

South Wales Caving Club

Report of the Risk and Governance Sub-Committee.

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1. Membership.

The sub-committee consists of the following senior members: Andy Freem (Chairman), Kevin Diffey, Clark Friend, Jem Rowland and Fred Levett. All have played a full part in the research and debate that has led to this report. For this reason, further references to the sub-committee use the term 'we'. We have been passionate in our desire to focus the debate on the well-being of the Club and its members over the coming years and not simply to present a cold legal position.

2. Our brief and its context

There has been a rumbling concern amongst some members about the extent of exposure to civil and criminal liability that there may be for members, committee members and trustees under our present structure. A range of views, and often diametrically opposed views, have been put forward. A change by a Northern caving club to become a type of incorporated association (IA) rather than an unincorporated association (UA) has prompted the Committee to establish this sub-committee. Our brief is to research the alternatives, present an explanation of what they may offer and make recommendations. Also we are asked to comment in the round about SWCC's governance arrangements and, on a lesser point, offer views on better managing the Trustees (see section 8).

The context for our work is one of substantial legal and societal change since the founding of our Club in 1946. Over the period of the Club's existence there have been, in society, huge changes in aspiration, wealth, transport, communications, population density, land access and health. The shadow of the Second World War has diminished, giving way to a reduction in personal responsibility and increase in state intervention. The law now regulates the day to day affairs of both citizens and organisations in unprecedented detail, with a myriad of potential penalties for infringement, or the right of third parties to seek redress. It is a credit to the Club's founders and successive committees that our organisation has been steered to this point in a largely successful way.

We are clear that the Club must continue to adapt to the environment it operates in. Yet, the Club has become more influential and is thus more likely to be the subject of scrutiny. SWCC's asset register is impressive: 12 cottages (£0.5m), 60 acres of freehold land (£0.2m), 2500 acres of mineral rights (£?), 3 tenants, cash (£50k) and a turnover of £20k p.a.. The Club also owns a cave entrance, manages cave access and runs a hostel and campsite. We know that, whilst the Club does interact in a substantial way with the outside world, at its heart it is a members' club in the traditional sense of the word. Our members attach great value to freedom of decision making and action.

3. Risk and risk management

Given the concerns relating to liability, we have looked at the management of risk in the broadest sense and have conducted some analysis. We have created a draft risk register for the Club which codifies the litigation risks, our current avoidance measures, legal minimums, best practice and the use of insurance and disclaimers. It also reviews general risks that might adversely affect the Club's future. It is not yet perfect but in time could provide a valuable tool for identifying areas of risk and our agreed response. Note that this is not about removing all risk; it is about agreeing what is an acceptable risk and managing that risk to the agreed level.

The risk register gives a clear understanding on when we rely on disclaimers (and thus can check we have them) and when we rely on insurance (and thus can check whether or not we are suitably covered). We have already used it to review insurance arrangements and have reported to Andy Freem on the suitability of our policy with BCA and the buildings' insurer. This is mostly good news, with a couple of changes needed, some areas to watch, and a bigger concern about the third party liability cover for our land holdings.

We realise that this more formal approach may be difficult for the whole membership to understand and may be best managed by a dedicated group, from which only the results are presented. The fact that this work has been done and is continuing offers us a 'due diligence' defence in a range of possible legal actions.

We are absolutely clear that, without proper risk management processes in place, simply playing with our legal status will not have the desired effect of reducing potential liabilities to an acceptable level. In today's world there is no magic structural solution to avoiding litigation, other than managing risk; changing the Club's legal status would be just a means of directing its impact to the least damaging place in the organisation. Further, insurance companies (for those risks which the Club chooses to insure) would not pay out to reckless clients. We noticed with interest that a climbing club that has now converted to an IA only realised it was not managing risk very late in the day of the incorporation procedure and decided it should do something about it.

A preliminary, but very important, finding of our analysis is that serious risks arise from running SWCC's hostel and campsite. In comparison, other sources of risk appear to be more manageable.

