

## QUESTIONING THE LEGAL STATUS OF UNINCORPORATED ASSOCIATIONS

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### INTRODUCTION

Unincorporated associations do not possess a separate legal identity independent of their members. The resulting effect is a considerable amount of operational complexity when determining, *inter alia*, who makes contracts on behalf of the association, who employs the association's staff and by the association not possessing the capacity to hold its own property which will usually be held on trust by the members.<sup>1</sup> An ancillary problem resulting from the association's lack of legal status is that members who are injured on the association's premises have no legal redress against the association, action being precluded because the member would, in effect, be suing himself.<sup>2</sup> One option for resolving this particular problem, outlined in a previous article,<sup>3</sup> is to extend the liability of the committee in such associations. It was submitted that if the committee undertakes and accepts managerial responsibility this embodies, by implication, a responsibility for the safe condition of the association's premises thus giving rise to a duty of care to both ordinary members and visitors. However, this would depend on the judicial interpretation of the rules of the association and would not solve the related problems arising from the association's general lack of legal capacity. In addition, in practical terms it may reduce the number of volunteers willing to undertake this role. The purpose of this article, therefore, is to suggest an alternative solution. It is submitted that the introduction of legislation automatically giving non-profit making associations a separate legal identity would have many benefits including achieving a level of consistency in the legal treatment of such associations; giving members legal redress when injured on the association's premises and

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\* This is the second part of two conjoined articles, the first part appearing in (1999) 50 *Northern Ireland Legal Quarterly* pp 515-527. I would like to thank David Capper and an anonymous referee for commenting on an earlier draft.

<sup>1</sup> See Warburton, "The Holding of Property by Unincorporated Associations" [1985] *Conv* 318.

<sup>2</sup> See *McKinley v Montgomery* [1993] NI 93. In this case the Northern Ireland Court of Appeal held that a lady member of Eglinton Cricket Club could not maintain an action, based on section 2(1) of the Occupiers' Liability Act (Northern Ireland) 1957 and common law negligence, against the club for injuries resulting from a fall on the club's premises. Her membership of the club meant that she could not be classed as a visitor to whom a duty of care would have been owed. Furthermore, the fact of her membership precluded her from successfully suing the respondents as the nominated representatives of her fellow members as there was no real distinction between them and, as such, she was owed no duty of care. See also *Prole v Allen* [1950] 1 All ER 476; *Shore v Ministry of Works* [1950] 2 All ER 228; *Robertson v Ridley* [1989] 2 All ER 474.

<sup>3</sup> Glennon, "Extending the Role of the Committee in an Unincorporated Association – A Separate Duty of Care to Members and Visitors?" (1999) 50 *NILQ* pp 515-527.

enabling the association to make contracts in its own right and hold property unfettered by the present complexities.

## THE ASSOCIATION AS A SEPARATE LEGAL PERSONALITY

The question of whether a club or association should have a separate legal personality raises a broad range of questions, such a development involving a complete re-assessment of the fundamental nature of clubs and societies. At present, unincorporated associations have no legal identity independent of their members.<sup>4</sup> It is interesting to note, however, that unincorporated associations cannot avoid some sort of formal legal regulation. Indeed, it is ironic that for some purposes unincorporated associations are recognised as a body, an ‘entity of assessment’.<sup>5</sup> Section 6 of the Income and Corporation Taxes Act 1988 includes an unincorporated association within the definition of ‘company’ for the payment of corporation tax.<sup>6</sup> A noteworthy point is that

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<sup>4</sup> An interesting debate, however, is whether unincorporated associations have, by implication, a legal identity. This theory is based on the idea that the collective body of members has a separate identity from the individual members. In the words of Dicey: “It is a fact which has received too little notice from English lawyers, that whenever men act in concert for a common purpose, they tend to create a body which from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted”. Dicey, *Law and Opinion in England* p 153. In the present context, the hypothesis is that any body bearing the characteristics of a corporation should, by implication, have a separate legal personality. Lloyd responds with the observation that having a personality in fact is different from having a personality in the eyes of the law. Lloyd, *Law of Unincorporated Associations*, (1938) p 6. Millett J was of a similar opinion in the case of *Maclaine Watson & Co. v Department of Trade and Industry* [1987] BCLC 707 saying that the existence of a natural person is completely distinct from his legal capacity: “He has life, and the physical capacities with which he is endowed by nature. But an artificial legal person is entirely the creation of law. It has no physical existence. It exists only in contemplation of law as the subject of legal rights and duties”. An interesting argument was raised in the Irish case of *Murphy v Roche* [1987] IR 656, where it was asserted that the unincorporated association was a legal entity distinct from the individual members who collectively made up the club analogous to the legal distinction between the State and individual citizens. On this analysis, it was argued that the totality of the members owed enforceable duties to individual members. It was argued in response that the legal identity of the club was only co-extensive with the collective body of its members. Furthermore the analogy with the State was false on the basis that the State can be regarded as an entity which has been created to protect individuals’ pre-existing rights. By contrast, no such rights exist in relation to club members outside the rules of the association, the club’s existence being wholly dependent on them. Gannon J, in the High Court, upheld the long-established principle that the club has no separate legal character distinct from its members.

<sup>5</sup> *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners* [1987] 1 WLR 1057 at 1063 *per* Sir Nicolas Browne-Wilkinson V-C.

<sup>6</sup> Section 6 states that a company is defined as “any body corporate or unincorporated association . . .”. Sellwood summarises the position in this respect: “most members’ clubs, societies and associations are. . . likely to be within the charge to corporation tax although they will not necessarily have income that is chargeable.” Sellwood, *Bogey at the Nineteenth*, Tax. 1991 (127) 3308, 335. This is because corporation tax is payable on profits and not gross income. An unincorporated

it is the association itself that bears the liability and not the individual members<sup>7</sup>. This point arose in the case of *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners*<sup>8</sup> where the question was whether assessments to development land tax should be made on the club<sup>9</sup> or on the individual members of the club. It was held by the Court of Appeal that the club as an unincorporated association was a 'person' within the context of the legislation;<sup>10</sup> the assessments, therefore, were properly made on the club. This treatment of unincorporated associations, however, is the exception as opposed to the rule and in the context of liability to individual members there is no such recognition of the association as a separate entity. The conferment of a separate legal personality on an association or club would remedy this defect. It would also attenuate the distinction between the legal treatment of unincorporated associations and corporations. Indeed, Ford thinks that the two have a lot in common. The difference, he argues, is not one of personality as opposed to lack of it, but rather connotes legal attributes in one package by reference to those of a human individual as opposed to the piecemeal legal recognition accorded to unincorporated associations.<sup>11</sup>

### **The benefits of associations having a separate legal personality**

In general, the conferment of a separate legal personality on associations is meritorious as regards their dealings with members and non-members alike. Indeed, Fletcher states that:

“Lack of status, the refusal of the courts to recognise that an unincorporated association possesses an identity or existence separate from its constituent members, is the cause of most legal problems which arise in dealings between an unincorporated association, acting collectively, and its members or outsiders.”<sup>12</sup>

Conferring a separate legal personality on associations would have significant benefits. In practical terms there would be a great deal more clarity as to who the proper defendant is in negligence actions. At present,

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association also comes under the ambit of 'company' by section 288(1) of the Taxation of Chargeable Gains Act 1992.

