defendants take place: see section 61(5). The consequence is, as provided for by those subsections, that we direct their acquittal.

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