Guidance Note on Unincorporated Associations

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Summary

We have summarised answers to certain key legal questions that charitable unincorporated associations may have in relation to how they operate.

Unincorporated associations can be simple, flexible and cheap to set up, making them an ideal structure for some smaller charities. However, those members taking on management responsibilities in charitable unincorporated associations (who we term "**Managing Trustees**") or holding land or property on behalf of the charitable unincorporated association (who we term "**Holding Trustees**") should be aware of the potentially significant personal liability that comes with their position. As a result, this is not a charitable structure that should be used for larger organisations, those that are hiring employees, or those that are dealing with notable donations or assets.

Many charitable unincorporated associations start small and, over time, may outgrow their unincorporated structure. In such cases, Managing Trustees should seriously consider updating the corporate form of their association, for example, to a charitable incorporated organisation or private company limited by guarantee.

General considerations

What is the difference between an unincorporated and incorporated organisation?

Many small charitable organisations, such as community sports clubs, are unincorporated. This is generally because they are easy and cheap to set up, and there is no requirement to file annual returns and accounts with Companies House as a private limited company would do (although a charitable unincorporated association must still comply with their obligations under charity law in terms of filing annual reports and returns and statements of account with the Charity Commission). The charitable unincorporated association itself does not have a separate legal identity and, unlike an incorporated organisation, it does not have legal capacity to hold and deal with assets, enter into contracts or employ employees in its own right. Instead, individuals (usually Managing Trustees and/or Holding Trustees) will have to fulfil this role personally "on behalf of" the unincorporated association.

In contrast, an incorporated organisation has its own legal identity and can hold and deal with assets in its own right and enter into legal arrangements, including contracts. Incorporated status normally provides limited liability for its members, and directors or trustees will not have personal liability for the organisation and its transactions (except in specific circumstances, such as a breach of director duties).

What are the disadvantages of an unincorporated association structure?

Some of the main disadvantages are:

- **Lack of Separate Legal Identity:** As unincorporated associations do not have a separate legal identity (as distinct from the collection of individuals that make up the organisation's membership), contracting and dealing with third parties can be difficult. Members will encounter similar problems when dealing with assets on behalf of the association, which cannot own assets in its own name.
- **Potentially Unlimited Liability for Members:** This lack of a separate legal identity means that those individuals responsible for managing the unincorporated association or holding property on its behalf, i.e., Managing Trustees and Holding Trustees, have unlimited liability and are jointly and severally liable for the debts and obligations of the organisation. As a result, Managing Trustees and Holding Trustees will bear personal responsibility if the organisation is sued. Subject to any specifically negotiated contractual limitations, there is no limit on Managing Trustees' or Holding Trustees' liability, so their potential exposure is unlimited and their personal assets may be at risk. This is a very important consideration for anyone setting up or managing a charitable club or association.
- **Complex / Impractical Administration:** If the charitable organisation is likely to undertake significant obligations and liabilities – for example, if its acts as an employer, a property owner or a service provider – then it will generally be more appropriate for the organisation to be incorporated to avoid such personal liability.
- **Reduced Options for Outside Funding:** The lack of incorporation may also mean that banks are unlikely to lend money to the association and grant funders may be unwilling to award large sums of money. It may also make it more difficult to receive individual donations and fundraising through events as members of the public often want to see proof that their money is going to an organisation of substance.

Employment

Can unincorporated associations hire employees?

Yes, but only via individuals acting on behalf of the unincorporated association. The association does not have its own, distinct legal personality, so cannot act as an employer in its own right.

Who should sign the employment contract?

As an unincorporated association does not have legal personality, it cannot enter into contracts – including employment contracts – in its own name. Instead, employment contracts must be signed by one or more individuals (usually Managing Trustees) "on behalf of" the association. The courts will usually consider that the employment contract is between the employee and the members of the management committee or trustee board that is in place at any time. As such, although the Managing Trustees will change over time, those that are in place at the relevant time are likely to be held responsible for the employment contract, even where they were not holding the position of a Managing Trustee when the employment contract was originally signed.

What if the unincorporated association becomes part of a legal dispute with an employee?

Managing Trustees are ultimately responsible for the employment contracts. If neither the assets of the unincorporated association nor any insurance policy taken out can cover the liability for a court or tribunal award that is made in favour of the employee, the Managing Trustees may have to personally contribute towards payment.

Contracts

Can an unincorporated association enter into contracts in its own name, or must individuals do so on its behalf?

An unincorporated association cannot enter into contracts in its own name and so it is not possible for a third party to contract with the unincorporated association itself. Instead, Managing Trustees must sign the contracts. As with employment contracts above, they do this in their own name, usually on behalf of the members as a whole or the other Managing Trustees (as a group) depending on the basis of their authority to contract set out in the association's constitution. In doing so, they assume personal responsibility and liability for the obligations in the contract (subject to any limitation of liability clause in the contract). Depending on the specific rules governing the unincorporated association and how specific contracts have been entered into, this can create additional administrative burdens or difficulties if such individuals leave the organisation (in terms of assigning the contracts or entering into new contracts).