<sup>7</sup> See *Worthing Rugby Football Club Trustees v Inland Revenue Commissioners* [1987] 1 WLR 1057; *Carlisle and Silloth Golf Club v Smith* [1913] 3 KB 75 (where it was established that an unincorporated members' club could be assessed to income tax on its profits as an entity separate from its members) and *American Foreign Insurance Association v Davies (Inspector of Taxes)* [1950] 32 TC 1. In *Carlisle* Buckley LJ said that the question was not whether the members of the club were making a profit, but whether the society was making a profit by the concern in question.

<sup>8</sup> *Ibid.*

<sup>9</sup> The club was an unincorporated members' association.

<sup>10</sup> Section 28(1) of the Development Land Tax Act 1976 and by virtue of section 19 of the Interpretation Act 1889 which defined a 'person' as any body corporate or unincorporate.

<sup>11</sup> Ford, *Unincorporated Non-Profit Associations*, (1959) at p 145.

<sup>12</sup> Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) 207.

there are a few possible courses open to a non-member. Such a person could bring an action against the officers or committee of the club, invoke a representative action,<sup>13</sup> or sue all those who were members at the time the injury occurred. As regards liability to a member, the fact that the association would have its own identity signifies that it has a means of identification outside the collective body of members. The result is that it could be sued by a member as the two would no longer be synonymous.<sup>14</sup>

Similarly, the question of who is the employer of the association's staff would no longer pose difficulties. Warburton says that at present the employer will most likely be the person who engages the employee, most likely the committee. However, this is not necessarily the position. In *Kinner v Trustees of West Belfast Pigeon Club*<sup>15</sup> the employer was held to be all the members, except the plaintiff himself who had been injured on the club's premises. Once again the conferment of a separate legal identity on the association would clarify this issue and the duties and responsibilities of the employer would no longer be held by the committee or members collectively, but by the association itself. In more general terms, such a status would give the organisation permanence and a more structured basis for internal decision-making. Furthermore, an important aspect of the proposed legislation would be the exclusion of the ordinary member's liability for any liability, act or default of the association, thus protecting the individual members from the association's debts and obligations.<sup>16</sup>

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<sup>13</sup> Under RSC (NI) 1980, Ord 15, r 12.

<sup>14</sup> The effect of an association having a separate legal personality can be seen in the case of *Gesner v Wallingford & District Labour Party Supporters' Association Club Ltd*, *The Times*, 2 June 1994. A members' club was registered under the Industrial and Provident Societies Acts 1965 to 1978 and was, therefore, a body corporate. When a member was injured on the club's premises the question was raised as to whether a duty of care was owed either under the Occupiers Liability Act 1957 or at common law. It was asserted that although the buildings and land occupied by the club was vested in the club as a corporate body, this was held for the benefit of the members thus making this indistinguishable from those cases involving unincorporated associations. Glidewell LJ, in the Court of Appeal, refuted this assertion, holding that there is a "world of difference" between the two cases. His Lordship emphasised that the club was not merely a body which can be sued but a body which owed duties. In response to the second argument that a member was not a visitor within the context of the Occupiers Liability Act Glidewell LJ held that members of an incorporated society enter the premises under a contractual licence between them and the society. This means that a duty of care is owed by the club or society to the individual members. The basis of this position is the fact that in the case of an incorporated society the rules form a contract not only between the members but also between the club, as a body, and the members.

<sup>15</sup> [1998] 7 *BNIL* 91.

<sup>16</sup> It could be argued that this will not necessarily result in a radical difference as members already enjoy a form of limited liability. The mere fact of a person's membership of an association will not render them liable for the association's debts and obligations. A member will be liable for any damage or injury caused by his own acts or the acts of his agent. It should also be noted that agency will not be implied from the fact of membership alone but can be found expressly or by implication in the contract of membership.

If it is accepted that associations should have separate legal personality the next question is whether this could be adequately facilitated under existing legislation or whether the introduction of specially designed legislation is warranted? The unincorporated association, at present, has the option of incorporating under the Companies (Northern Ireland) Order 1986 either as an unlimited company, a company limited by shares or a company limited by guarantee. One of the main considerations is to ensure that the members enjoy limited liability thus precluding the unlimited company as a suitable framework. It seems that the company limited by guarantee is the most feasible option for associations wishing to incorporate as the emphasis is not on raising the necessary capital facilitated by the company limited by shares. Indeed, Bailey says that this is the most suitable form of limited company for the voluntary association as "... [the] incentive to participate is not profit but commitment to the goals of the association".<sup>17</sup>

The company limited by guarantee can be, and is, used by non-profit and charitable associations and the Companies (Northern Ireland) Order 1986 is wide enough to facilitate such bodies. However, incorporation under this legislation is a matter of the association's own choice and may not be an attractive option as loss of immunity in tort to members would follow. For this reason specially designed legislation automatically conferring a separate legal identity on associations, comparable to the status of trade unions, is a more desirable option. It is proposed that compulsory registration with a newly appointed regulatory body as a non-profit association would invoke the tailor-made legislation which would automatically confer a separate legal personality on the association.<sup>18</sup> One question, however, concerns the definition of association qualifying for inclusion under the proposed format. It is submitted that those associations which have for their purpose objects of a social, recreational or other non-profit generating objective where the members do not enjoy any type of financial gain from their membership should come under the ambit of the legislation. One of the main benefits of such a legislative scheme would be to achieve a level of consistency regarding the legal treatment of associations and their members and would result in a unified structure for associations with a non-profit generating objective.

