

LAW

CONSTITUTIONS – NEED FOR REVIEW?

Elaine McDaid, legal expert argues that clubs should review their constitutions.

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In Golf Club Management edition November 2008, Adrian Houstoun argued that a recent case when the Environment Agency tried to prosecute the chairman and treasurer of a club showed the need for better risk management within clubs. (See GCMA library document no. 9006)

Analysing the same case, legal expert Elaine McDaid argues that clubs should review their constitutions

Can innocent golfers become criminals? Yes, they can. The Environment Agency recently prosecuted the chairman and treasurer of a golf club after an underground pipe, taking heating oil from a storage tank to the golf club's boiler, was punctured by builders. More than 1,500 litres of oil leaked into a nearby water-course. The two officers of the golf club were, to their enormous surprise and horror, charged with a strict liability offence and could have faced imprisonment for up to two years. Recently, the Court of Appeal held that, not only was it right that the two officers could be prosecuted, but also any of the golf club's members could have been joined in the prosecution. This particular golf club's 900 individual members would certainly have tested the capacity of our prisons!

Many clubs and membership organisations are unincorporated associations. Unincorporated associations have been defined as a body of two or more persons bound together for common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations. These undertakings, duties and obligations are normally brought together in a constitution, which sets out rules dealing with the appointment of office-holders, such as the chairman, secretary and treasurer, and the election of members of the management committee. The duties, powers and responsibilities of those appointed will normally be set out in the constitution, as will rules governing membership. The membership is usually identifiable, but of course changes constantly as people join and leave. Critically, an unincorporated association has no legal identity of its own. In legal terms, it is simply a collection of individuals.

Consequently, as was dramatically portrayed in the golf club case, each and every member of an unincorporated association is legally liable for any offences which may be committed in the name of the association. All the members of an association will be jointly and individually liable for the actions of the association. The office holders and the management committee members are normally the first in line if anyone has a grievance against the association.

Because it has no legal identity, an unincorporated association also suffers from additional drawbacks. It cannot enter into contracts in its own name. It cannot borrow money. Neither can it start any legal action. Because of the peculiar nature of an unincorporated association, it is always very hard to determine the precise legal basis upon which it may hold any assets. This difficulty gives rise to two important consequences. First, anyone wishing to leave a legacy to an unincorporated association faces serious difficulties in wording their gift in their will. For example, is the gift only to those persons who are members of the association when he makes his will, or when he dies? Can the gift benefit future members? If future members can benefit, it is likely that the gift will fail. Legacies to unincorporated associations have proved to be fertile grounds for fiercely fought litigation – we lawyers love a legal gravy train! Secondly, there are often disputes as to how any assets of an association should be distributed when the association ends – another opportunity for lawyers to rub their hands with glee!

Is there a relatively straight-forward solution? All clubs and membership organisations ought to review their constitutions and particularly consider whether it would be wise and prudent to become a company limited by guarantee, where the liability of the members is limited, normally to £5 or £10. A company limited by guarantee is a legal person and has a legal identity of its own. An association is likely to enter into contracts, it may consequently need the benefit of limited liability to protect its management committee members and its general members. These contracts might include employment contracts, contracts with service or product providers, the acquisition of land or buildings. A guarantee

company will give the benefit of limited liability to these contracts. It should also provide a clear legal identity and a democratic structure, with the duties and responsibilities of the directors set out very comprehensively in the Companies' Acts.

Following this review of the constitution of clubs and membership organisations, their members – and golfers in particular – can pursue their legitimate activities and aim for a round in par with complete peace of mind.

Thankfully in this case, the Court of Appeal used its discretion to acquit the chairman and the treasurer of the golf club.

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Also see GCMA library documents:

WATER MANAGEMENT:

<i>Prosecution for polluting controlled waters</i>	<i>9001</i>
<i>Water pollution at golf clubs</i>	<i>9006</i>