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## **DOCUMENT**

### **Title: Pathway To Incorporation**

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Revision: 1

Date: 14 May 2015

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VAT No: 598 3758 66 | Company Number: 8904597 Registered in England

## PATHWAY TO INCORPORATION

### What is 'Incorporation'?

A Club which is a private members club which operates as an 'unincorporated association' is not a legal entity in its own right. It is an association of individual members who have, on the basis of the constitution they have adopted, chosen to run a club – by the members for the members. However, the association cannot own assets - they are owned by others on behalf of the members as a whole. For example, any interest in land must be vested in trustees who hold legal title to the land (whether freehold or leasehold) upon trust for the members.

Incorporation means to transfer the business and assets (and a golf club is a business) into the ownership of a limited company which becomes the owner and operator of the club business, which acts through directors and which, unlike an unincorporated association, is a legal entity. It is a 'non-human legal person.' This means the company can own assets in its own right, enter into contracts, employ people and it can sue and be sued.

The important thing about incorporation is in relation to liabilities when things go wrong. If a company suffers an unexpected claim which is not insured (and maybe not insurable) then it is the company which remains liable and even if it cannot meet the claim there is no automatic recourse to its members or directors.

Compare the situation in an unincorporated club – where in the event of a liability which cannot, for whatever reason, be met out of club funds – then it is the members of its executive committee who are liable to make up the balance – personally.

The incorporation of any business brings with it the limitation on liability which is implicit in the word 'Limited.' Some companies are limited by shares – in which case each member's liability in the event of the company's insolvency is limited to the amount paid up on the shares they hold. Whatever they paid for them will have been lost. Other companies may be limited by guarantee, rather than having a share capital. In a guarantee company no-one invests to acquire an interest in ownership – rather, the members of the company simply undertake to contribute a fixed sum should the company be wound up when insolvent. The liability limit is typically only £1 or £5.

The point is that the limitation on liability protects the individuals involved in a way that cannot be achieved for the committee members in an unincorporated club.

So – 'incorporation' means to become a company – and thereby to achieve the benefits of limited liability.

### What does 'Incorporation' involve?

The basic considerations are:

1. For the club to determine to incorporate – i.e. there must be a sufficient level of support for incorporation from amongst the executive committee members and the members generally;
2. There must be an assessment of all the clubs assets, liabilities and contractual commitments - because when it comes to incorporating – it means transferring all assets to the new company in exchange for the company indemnifying the club in respect of its liabilities – so you must know what they are;
3. To write a Business Plan – because achieving incorporation is not just an end in itself. The financial probity of the new company post incorporation must be assured – and so to know that it will be financially viable will be essential, especially if third party funding is required;

4. The establishment of the new company either by way of a new incorporation at Companies House or by acquiring a new ready-made company 'off the shelf' will first require a decision as to whether it ought to be a company limited by shares or by guarantee. Should some or all of its members have ownership stakes (with the potential for sharing in its profits)? or, should all surplus revenues of the company be applied for the purpose of its club business?
5. Who will be the new directors? Do they understand the legal duties and obligations of a director? Should advice be sought?
6. Once the type of company has been decided and the proposed new directors identified – how should those features of the club's governance which are required to be retained be provided for in the company's constitution? Management of the day to day affairs of the company is the directors' individual and collective responsibility – but they may delegate to other individuals (such as a club secretary) and/or to Committees. In either case, decisions will be needed about the role of such individuals, the composition and terms of reference of committees and the adoption of company articles of association which admit of and properly govern such a two-tier structure. Why? So that there is certainty and so that no-one is given authority without responsibility to the board which is answerable ultimately to the company's members as a whole.
7. If the club has any interest(s) in land (be it the clubhouse, car park, golf course or whatever) it will be necessary to have ownership and use rights examined. Does the club own its land (title to which is held in the names of trustees) or does it have merely a use right by way of lease or licence? Is whatever interest is held to be transferred to the company?
8. Should title to the land be kept separate from the company (in case of financial difficulty) or will the company's ownership of land be essential to obtaining secured borrowings from a bank or others if that is necessary? (Such questions will be central to the development of the financial aspects of the business plan).
9. The position of club staff must be considered – e.g. the club pro, the steward, catering and bar staff, green keepers and anyone else who is paid by the club – because upon a transfer of the business of the club to a new company the contracts of employment of existing staff will transfer as a matter of law (under TUPE). In addition, TUPE provides an employer with certain consultation obligations opposite its employees, a failure to observe which can be costly. Whilst the club pro may be an employee, many are engaged on a self-employed basis as independent contractors to the club.
10. So, essentially, incorporation achieves the transfer of the business and assets of an unincorporated association to a new company – but there is a great deal to consider along the way – upon which professional advice ought to be taken.