### **The Association as a Separate Legal Entity**

Initially it has to be decided what type of legal personality should be conferred? A distinction may be drawn here between corporate status and legal capacity. Is it necessary for an association to have full corporate status

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<sup>17</sup> Bailey, "A Question of Status", (1989) *Accountancy*, 104(1152), 84. Article 13(3) of the Companies (Northern Ireland) Order 1986 states that the members of a company limited by guarantee have to contribute, on the winding up of the company, an amount not exceeding the sum specified in the memorandum. The company limited by guarantee is only suitable for non-commercial purposes as it does not have any capital contributed by the members while the company is a going concern.

<sup>18</sup> Warburton has proposed similar tailor-made legislation for charities. This would involve a legislative provision that a "charity corporation" registered with the Charity Commissioners be a body corporate with limited liability. Warburton, "Charity Corporations: The Framework for the Future?", [1990] *Conv* 95.

to enjoy the benefit of having a separate legal personality, or is the endowment of various legal capacities sufficient to give it an identity independent of its members? The relationship between legal capacity and legal status was raised in the case of *Maclaine Watson & Co. v Department of Trade and Industry*.<sup>19</sup> The International Tin Council was granted by the International Tin Council (Immunity and Privileges) Order 1972 the “legal capacities of a body corporate”, although it was not made a body corporate. The question was whether this gave the ITC a separate legal existence. In the House of Lords Lord Oliver referred to the judgment of the trial judge, Millett J, who held that as the legal capacities bestowed were the most extensive powers conferable on an artificial entity the ITC had a separate legal existence from its members and could acquire its own rights and duties independent of its members. On the specific point referred to Millett J held that:

“the separate legal existence of an artificial person is simply the sum or consequence of its characteristics or attributes, and is seen in terms of its capacity to acquire legal rights and duties of its own. In my judgment, the dichotomy between status and capacity is false”.<sup>20</sup>

This is not to say, however, that all associations or bodies with varying degrees of legal capacity will be accorded a separate legal identity. In *Bosnor v Musicians’ Union*<sup>21</sup> the House of Lords held that the registered trade union was not granted a separate legal entity distinct from its members as some, but not all, of the characteristics of a separate legal personality had been granted by the Trade Union Act 1871.<sup>22</sup> It seems, therefore, to depend on the wording of the legislation. A salient point in the *Maclaine* case was that the capacities were conferred directly on the ITC itself, not on its members or officials. Similarly, in the Australian case of *Chaff and Hay Acquisition Committee v J A Hempill & Sons Pty Ltd*<sup>23</sup> a committee was established by statute, it was not incorporated but was given various legal capacities.<sup>24</sup> The legislation importantly contained an express provision excluding the liability of the members. The High Court of Australia held that although the committee was not a corporation it was a legal entity. Millett J. in *Maclaine* thus commented that the creation of a separate legal entity is the consequent characteristics and attributes of a legal person conveyed by statute and “. . . that the capacity to acquire its own legal rights and duties, distinct from those of its members, is sufficient”.<sup>25</sup>

It seems, therefore, that a comparable stance could be taken with unincorporated associations. Legislation could be enacted giving such associations sufficient legal personality enabling them to incur liabilities on their own account which are not the liabilities of their members. Latham CJ

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<sup>19</sup> [1989] 3 All ER 523.

<sup>20</sup> [1987] BCLC 707 at 712.

<sup>21</sup> [1956] AC 104.

<sup>22</sup> The union could, however, be sued in its registered name and any judgment obtained could only be enforced against the property of the union.

<sup>23</sup> (1947) 74 CLR 375.

<sup>24</sup> It could acquire property and hold it in its collective name, dispose of that property and sue and be sued in its collective name.

<sup>25</sup> [1987] BCLC 707 at 712.

opined in *Chaff and Hay Acquisition Committee v J A Hempill & Sons Pty Ltd*<sup>26</sup> that:

“A body which, as distinct from the natural persons composing it, can have rights and be subject to duties and can own property must be regarded as having a legal personality, whether it is or is not called a corporation”.<sup>27</sup>

A similar structure has been introduced for trade unions. While the trade union is precluded from being a body corporate under the Companies Act 1985 it has been given a quasi-corporate status by the Trade Union and Labour Relations (Consolidation) Act 1992. In the case of *National Union of General and Municipal Workers v Gillian*<sup>28</sup> Uthwatt J in the Court of Appeal thought that trade unions had been given some sort of legal entity which had an existence separate from their members. His Lordship defined it as a ‘near-corporation’. In some circumstances, therefore, an unincorporated entity may have sufficient legal capacity to sue and be sued in its own name. As statute has conferred on trade unions many of the benefits of incorporation, a similar result could be reached with other unincorporated associations.<sup>29</sup>

## INCORPORATED ASSOCIATIONS

### Purpose of the association

There are various considerations to be addressed when deciding the detail of the legislation.<sup>30</sup> It has been mentioned that the objectives of any association

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<sup>26</sup> *Supra*, n 23.

<sup>27</sup> *Ibid*, at 385.

<sup>28</sup> [1946] KB 81.

<sup>29</sup> Section 10 of the Trade Union and Labour Relations (Consolidation) Act 1992 bestows on trade unions the capacity, among other things, to make contracts on their own behalf and to sue and be sued in their own names. This means that a judgment is enforceable against the union and its property and not against the property of its members. A trade union, however, is fully liable in tort except where it acts in contemplation or furtherance of a trade dispute. Section 22 of the Trade Union and Labour Relations (Consolidation) Act 1992, however, sets out a maximum level of damages which can be awarded commensurate with the size of union membership, for example, £10,000 where the union has fewer than 5,000 members; £50,000 where it has between 5,000 and 25,000; and £125,000 where it has between 25,000 and 100,000 members.