This contrasts with the separate legal identity of an incorporated organisation whereby the organisation will continue to exist in the same form even if specific individuals (such as directors or trustees) leave.

How should unincorporated associations sign contracts?

It would be usual for the rules or constitution governing the unincorporated association to grant authority to certain of the members (i.e., the Managing Trustees) to sign on behalf of the unincorporated association. The execution clause should state the names of the individuals and the capacity in which they are signing,

e.g. as a member of the management committee (or similar) of the unincorporated association.

What should we do if we discover we have signed a contract in the name of the unincorporated association?

As the unincorporated association cannot be a party to the contract and cannot sign contracts in its own name, the most appropriate course of action is likely to be to re-sign the contract in the correct manner, in line with its constitutional rules and general legal principles.

What should an incorporated association do if it needs to vary or assign a contract, but the original signatory has left the association or is no longer contactable?

A note on what is meant by 'varying' or 'assigning' a contract. 'Varying' a contract means changing one or more parts of it after it has already been made, for example, the amount of money payable, the timeframe in which something is due or what needs to be done. 'Assigning' a contract means transferring the rights and benefits under it to someone else.

It is first worth checking the contract to determine whether it specifies that the contract can be varied or assigned by other individuals (i.e., one of the current Managing Trustees) on behalf of the management committee (or equivalent) of the unincorporated association rather than the original signatory. If the original signatory was acting as an authorised representative or agent on behalf of the members (or management committee) of the unincorporated association pursuant to its rules or constitution, then there may be similar rules allowing for the appointment of a new authorised representative or agent who can vary, assign or take such other action as may be necessary in connection with the contract.

Who is legally responsible if the unincorporated association breaches a contract?

It will generally be the Managing Trustees (those with control and management of the administration of the unincorporated association) that risk personal liability, although depending on the constitution of the organisation and the contracts that they have entered into, it is possible for the wider membership to become implicated as well in certain circumstances.

Will an individual Managing Trustee who signs a contract be personally liable, or would he/she be considered jointly liable with the members as a whole or all of the Managing Trustees collectively?

The Managing Trustee signing the contract will be personally liable as a signatory undertaking obligations under the contract. Whether other Managing Trustees or the wider membership would be liable jointly with the signing Managing Trustee will depend on the facts and circumstances of each specific case. A number of factors will be relevant. The first is whether the unincorporated association has any rules or any agreement as to how liability should be shared and what those rules say. Committee members' or general members' liability, for example, may be limited by express terms in the rules or constitution. The circumstances in which the contract was signed will also be relevant. Individuals contracting on behalf of the association may be personally liable or they may be acting as agents for the members as a whole or the management committee (or equivalent). If authority to enter the contract was given by the management committee, then the Managing Trustees may also be liable.

This is one reason why it is important to have basic 'rules' written down that state the unincorporated association's aims, the powers it has to achieve these aims and the management procedures, including how to close the association, even if the unincorporated association does not have a full constitution. The Charity Commission has a model constitution for unincorporated associations which can be used for this purpose.

Is it possible to limit individual liability when entering into contracts?

The contract can include a clause that limits liability to a specific sum. Personal liability of the individuals could be restricted to the funds of the unincorporated association, for example. However, third parties are likely to push back on this if they believe that that the funds of the association are not sufficient to cover any potential claims.

If we have a legal claim against a third party under one of our contracts, how do we bring it? Is there any risk for the Managing Trustees?

As an unincorporated organisation does not have its own legal personality, it cannot bring a claim itself. Instead, Managing Trustees would have to bring claims personally and in their own names. The risk in doing so is that, if the claim is not successful, the claimant(s) can be ordered by the court to pay the defendant's legal costs. As a result, the individual Managing Trustees would be liable for such costs. In this situation, it would be crucial to have sufficient insurance in place to cover the risk of such liability.

Land

Can an unincorporated association own or lease property?

An unincorporated association cannot own or lease property. Instead, property must be held by individuals on behalf of the association. This can be done in several ways, including commonly by some of the members as trustees on trust for all the members.

How land is held, and any associated liabilities, depends on the specific circumstances of the unincorporated association and the relevant contracts. Legal advice should be sought if the unincorporated association holds any property.

Who is liable for obligations under a lease or property agreement?

The individuals who signed the relevant lease or property agreement, being Holding Trustees, will be personally liable for the obligations under the agreement (for example, rent payments).

Can an unincorporated association mortgage land?

If an unincorporated association does not have an express power under its rules to borrow money, it cannot grant a mortgage over its property to secure an overdraft or a loan from a bank or a third party (including its own members). If the unincorporated association does have an express power, then a lender may require proof of that power and proof of how title to the property is held.

What happens to the property if the unincorporated association dissolves?