#### Key stages in the 'Incorporation' process

1. The decision to incorporate, first by the executive committee.
2. The preparation of a business plan – which requires detailed assessment of all assets and liabilities, cash flow forecasting and taking account of tax considerations (e.g. the incidence of VAT on some or all of the new company's activities).
3. Appraisal of current contracts (e.g. with suppliers or catering franchise holders; club professional if an independent operator and any finance and/or leasing companies) and employees' contracts – and consideration of whether they can be transferred or are likely to be re-negotiated.
4. Consideration of the constitutional and governance structure. Will the directors devolve management of certain functions to committees?

5. Club Rules – can be established or retained by resolution of the directors and provisions for them to determine the rules and any changes should be provided for in the company's articles – so an appraisal of current rules should be undertaken at this early stage.

6. If it is intended that any interest in land is to be transferred to the company (rather than held separately by trustees) legal advice should be sought in relation to any title issues or impediments to achieving a transfer. It should be noted that if it is intended that trustees currently holding legal title for the benefit of the club are to transfer that title to the new company for no consideration – the no stamp duty land tax (SDLT) is payable. SDLT attaches only where a price is paid. It may be necessary to seek advance clearance from HMRC to confirm that a transfer by trustees will not trigger a charge to capital gains tax.

7. Once the executive committee has determined that they will recommend incorporation to the members – communication becomes increasingly important. A period of consultation might be considered appropriate – or an informal members' meeting arranged generally to discuss the committee's proposals. It is often advisable to have professional advice available at such a meeting to deal with any technical legal, accounting or taxation questions.

8. Ordinarily when an organisation disposes of or transfers capital assets the transfer would be a disposal for capital gains tax purposes and potentially give rise to a tax charge. However, it should normally be possible for the incorporation of a club by way of a transfer of assets to a company, where the members give up their rights as members of the Club in exchange for admission to membership of the new company, to be treated for tax purposes as a 'reconstruction' and therefore on a 'no gain no loss' basis so that no CGT is chargeable. An advance application for tax clearance from HMRC is recommended in this regard.

9. Assuming the general consensus is to proceed to incorporate the club – solicitors will usually be instructed – who will then attend to:

- Incorporating (or acquiring off the shelf) a new company;
- Advise upon and draft articles of association to meet the club's requirements;
- Advise in relation to the appointment of directors and attend to the necessary Companies House filings;
- Draft an appropriate business/assets transfer agreement;
- Advise what employee consultation is required in relation to TUPE;
- Consider and advise upon the transfer of current contracts;
- Advise upon and draft the requisite notices of meetings and resolutions to be proposed for members' approval – and upon the proper voting procedures;
- Advise in relation to matters to be attended to prior to effecting the incorporation e.g. setting up new bank accounts, arranging transfer of insurances; registering the company for VAT;
- Subject to the members approving and authorising the incorporation, attending to completion of the transfer agreement; and
- Advise upon on going obligations with regard to the preparation and filing of accounts, filing an annual return and the notification of changes in directors etc.

Solicitors may also deal with any application for tax clearance (as noted at 8 above) and advise upon Club specific Rules or Bye-laws if required.

Timing and other considerations

The incorporation process though quite straightforward in legal/structural terms requires a good deal of time and commitment from members of the executive committee – or from a smaller number of members tasked with driving the process. Whilst a company can be incorporated or bought off the shelf in a day, and a draft transfer agreement obtained equally quickly – neither the model articles of such a company nor the draft agreement will be bespoke to the club's requirements.

Taking advice in relation to constitutional issues, club rules, the distinction between members of the new company and members of its golf club, and undertaking appropriate member consultation takes time; as does the preparation of a robust business plan and assessment of the new company's financial future.

Only after the preparatory work has been done and legal, accountancy and tax advice taken as appropriate can one proceed to convene formal meeting to implement the incorporation and transfer. It is a process which should not be rushed – but one which can be made to run more quickly and smoothly by seeking the right advice.

Furthermore, the costs of incorporation can be meaningfully reduced if help and advice is sought from those who are familiar with the process and all the questions it raises.

NGCAA members can benefit from the reduced rates for legal advice and assistance available from the association's retained lawyers, who will be happy to discuss your requirements, assess your need for legal help and provide a fee quotation for the work agreed to be undertaken. Subject to agreeing an attendance fee in advance our lawyers will also arrange to meet with members' representatives to discuss their plans.