<sup>30</sup> Warburton’s proposals for the ‘charity corporation’ are interesting. It was suggested that the main powers, duties and liabilities of the corporation be laid out in statute while the bulk of the administrative rules be determined by subordinate legislation and documents issued by the Charity Commissioners. Warburton proposes that those responsible for the operation of the new legal structure be called stewards and that their duties and liabilities be laid down in statute. Similarly, the rights and duties of the members should be laid down, including the power to elect and remove stewards, and to avoid any dispute it should be clearly stated that a member of the ‘charity corporation’ is not liable for the debts of the corporation or to contribute to its assets. Warburton suggests that it would be beneficial to set out in a Schedule to the legislation a list of matters which must be included in the constitution of a charity corporation including the conduct and procedure of general meetings, the election, authority and proceedings of the stewards’ committee, the keeping of financial records and indemnities for

qualifying for inclusion under the legislation must be non-profit. One reason for this is to preclude businesses from coming under the ambit of the legislation to avail of any legislative relaxations. The proposed format differs from the general premise of the Companies (Northern Ireland) Order 1986 which has to balance the needs of creditors, shareholders and managers in a commercial context. One of the main considerations is that the economic interests of the members are less significant in a non-profit association. Their expectation of the club or association should not involve either a return on their capital investment, or any other type of financial gain. Perhaps, therefore, the test to be used in deciding what qualifies an association as non-profit, is whether any profits made are to be distributed to the members? The distribution of profits during the lifetime of the association should be expressly prohibited in the legislation and on the association's dissolution provision should be made allowing any accumulated profits to be distributed to existing members, subject to any agreement the members may make to the contrary.

Useful guidance can be obtained from Australia where every State has an Associations Incorporation Act providing for the incorporation of non-profit making organisations.<sup>31</sup> The Associations Incorporation Act 1984 (New South Wales), for example, provides that an association eligible for incorporation under the Act includes a society, club, institution or other body provided that it has not less than five members. Section 7 of this Act makes it clear, however, that an association is not eligible for incorporation if it is carried on, *inter alia*, for the object of trading or securing pecuniary gain for its members or has a capital divided into shares or stock held by its members.<sup>32</sup>

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stewards. This is regarded as an advantage as “. . . no organisation would be capable of becoming a charity corporation unless it possessed a constitution with sufficient rules to run the charity effectively”. See Warburton, “Charity Corporations: The Framework for the Future?”, [1990] *Conv* 95.

<sup>31</sup> Associations Incorporation Act 1984 (New South Wales); Associations Incorporation Act 1991 (Australian Capital Territory) as amended by the Associations Incorporation (Amendment) Act 1994; Associations Incorporation Act 1996 (Northern Territory of Australia); Associations Incorporation Act 1981 (Queensland); Associations Incorporation Act 1985 (South Australia); Associations Incorporation Act 1981 (Victoria) as amended by the Associations Incorporation (Amendment) Act 1997; Associations Incorporation Act 1987 (Western Australia); Associations Incorporation Act 1964 (Tasmania). Fletcher states that the purpose of the legislation is to provide for an incorporated alternative to the unincorporated association as an escape from “the dilemma of the unincorporated association”. Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) at p 354.

<sup>32</sup> Section 7 also provides that an association which is a company within the meaning of Corporations Law, other than a company limited by guarantee, is not eligible for incorporation. This is in line with the earlier point that it is necessary to preclude profit-making businesses who would ordinarily opt for incorporation as a company limited by shares from coming under the ambit of this new legislative scheme. Indeed, all the Australian models have a prerequisite of a non-profit generating objective. Fletcher states that this is to ensure that “. . . the benefits of the legislation are not conferred on associations formed with a primary purpose of carrying on trading functions and all [statutes] prohibit the incorporation of associations formed for making pecuniary profits or gains for their members.” See

### Size of the association

The automatic conferment of separate legal personality means that the legislation would have to be designed to encompass a diverse grouping of associations, both large and small. It has to be decided, therefore, whether legal treatment should be dependent on the size and resources of the association? However, what does size mean in this context? It could be interpreted to mean, *inter alia*, the number of members, the capital resources of the association or the value of the association's premises. Ideally, however, the present informality should be maintained as far as possible to ease the day to day operation of the association and flexibility in relation to internal matters. Indeed, Fletcher states that in Australia the law on incorporated associations has been

“... drafted with a view to providing [incorporation] at the least possible cost, in time and effort, and with minimal interference in association affairs consistent with regard for the public interest in an officially registered organisation”.<sup>33</sup>

The proposed legislation should, therefore, balance the need for regulation with the desire to maintain the associations' autonomy as far as possible. Indeed, the purpose is not to impose onerous administrative and financial burdens on such associations to make it impractical for smaller organisations. From this perspective the size of the association need not be a relevant factor when deciding the detail of the legislation.

### Interests of creditors and the position of managers of the association

The fact that the legislation would deal with non-profit bodies does not mean that the interests of creditors be overlooked. Comparable with the Companies (Northern Ireland) Order 1986 an element of transparency is necessary as the interests of the creditor still has to be safeguarded bearing in mind that the liability of the members would be limited. For this reason the filing of documents, articles of association and financial accounts with a public registrar would still be a good idea.<sup>34</sup> It seems that a balance has to be struck between safeguarding the interests of creditors and keeping the administrative burden and cost to a minimum.

Another point worth considering is the position of the managers of the incorporated association. Although the association would have a separate legal identity it would be necessary to have a human element within the body to make decisions and carry out the day-to-day management. This function is currently carried out by the committee of an association and it is submitted

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Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 223.

<sup>33</sup> *Ibid*, at 354.

<sup>34</sup> In New South Wales, for example, the committee of the association must prepare an annual financial statement which gives a true and fair view of, *inter alia*, the income and expenditure, assets and liabilities and mortgages and charges of the association during its last financial year. The statement must be approved by the general meeting of the members before being filed with the Registrar: Associations Incorporation Act 1984 (New South Wales) ss 26(6) and 27(1).

that the new structure should not differ radically from this, whether the management body be called directors, officials or something different.<sup>35</sup> There is the potential, at the minute, for a committeeman to abuse his position and this would be no different in the new structure. However, counter measures could be built in to the new legislation to try to prevent this bearing in mind that any duties and obligations imposed on the managers should not be so onerous as to discourage members from undertaking this role. The position of directors in a limited company and managers in this context are not really comparable. Neither is the relationship between directors and shareholders on the one hand and managers and the general body of members on the other. Directors in a profit-making enterprise are concerned with making a profit for the shareholders, but are in the position for their own financial gain as well. For this reason, it could be argued that there is a greater potential for a conflict of interest to arise. Members of non-profit associations, however, do not have comparable economic objectives and do not need the same level of protection.