If the unincorporated association dissolves and no longer exists, then the question of what happens to any remaining assets (including property) depends on the specific circumstances of the unincorporated association. If the rules of the unincorporated association specifically deal with the distribution of its property on its dissolution (for example, that it is applied to another charitable purpose) then those rules will prevail. Usually, the governing document of a charitable unincorporated association would include wording to prevent any distribution of its assets to the members. In practice, it is likely that the property will be sold, and the resulting funds would be put towards another, similar charitable purpose once all of the unincorporated association's liabilities have been satisfied.

What should we do if we discover land/property of the unincorporated association is held in the name of a Holding Trustee who has passed away or with whom the association has lost contact?

When Holding Trustees change (for example, by retiring or dying), the general law on changing trustees applies. If the outgoing Holding Trustees do not transfer the land, it can cause considerable problems later, particularly if there has been more than one change of Holding Trustee or if a former Holding Trustee dies. For example, if Holding Trustees want to sell or transfer land registered in the names of former Holding Trustees, they must trace those Holding Trustees or obtain evidence of their death. This would mean liaising with the personal representatives or executors of the deceased Trustee. Alternatively, the remaining Holding Trustees may need to apply to the court for a vesting order to transfer the land's ownership to another Trustee. None of these scenarios are particularly desirable.

Some of these potential difficulties can be avoided by applying to the Charity Commission for an order to vest land held on trust for a charitable unincorporated association in the Official Custodian for Charities. The Official Custodian will hold title to the charity's land on its behalf and means that Holding Trustees do not need to hold land in their own names (although for unincorporated associations, the Holding Trustees must still be party to the relevant legal documents, e.g., a conveyance or transfer, lease or mortgage). This simplifies title to the land and avoids:

- The need to transfer the land every time a new Holding Trustee is appointed to the charity; and
- The risk of charity land remaining vested in individuals who are no longer involved with the charity and who may be difficult to trace.

Where charity land is vested in individuals who have died or are untraceable, successfully applying for an order to vest charity land in the Official Custodian may be the best way to perfect the charity's title to the land. This is a free service provided by the Official Custodian, and further information can be found on the government website.

Note that even where land is vested in the Official Custodian, the power and duty to manage the land remains with the Managing Trustees. Also, the fact that the land is vested in the Official Custodian does not release the Managing Trustees from their obligations in respect of the land. Obligations which are enforceable by or against the Official Custodian because the land is vested in the Official Custodian are enforceable by or against the Managing Trustees as if the land were vested in them.

Conversion

If an unincorporated association wishes to incorporate, what can it do?

If a charitable association determines that an unincorporated structure is no longer the best legal form for it, then it can incorporate to form another structure, such as a company limited by guarantee, or a charitable incorporated organisation (**CIO**), for example. These structures have a separate legal personality and benefit from limited liability. The charity can legally enter into contracts in its own name, rather than in the names of its individual trustees.

To convert to a CIO, you would need to set up and register a new CIO, transfer your charity's assets and liabilities to the new CIO and close the unincorporated association. Legal advice should be taken when considering a conversion, as there are likely to be additional legal considerations where employees and land are being transferred.

Note that the decision to incorporate will involve establishing an incorporated entity, transferring the unincorporated association's assets to it, and dissolving the unincorporated association. Depending on the rules governing an unincorporated association, this is likely to require the prior approval of the members of the unincorporated association. Legal advice should be sought before proceeding where necessary.

What happens to an unincorporated association's contracts if it decides to incorporate?

These contracts would need to be transferred to the newly incorporated entity. This can be done via a "novation" of the relevant contracts. Novation is a means of transferring a party's rights and obligations under a contract to a third party. This process is relatively straightforward and will require the consent of all the parties to the original contract and the new entity to which the contract is transferring. Alternatively, the contracts could be terminated (if possible) and new contracts drawn up with the new entity.

If an unincorporated association does not incorporate, can the Holding Trustees or Managing Trustees just rely on insurance to cover their personal liability?

Many unincorporated associations take out insurance to protect individuals from personal liability. Trustee indemnity insurance and public liability insurance products are an option to try and cover off some of the risks. However, there are a range of financial risks for which insurance is generally not available. For example, liability under employment contracts, commercial agreements or a lease may not be covered by the insurance products that you have chosen. It is crucial to check and understand the scope of your policy carefully.

One of the key disadvantages of relying on insurance products is that third parties may be wary of contracting with (or donating money to) an unincorporated association. As a result, they may request particulars of the insurance policy (in order to understand to what extent the potential liabilities are covered), require personal guarantees from Managing Trustees, or may even refuse to contract with the unincorporated association.

Although relying on insurance products can be feasible, the inherent risk is that ultimate liability still remains with the Managing Trustees and / or Holding Trustees (as the case may be). In practical terms, the insurance company may delay or deny a payout in the event of a claim or any insurance payout may not

cover the entire liability faced, which could have serious financial repercussions for the Managing Trustees or Holding Trustees involved.