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DOCUMENT

Title: **Should your Club Consider Incorporation**

Against whom is such a claim pursued? Who is to be named as defendant on the writ? As an unincorporated association, your members' club is not a legal entity and cannot therefore be party to legal proceedings.

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Page 1 of 3

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The economic climate has sent a chill wind through many a committee meeting room as making ends meet becomes a monthly priority. Membership levels are difficult to maintain, fees are being squeezed and as the peripatetic golfer travels to play when and where he wishes rather than commit to a club, incomes become less predictable.

But, what has this to do with whether or not you should incorporate your club? Well, like it or not your club is a business. Businesses face threats and challenges of all kinds. Some foreseen and compensated, others unforeseen and problematic (or merely expensive to deal with). Risks which may be foreseen might be capable of, say, insuring – but what if an unforeseen liability comes along and your club faces a claim for which is not insured, a claim for sex discrimination, for example?

Against who is such a claim pursued? Who is to be named as defendant on the writ? As an unincorporated association your members' club is not a legal entity and cannot therefore be party to legal proceedings – but that in no way denies the claimant their right of action which would be properly pursued against the members of the club's management committee (or any one or more of them) – personally. Yes, the individual members of the committee are in the firing line and if a judgement is made against them, it is for them personally to meet it.

Now one might reasonably expect that the club's resources are going to be made available to meet what is in truth a club liability – but what if those resources just aren't enough? If as a consequence of the claim the club's liabilities exceed its assets – then those committee members will be obliged to reach for their cheque books to make up the difference – as the individuals responsible for the club's affairs.

It's a scary thought – that after all the time, effort, and commitment your management committee members put into the club – they have to foot the bill.

Can they go to the members and ask them to contribute? Well, they can ask – and many members may well be willing to put something in the pot. Some will not. That's human nature – and it is not implicit that, having appointed the management committee, those members are obliged to contribute. Even if your club constitution makes provision for such circumstances and purports to oblige all members to contribute to the club's liabilities – enforcement of such a provision would be costly and time consuming in its own right – as well as divisive.

Now consider this. Suppose your club was incorporated – i.e. owned and operated through the medium of a limited company - when the unforeseen liability arose. If those charged with management of the club's affairs were company directors – rather than committee members – then the liability of the company would not attach to them personally.

A company is a legal person. It can own assets. It can enter into contracts, sue and be sued. The point is that it exists in its own right separate from those who own and/or control it. If a company's liabilities exceed its assets, (i.e. it is insolvent) then no claimant against it has any right to seek recompense for the shortfall from its members. Their liability is 'limited' in the case of a company having a share capital to the amount paid up on the shares they hold (which will have been lost). If the company is limited by guarantee – its members can be called upon to contribute no more than the amount they have each agreed to contribute on the company's winding up as set out in the company's memorandum or articles of association (usually no more than £5).

What of the directors? Can they be pursued for company liabilities? No – Unless they have committed some, wrong or have been trading the company whilst insolvent – or if they have expressly agreed to give a personal guarantee for certain stated (but therefore known) liabilities of the company.

If for no other reason than that those who take it upon themselves to assume responsibility for the management of your club and the stewardship of its assets and finances ought to be able to sleep at night – consideration should be given to incorporation.

There are, of course, other persuasive considerations. An unincorporated club cannot hold land or any interest in land in its own right. Ownership of title to, or a leasehold interest in, your golf course – or merely licenced rights to use it must be held by trustees for the benefit of the members. If the club were incorporated it could hold title to the course (or the appropriate interest in it) in its own right. Trustees die or wish to retire – and in each case a formal transfer of title to the names of new trustees must be dealt with. Further, if the land is held under a lease – then the trustees are personally responsible for paying the rent (even though they would normally have an indemnity from the club).

As a legal person, a company can enter into contracts. Compare this with contracts entered in to on a club's behalf by its management committee – for which the members of that committee can be responsible – including all service contracts with club employees.

Issues can arise in the case of long running contracts – such as between the club and a brewery or leasing company. This will have been entered into by the management committee (or certain of its members). A problem may arise in later years when different members constitute the committee. Members of the 'new' committee are not bound personally by the contract upon being appointed - but if they effectively adopt the contract by continuing to benefit from it and observe its terms then it would be difficult to argue that they have not assumed responsibility for it. If a company had entered into such a contract, then it would be and remain the party to it irrespective of changes to the board.

Claims in tort – e.g. for negligence, which relate to the occupation of property raise the question as to who exactly is 'in occupation?' If the property is held by trustees, then they will be in occupation – and forced to rely on any indemnity to which they are entitled under the club's constitution of liable as a consequence. There has been a case recently where trustees were held personally liable when a member was injured in an unincorporated club's building because the club's rules provided that the trustees were responsible for the upkeep of the building.

The exposure of individuals to personal liability is avoided if a club is incorporated and the company holds the relevant interest in land and is the occupier - or is the party to contracts as the case may be.

Is there any disadvantage to incorporation? Perhaps only (if it is a disadvantage) that a company is open to external scrutiny – being obliged to file its accounts annually and an annual return at Companies House and certain other notices such as upon the appointment and retirement of directors. Given that any club will prepare annual accounts for circulation to its members – the additional administrative burden is modest.

Having a board of directors does not preclude organising the running of your club along traditional lines – with such rules, sub-committees and other features as are thought desirable to maintain. That is but a matter of establishing the company with articles of association which provide for such a two-tier management system.

As a final thought, one might consider that a company, being able to long outlive all members and directors, implies and indeed facilitates a sustainability which is less likely to be affected by the partisan interests of some part of a club's membership for the time being.

If you would value advice upon the incorporation of your club, what it involves and how to go about it then please contact Jackie Howe on 01886 812943 or by e-mail to jackie@ngcaa.co.uk. Our legal advisers (whose fee rates are discounted for NGCAA members) can assist with all aspects of the incorporation process including preparing bespoke constitutional documents and complementary rules - and in relation to the transfer of property and other assets from club to company.

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