Any formal regulation, however, must, to a certain extent, protect creditors and ensure that the managers/directors do not abuse the power which is bestowed on them. As regards the latter consideration, the rights and duties of the members should be clearly laid out in the legislation<sup>36</sup> and should include the power to elect and remove the managers/directors.<sup>37</sup> Furthermore, it should be remembered that in such associations it is likely that there will be a greater turnover of managers anyway. One way of keeping the managers in check would be to state in the association's constitution the objective(s) of the association and a requirement that the managers act only in fulfilment of this.<sup>38</sup> However, to ensure continued

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<sup>35</sup> Section 29(1) of the Associations Incorporation Act 1985 (South Australia) provides that "... the persons who have under the rules of an incorporated association power to administer the affairs of the association constitute, for the purposes of this Act, the committee of the association". Fletcher emphasises in this context that the main purpose of the Australian legislation governing incorporated associations is to "... resolve problems arising from lack of legal status not to regulate association affairs. Thus. . . the legislation, in most jurisdictions, does little to impose a management structure, set standards for managers or dictate managerial duties to associations". Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 288.

<sup>36</sup> At present the rights of members depend on the rules of the association and as the rules vary from association to association so the rights of members vary. A legislative scheme which provides for the rights and duties of the members would, therefore, ensure a measure of consistency.

<sup>37</sup> Warburton makes the point that at present in relation to unincorporated associations there is no statutory source of rules to fall back on thus rendering it difficult to control any abuse by the committee. For example, members have no automatic power of removal unless it is conferred by the rules of the association. See Warburton, "Charity Corporations: The Framework for the Future?", [1990] *Conv*, 95 at 99. Tailor-made legislation, however, could remedy this by giving the members the power to remove any committeeman or officer of the club by a simple majority.

<sup>38</sup> Indeed, the legislation should require incorporated associations to state their objects either in their rules or a separate statement of objects. For example, section 19 of the Associations Incorporation Act 1984 (New South Wales) provides that an application for incorporation under the Act must include a copy of

protection to creditors, acting outside the stated purpose would not render transactions invalid, but would initiate internal procedures against the manager in question.<sup>39</sup> In this way it is hoped that managers would observe the limitations on their powers.<sup>40</sup> Another useful option which could be included in the legislation is a provision requiring those responsible for the association's accounts to lay them before the general body of members.<sup>41</sup> However, in keeping with the desired autonomy of the association, this requirement could be dispensed with by a majority of members.

As regards the powers of the association the legislation should specify that the powers of the incorporated association, subject to the legislation and the association's rules, should include the power to acquire, hold, deal with and dispose of any real or personal property; open and operate bank accounts; invest its money upon such terms and conditions as the association thinks fit; borrow money upon such terms and conditions as the association thinks fit; give such security for the discharge of liabilities incurred by the association

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the statement of objects which has been approved by the association. Section 23A of the Associations Incorporation Act 1985 (South Australia) provides that the objects of the association must be stated in the association's rules.

<sup>39</sup> This involves a comparable limitation on the *ultra vires* rule as applied to corporations under section 35 of the Companies Act 1985. See, for example, section 18 of the Associations Incorporation Act 1984 (New South Wales); section 17 of the Associations Incorporation Act 1981 (Victoria) as amended by the Associations Incorporation (Amendment) Act 1997; section 26 Associations Incorporation Act 1981 (Queensland) and section 15 of the Associations Incorporation Act 1987 (Western Australia). The latter provides that "a contract made with an incorporated association is not invalid by reason of any deficiency in the legal capacity of the association to enter into, or carry out, the contract unless the person contracting with the association has actual notice of the deficiency". Section 15(3) provides the qualification that this does not "... prejudice an action by a member of an incorporated association to restrain the association from entering into a transaction that lies beyond the powers conferred on the association by this Act or its rules".

<sup>40</sup> An interesting precedent is set out in the report by the Alberta Institute of Law Research and Reform, *Proposals for a new Alberta Incorporated Associations Act*, Report No 49, March 1987. The report outlined the proposed duties on directors of an incorporated non-profit making association as the duty to act honestly and in good faith with a view to the best interests of the corporation and the duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The report concluded that it was reasonable to impose these duties on volunteer directors as, without this, the common law may impose an unduly high standard of care on directors with specific qualifications. Also, the inclusion of the term 'comparable circumstances' dictates the standard of care to be applied, allowing the court to focus on the voluntary nature of the association. This report resulted in Bill 54 (Volunteer Incorporations Act) introduced into the Alberta legislature on 15 June, 1987. However, the legislation was not passed and the provincial Alberta Societies Act 1980 still applies to non-profit associations wishing to incorporate. Alternatively, a non-profit organisation can choose to incorporate federally under the Canada Corporations Act 1970, part II of which embraces organisations "without share capital, for the purpose of carrying on, without pecuniary gain to its members" and with "a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting" purpose.

<sup>41</sup> *Supra*, n 34.

as the association thinks fit; appoint agents to transact any business of the association on its behalf; enter into any contracts it thinks necessary or desirable and to do all such other things as are incidental or conducive to the attainment of the purposes and the exercise of the powers of the incorporated association.<sup>42</sup>

### Financial cost

The financial cost involved in the new legislative scheme should be minimal. It would be advisable for the association to obtain insurance for the managers covering them against personal liability and insurance for the association to cover claims by members, who would now be able to sue the association itself. When assessing whether the insurance costs are too onerous for such associations it should be remembered that addressing the problem at hand, in whatever way, will invariably involve some sort of financial cost. If, without incorporation, the liability of the committee is extended, liability insurance would also be advisable. Furthermore, although the insurance purchased for the incorporated association may involve an increase in membership subscriptions, this will be spread between all the members. It could be argued that associations with a smaller number of members could not afford such an increase. However, if one considers the insurance purchased to cover the cost of potential liability to members this may not involve a huge increase for associations with a smaller membership base as the increased cost may be commensurate with the size of the membership.<sup>43</sup>

If the association is given a separate legal personality and can be sued by members and visitors alike the obvious question is whether the incorporated body can either limit or exclude liability under the Unfair Contract Terms Act 1977. This raises important contractual issues which will be discussed in the following section.