4. Key features of the Club's current legal status and comparison with an incorporated body

We realised that we lacked information about the nature of our current status and the risks and benefits involved. We agreed to buy 'Ashton and Reid on Clubs and Associations'. The second edition is up to date to 31st December 2010. The book is aimed at those who operate Clubs. It appears very authoritative and comprehensive but is a technical read. We also reviewed material produced by CPC, BPC and Fell and Rock in their pursuit of incorporated status and looked at

some other sporting organisations. We looked at the publication “Charitable Incorporated Organisations: A guide to establishing your organisation as a CIO” published by Sherrards Solicitors to provide a clear alternative view and the BMC guide to landowners (of climbing locations).

Most of the information in the remainder of this section (4) is derived from the authoritative book by Ashton and Reid referred to above.

4.1. Background

There is a large body of law that relates to Clubs and 6 criteria are set out that must be met before we could be considered a club (Book reference 1.1). SWCC meets those criteria and is an ‘unincorporated association’ (UA). Such clubs date back to 1650 and they are governed by common law and case law of which there is a large amount. This leads to uncertainty over the outcome of legal action. An ‘incorporated association’ (IA) is governed largely by statute law, giving greater clarity in the case of legal action. There are different routes to incorporation but these are not the subject of this section.

4.2. Advice

Advice is offered on whether to operate ‘unincorporated’ or ‘incorporated’. The choice is determined by relative priorities – ease of management or peace of mind. However it is far from simple. Ashton & Reid further state that if the club is well run, financially secure and does not want to borrow money then ‘unincorporated’, in their view, is satisfactory (1.46). Some further details are presented below.

4.3. Liability and the IA

There is no magic solution to avoiding liability for individuals. In an incorporated association the club exists as a legal entity and legal action may be taken against it and action may be taken in its name. However directors who are negligent, or consent to a course of action, may still be personally liable. There is also the risk of failing to operate within the relevant statute law governing the type of incorporation and incurring a penalty. Members’ liability is definitely limited to a predetermined sum (usually £1).

4.4. Liability and the UA

Who might be liable in an UA? Case law has limited the liability for an individual member to the entrance fee and subscriptions. This was summarised in an appeal case in 1903 (1.10). Note the ‘s’ on subscriptions; we believe that this refers to the total sum of money paid to the Club during the entire period of a person’s membership.. For example, if an incident occurred, the members *at the time* would be liable to the value of their entrance fee and cumulative annual subscriptions. This principle seems to hold well for contractual and financial matters, however examples are cited where all the members have been held liable in the torts of negligence or

nuisance to a third party. No indication is given as to whether the extent of their liability is limited as stated in this paragraph. The Management Committee of the UA are however liable personally without limit and the book states “this may be seen as a serious disadvantage of an unincorporated members’ club”. Various protection measures are described. Chief amongst them is adequate insurance (12.17, 5.44, and 12.58). Of vital importance would be funds to pay a solicitor to defend any action, since a speculative action could well be successful if undefended. This may be quite serious for individual members who, even with case law on their side, nevertheless would need to mount a defence.

4.5. Criminal Prosecution

In respect of criminal action the situation is complex but offers some hope. In 2009 an appeal was heard relating to an offence under the Environment Act. Initially the prosecution was brought against the Chairman and Treasurer of an UA. The lower court found that they could not be convicted without personal culpability and the action should be brought against the UA. How could this be so as the UA did not exist in law? The appeal court considered a 1984 case in which the court looked at the Interpretation Act of 1978. This provides definitions to be used when considering statute law. A person is defined as including amongst other things ‘a body of persons unincorporate’. Thus if an offence can be committed by a person a UA can be prosecuted for that offence. The book points out that there are many offences in law which contain different provisions and both officers and members of clubs can be prosecuted if it is so specified. An example is given of various offences in licensing law where an individual member can be guilty for being present when the offence was committed.

This is a brief summary of a complex area and demonstrates the uncertainty a UA finds itself in. A prosecutor would find themselves in a similarly complex and uncertain area when taking a decision to prosecute. Note that whilst an IA can be prosecuted in its own name, Directors of an IA may find themselves personally liable if the offence arose through their consent, connivance or neglect, and this could include members of the IA, as in the example given above.