### CAN LIABILITY BE LIMITED OR EXCLUDED?

The question of whether the proposed incorporated association could limit or exclude liability depends on the application of the Unfair Contract Terms Act 1977 which prohibits businesses from excluding liability for death or personal injury,<sup>44</sup> and from excluding liability for other damage beyond a point which is reasonable. Non-business entities, however, are not bound by the restraints of the 1977 Act. The question, therefore, depends on the interpretation of 'business'. There is little guidance as to what constitutes a 'business' under the Unfair Contract Terms Act, section 14 of which defines

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<sup>42</sup> See, for example, section 25 of the Associations Incorporation Act 1985 (South Australia); section 16 of the Associations Incorporation Act 1981 (Victoria); section 17 of the Associations Incorporation Act 1984 (New South Wales); section 25 of the Associations Incorporation Act 1981 (Queensland) and section 13 of the Associations Incorporation Act 1987 (Western Australia).

<sup>43</sup> Fletcher makes the point that an incorporated association is liable in the same way as any other property owner, operator of vehicles or employer in tort but "because . . . the association and not the changing body of committee or ordinary members is the liability bearer, it should be in a better position than an unincorporated association to insure against such risks." Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 297.

<sup>44</sup> Section 2(1).

a business as including “a profession and the activities of any Government department or local or public authority”. Neither does case law give any guidance regarding associations, clubs and societies in this context.

Section 1(3) of the Unfair Contract Terms Act 1977<sup>45</sup> excludes from “business liability” a duty regarding the dangerous state of premises towards a person gaining access for recreational or educational purposes, unless the granting of access falls within the business purposes of the occupier. This is an unhelpful and poorly drafted provision as it excludes certain activities from the definition of business unless they are carried out for business purposes, while no further guidance or clarification is given regarding the concept of business. *Prima facie*, therefore, recreational or educational use of property will be outside the ambit of the Unfair Contract Terms Act, but not necessarily so. It seems therefore, that when dealing with non-commercial access the question of the ‘business’ of the occupier still has to be addressed.

Non-profit incorporated associations, on first view, would appear to be able to exclude liability as the requirement of a non-profit objective, by implication, renders the association a non-business operation. However, this is not necessarily the case as it is impossible to say that every non-profit operation will be non-commercial. An interesting case is *Inland Revenue Commissioners v Eccentric Club*<sup>46</sup> where the question was whether a company, which was incorporated to carry on a social club, was carrying on any trade or business. The club argued that, although it was a company, it did not operate on commercial principles as its objects were to promote social intercourse and not the acquisition of financial gain. It was held that the company was not carrying on a trade, business or anything of a similar nature and, therefore, was not liable to corporation profits tax. Pollock MR recognised that the dilemma arose as to whether:

“... the form of the Eccentric club alone is to be looked at, or whether one may test the question whether the company is carrying on business, by looking at the nature and purpose and substance of the transaction by which the members of the club are aggregated in the company”.<sup>47</sup>

His Lordship concluded that the company was only a structure for carrying on a purely non-commercial social club.

The question, therefore, to be addressed is whether an association, which is regarded as non-profit for the purposes of certain legislation, can be classed as “business” under the ambit of the Unfair Contract Terms Act 1977?<sup>48</sup>

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<sup>45</sup> Amended by article 4 of the Occupiers’ Liability (Northern Ireland) Order 1987.

<sup>46</sup> [1924] 1 KB 390

<sup>47</sup> *Ibid.*, at 415.

<sup>48</sup> A preliminary consideration is the fact that if an association is found to be running a business for the acquisition of a gain and has more than twenty members, incorporation under the Companies Act 1985 will be necessitated. Section 716 of the Companies Act 1985 states that: “No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by a company, association or partnership, or by its individual members, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of

While the association would need a non-profit generating objective, for the purposes of the proposed legislation, this could be satisfied by ensuring that the profits are not distributed to the members. Nonetheless, incidental transactions could be interpreted as business transactions.<sup>49</sup> This can be seen in a different context in the case of *The Religious Tract and Book Society of Scotland v Forbes*<sup>50</sup> where a society which was founded for the diffusion of religious literature sold Bibles at depositories in Edinburgh and Belfast and sent out colporteurs to sell Bibles and act as cottage missionaries. While the shops resulted in a profit, the colportage was carried on at a loss. The net result of the society's operation was a loss and the society argued that the operation should be construed as a whole, any loss made in one department being deducted from any profit made in another before an income tax assessment was made. The Lord President conceded that the overall object of the society was the diffusion of religious literature and not that of making profit. However, he added that:

“Incidental to that large and beneficial purpose they engage in trade, and this assessment proceeds upon the very intelligible theory that the business of bookselling cannot be taxable or not taxable according to the motive of the bookseller”.<sup>51</sup>

It was held, therefore, that the society was carrying on the trade of bookselling by operating two shops. The decision of whether the loss of the colportage could legitimately be deducted from the profit of the society's other operations depended on whether the former was part of this business. It was held that while the shops were commercial operations conducted on strictly commercial principles, the colportage was not. The colportage was not carried on for commercial purposes, it could not have made a profit and was preserved to appeal to the religious public to obtain subscriptions. Neither was it conducted on commercial principles as the sale of the society's goods was not the main objective of what was essentially a charitable mission administering religious advice. The Lord President went on to say that:

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Parliament, or of letters patent”. However, this question arose in *Smith v Anderson* (1880) 15 Ch D 247. Brett LJ laid particular emphasis on the words “carrying on any business”, and held that if the acquisition of gain is a subsidiary aspect of an association or partnership, it will be outside the ambit of the legislation. A related question arose *In re St. James's Club* (1852) 2 De GM & G 383 where Lord St. Leonards LC held that a members' social club was not an association for the purposes of the Joint Stock Companies Winding Up Act 1848 as amended by the Joint Stock Companies Winding Up Act 1849. His Lordship continued: “. . . I cannot hold it to apply to every association or company. If I were to do so, I might be called upon to carry the application much lower. . . . A cricket club, an archery society, or a charitable society, would come under the operation of the Act. . . . If such had been the intention of the legislature, why should not the word ‘club’ have been expressly mentioned?”

<sup>49</sup> In a similar vein the report by the Alberta Institute of Law Research and Reform, *Proposals for a new Alberta Incorporated Associations Act*, Report No 49, March 1987 recommended that an incorporated association should not be prohibited from running a business for profit as long as the profits were not distributed to the members.

<sup>50</sup> (1896) 3 Tax Cases 415.

<sup>51</sup> *Ibid.*, at 418.

“... while I completely assent to the view that the establishment and conduct of the shops and the establishment and conduct of the colportage all rest upon the same ultimate motive, yet at the same time the two operations seem to be essentially distinguished”.<sup>52</sup>

Using a similar principle, it could be argued that business transactions may be incidental to the non-commercial objective of the association. On the rationale of the *Forbes* case it may not matter that any profits derived from ancillary commercial operations would ultimately be used for the furtherance of the non-profit purpose of the association. Lord Adam said in *Forbes* that:

“if a party takes to selling books it does not matter. . . what his object is in doing so, whether it is to put profit into his own pocket, or, having made profit, to expend that in charity or donation”.<sup>53</sup>

Two relevant points arise from this case. Firstly, an association's activities can be severed for some purposes and part of the operation can be construed as business or commercial, while the other is not. Secondly, the fact that any profits derived from the commercial aspect of the enterprise are ultimately bound for a non-commercial purpose does not alter this fact. It seems, therefore, that when deciding whether an association is carrying on a “business”, the substance of each separate operation undertaken must be considered and the ultimate destination of any profits made is not a conclusive factor. This makes it possible to distinguish between a club's various different activities. In this respect a distinction may be made between the club's inward and outward looking activities to render transactions between the members *inter se* non-business activities and those with the public as business. Such demarcation between an association's activities can be seen in the case of *Carlisle and Silloth Golf Club v Smith*.<sup>54</sup> In this case the members of the club paid an annual subscription to use the facilities of the club and its premises. On top of this visitors were allowed to enjoy the same facilities on the payment of green fees. The question was whether the club was carrying on “an adventure or concern in the nature of trade”, the annual profits or gains of which would be taxable. It was held that the separation of the club's activities rendered the acquisition of green fees from non-members liable to tax. An argument against assessing the club for income tax was the fact that the club's expenses each year exceeded the amount received from green fees from visitors. This was held to be irrelevant, however, as the fact that the club obtained external revenue rendered it liable to tax.<sup>55</sup> The relevance of this is that the activities of the club were severable, Cozens-Hardy M R putting it as follows:

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<sup>52</sup> *Ibid*, at 419. See also *Grove v Young Men's Christian Association* (1903) 4 Tax Cases 613.

<sup>53</sup> *Ibid*, at 419.

<sup>54</sup> [1913] 3 KB 75.

<sup>55</sup> Buckley LJ quoted from Lord Macnaghten in *Tennant v Smith* [1892] A C 164, “a person is chargeable to income tax not on what he saves his pocket but on what goes into his pocket”.

“It seems to me that there is a real difference between moneys received from members and applied for the benefit of members and moneys received by the club from strangers”.<sup>56</sup>

In the context of whether a club or association is operating a “business” for the purposes of the Unfair Contract Terms Act 1977, Josling is of the opinion that “business” has a commercial connotation and, therefore, transactions with members are outside the ambit of the Act.<sup>57</sup> Indeed, a similar principle is applied to the assessment of corporation tax. The principle of mutual trading means that an association will be exempt from tax on any surplus made on the provision of services for the exclusive benefit of the members.<sup>58</sup>

In conclusion, therefore, whether an incorporated association will be able to exclude or limit liability will depend on the facts of each case, the actual substance of the transactions involved and the regularity of those transactions.<sup>59</sup> As there is no direct judicial guidance in this context one can speculate about the possible approaches which may be taken. If one applies the severance argument in *Carlisle* the finding of a business operation may be likely as regards non-members if the services and amenities of the club are routinely utilised by such persons for payment.<sup>60</sup> This approach may also correlate the finding of a business operation with the size of the association as larger associations may be more likely to open their facilities to non-members. However, it may be possible for the association to avoid this, and the restrictions of the Unfair Contract Terms Act, by making non-members temporary members for a limited period.<sup>61</sup> This was suggested by Kennedy

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<sup>56</sup> *Supra*, n 54 at p 80.

<sup>57</sup> Josling, *Law of Clubs* (6<sup>th</sup> edition, 1987) at p 98.

<sup>58</sup> The definition of business for VAT purposes, however, does not include the exemption for mutual trading. Section 47(2)(a) of the VAT Act 1987 defines ‘business’ as the provision by a club, association or organisation, for a subscription or other consideration, of the facilities or advantages available to its members. There are, however, other examples of a club’s transactions with its members being outside the scope of a business. For example, it is a long established principle that the provision of alcohol to club members for payment is not a sale, *Graff v Evans* (1882) 8 QBD 373. (Such a club will still have to comply with licensing laws). See also *IR C v Eccentric Club* [1924] 1 KB 390.

<sup>59</sup> The Court of Appeal in the case of *R and B Customs Brokers Ltd v United Dominions Trust Ltd*. [1988] 1 All ER 847 held that a transaction would be “in the course of a business” under section 12 of the Unfair Contract Terms Act 1977 if it was integral to the nature of the business or there was sufficient regularity of transactions.

<sup>60</sup> The relevance of non-member use is backed up if one considers that the company in *IR C v Eccentric Club* was found not to be running a business. Interestingly on the facts of the case there were no receipts from persons who were not club members. Warrington LJ made reference to this acknowledging that “no payments for provisions supplied in the club are taken from any person not a member”. *IR C v Eccentric Club* [1924] 1 KB 390 at 421.

<sup>61</sup> Josling says that “it may sometimes be convenient to make the casual user of the club facilities a temporary or associate member. In such a case, the Act will not apply. But membership must be genuine and not a cloak”. Josling, *Law of Clubs* (6<sup>th</sup> edition, 1987) p 99. Warburton also makes the point that it may be possible “to avoid tax by creating temporary members but all the members should have the same rights and benefits and temporary membership should not be instantaneous”. Warburton, *Unincorporated Associations* (2<sup>nd</sup> edition, 1992) p 60.

LJ in *Carlisle and Silloth Golf Club v Smith*.<sup>62</sup> A distinction was made between the case where the club's facilities were open to the paying public and the case where a club gives access to people who are introduced by a member or are approved by the club committee who, upon payment, are entitled to use the club's facilities for a specified period. His Lordship opined that

“... I am inclined to think that the person to whom such privileges are accorded might fairly be regarded as becoming, for the time being, members of the club, subscribing to its funds”.<sup>63</sup>

As regards liability to members the upshot is that a member will be able to sue the association unless the club has taken steps to limit or exclude liability unrestrained by the Unfair Contract Terms Act 1977. In such a case the only way in which an injured member could obtain legal redress would be to attempt to sue the committee or individual officers of the club.<sup>64</sup>

An alternative approach may be to consider whether the association “*as a separate body*” operates on commercial principles and for commercial purposes? In essence, this raises the issue of whether the association, as a separate body, constitutes a proprietary club<sup>65</sup> operating the particular organisation? On the authority of *Inland Revenue Commissioners v*

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<sup>62</sup> *Supra*, n 54 p 82.

<sup>63</sup> *Ibid.*

<sup>64</sup> On the principle of *New Zealand Shipping Co. Ltd. v A M Satterthwaite & Co. Ltd. (The Eurymedon)* [1975] 1 All ER 1015, however, it may be possible for the club's exclusion of liability to apply to the committee and individual officers of the club. In this case the consignor loaded goods on a ship for carriage to the plaintiff consignee in New Zealand. The carrier's agent issued a bill of lading containing an exemption clause which purported to promise the defendant stevedores, who were employed by the carriers to unload the cargo in New Zealand, the benefit of various exemptions and limitations of liability. After the plaintiff became the holder of the bill of lading the cargo was damaged as a result of the negligence of the stevedores. The question was whether the stevedores could rely on the exemption clause to avoid liability. The plaintiff claimed that this was not possible as the defendant was not a party to the contract. It was held by the Privy Council that the exemption clause in the contract could be relied on by the defendant. Lord Wilberforce held that the terms of the bill of lading constituted a unilateral offer by the consignor to the stevedores, made through the carriers as agent, that if the stevedores unloaded the goods they should have the benefit of the exemption clause.

<sup>65</sup> Josling defines a proprietary club as a business in which an individual, individuals, partnership or company provides the amenities and facilities of a club for use by the members who, in reality, are customers. See Josling, *Law of Clubs* (6<sup>th</sup> edition, 1987) p 11. The essential characteristic of this type of club is that it is owned by the proprietor who carries on the business as a profit-making concern. The main difference, therefore, between a members' club and a proprietary club, according to Field, is the ownership of assets: “... if assets are held in private hands other than the hands of the members themselves the club is a proprietary one in the eyes of the law.” Field, *Practical Club Law*, (1979) p 4. In *I R C v Eccentric Club* [1924] 1 K B 390 at 421 Warrington LJ said that “The club proprietor, whether an individual or a company, carries on a business with a view to profit as an ordinary commercial concern”.

*Eccentric Club*<sup>66</sup>, however, it seems that the substance of the association remains the determining factor. In this case it was held that the company framework was nothing more than a convenient means for the members to conduct a social club, “*the objects of which are immune from every taint of commerciality*”.<sup>67</sup> However, once again in this determination the fact that the club’s transactions were between members and not outsiders was significant. Sargent LJ supported the contention that the

“... limitation of activities to a system of self-supply altogether differentiates their enterprise from that of an individual or company carrying on an ordinary proprietary club with the object of making a profit out of the supply of club amenities ...”.<sup>68</sup>

## CONCLUSION

In conclusion, the present position that an unincorporated association does not possess a legal status independent of its members causes obvious operational complexity when it comes to making contracts, employing staff and holding property. Warburton, for example, draws attention to the fact that in unincorporated associations:

“The employment of staff and activities requiring contracts with non-members are... hampered by the lack of legal status and can carry unexpected personal risk for members of the committee”.<sup>69</sup>

One further problem arising from such associations’ lack of legal status is that a member injured on the association’s premises, in the absence of special circumstances, is unable to obtain legal redress from the association. This position is arbitrary and unjustifiable rendering it impossible to state clearly to whom a duty of care will be owed, and by whom. The possible irony was evident to MacDermott LJ who in *Kinner v Trustees of West Belfast Pigeon Club*<sup>70</sup> said that it would be totally unreal to suggest that an injured barman who was not a member could recover against the club but a barman-member cannot. It is equally ironic that an injured trespasser is in a better position than an injured member.<sup>71</sup> Legal intervention in this area is necessary to

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<sup>66</sup> *Supra*, n 46.

<sup>67</sup> *Ibid*, at 421 *per* Warrington LJ

<sup>68</sup> *Ibid*, at 430.

<sup>69</sup> Warburton, “Charity Corporations: The Framework for the Future?”, [1990] *Conv* 95 at 99.

<sup>70</sup> [1998] 7 *BNIL* 91. In this case the plaintiff who was injured on club premises was both a member and an employee of the club. He alleged that he was injured while carrying out his duties as a barman. The defendant denied liability and alleged that the plaintiff’s action could not be maintained due to his membership of the club. The Court of Appeal, however, disagreed holding that his membership was not an immunity against actions. See Glennon, “Extending the Role of the Committee in an Unincorporated Association – A Separate Duty of Care to Members and Visitors?” (1999) 50(4) *NILQ* pp 515-527 for a discussion of this case.

<sup>71</sup> The position of an occupier in relation to trespassers is found in the Occupiers’ Liability (Northern Ireland) Order 1987. This provides that an occupier owes a duty of care to any person in respect of a risk against which he may reasonably be

avoid straining “. . . *reality for the sake of inadequate theory*”.<sup>72</sup> The most feasible solution would be to introduce legislation giving unincorporated associations a separate legal identity. The practical benefits of this include, *inter alia*, recognition of the association as a separate legal entity with perpetual succession, the association being able to hold its own property and to sue and be sued in its own name. In this vein Fletcher states that:

“the existence of a corporate liability bearer should resolve procedural difficulties and enable substantive issues to be litigated directly”.<sup>73</sup>

In relation to the association’s liability the application of the Unfair Contract Terms Act would be dependent on the nature of the association in question and the substance of the transactions undertaken by that body. In this way, it could be argued that the application of the ‘business’ test may be a useful regulating tool in deciding which associations should bear the full brunt of liability. The practical result may be that members can only sue the association if it has not taken positive steps to limit or exclude liability. Despite this, a legislative enactment giving associations a separate legal identity would reduce the present complexity involved with such bodies and solve the problem outlined by Lloyd namely that:

“. . . no system of law recognises the corporate character of every group, so that large numbers of associations remain without specific legal personality. Nevertheless grounds of expediency and even necessity may oblige the law to concede some degree of legal capacity to these bodies”.<sup>74</sup>

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expected to offer that person some protection. The standard required is to take such care as is reasonable in all the circumstances.

<sup>72</sup> Laski, “*The Personality of Associations*”, (1915-16) 29 Harv L Rev 404 at 420.

<sup>73</sup> Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986) p 297.

<sup>74</sup> Lloyd, *Law of Unincorporated Associations*, (1938) p 3.