4.6. Trustees

Trustees are needed to hold property for a UA (but not for an IA, which can hold property in its own name). The duties of a trustee depend on the type of trust. For SWCC the trustees are required by the Constitution to comply with the lawful instructions of the Committee. This is described as a ‘bare’ or ‘simple’ trust and the trustees have no active duties to perform. However the authors of the book consider that trustees are the occupiers of any property (the UA does not exist in law and so cannot be an occupier) and thus may become defendants in a civil action relating to the property. Insurance must extend to cover them. This is surprising as whilst

trustees are clearly owners, one might see the club as the 'occupier' which is then represented by its committee who are liable as described above.

4.7. Suing a third party

The book also discusses the matter of an UA taking action against another party, say for the non-performance of a contract. It cannot act in its own name and scenarios are described to deal with this but all involve individuals. An IA would act in its own name.

5. A central question; an unincorporated association or an incorporated body?

What can we learn from Ashton & Reid's 537 pages of law, advice and guidance?
What follows is our view.

Of the two potentially relevant structures:

- An UA has the benefit of ease of management, is flexible and responsive to members' needs and wishes, is a well-recognised mechanism for operating a club and has little interference from outside. There is a great deal of case law (i.e. that decided by judges) relating to UAs and potential liability but it is complex and generates uncertainty.
- An IA operates within a strict and defined regime that removes uncertainty in relation to potential liability but requires compliance with operating rules set by the Government.

Aside from concern about liability, an UA is ideal for us. If legal action is taken against us, ordinary members seem reasonably protected but may need to mount a defence against speculative action. The Committee members are exposed and they and the Trustees may face civil action in their own name.

An IA would be sued in its own name. It seems likely that since 2009 (see 4.5 above) a prosecution would be brought against SWCC in its own name (while in its present form as an UA), but culpable Committee members may face personal action. In a criminal case an IA would be prosecuted in its own name but directors could face personal action if an offence arose because of their consent, connivance or neglect.

As discussed in section 3, for both UA and IA good risk management is key to reducing liability. Insurance provides the next layer of defence. Structurally, there is no magic bullet to avoiding liability. Apart from the ease of management a key difference between being an IA and UA is much greater certainty in relation to liability, summarised by the book as 'peace of mind'. An important aspect of this is the potential for civil action to be taken against individuals as representatives of the club as opposed to being taken in the club's own name.

We have looked closely at the information from other organisations. It is difficult to see any definitive theme. Some rugby clubs are IA, some UA, similarly for climbing clubs. The MCC (Marylebone Cricket Club) has 18,000 members, is worth about £18m and is an UA. One might speculate that the members are comfortable with this as, whilst they are at risk, they have the funds and legal expertise to see off all comers.

On balance we conclude that the central issue is more about attitude to risk, and the views of informed members, than finding the answer in law.

Our recommendations are given in section 7

6. Governance of SWCC in its present form

The amount of business that must be transacted by the Committee has increased dramatically, to our direct knowledge. This is as a result of SWCC's increased influence, some of the changes described in section 2 and the Club's range of assets. The Club is governed in virtually the same way as when it was created 67 years ago. This is astonishing and a tribute to all committee members who make it work. The stresses and strains do show with invariably long meetings, difficulty in recruiting new committee members, the lack of time for proper policy development, and the regular misunderstandings that arise among some sections of the membership unfamiliar with the complexity of what has to be managed.

We recommend change. It is time to devolve some activity-based (rather than policy-based) matters to sub-committees. This is already taking place on a short-life basis. Examples are this sub-committee, the archive sub-committee and, previously, various fixed aids sub-committees. To be successful, any long-term sub-committees need to have their basis in the constitution, with the appointed officer as the sub-committee chairman. This gives a new opportunity for member involvement without the formality of the main committee rules. It should be done with the consent of the membership and we know it would be a considerable challenge to everyone to adapt to the new arrangements. Before developing this theme further, our proposal in section 7 gives the delegation approach a significant kick start.

7. Our recommendations, a way forward, engaging members and timetable.

We recommend that a formal system of risk management is adopted to control risk at a level acceptable to members, and that adequate insurance and, where suitable, disclaimers are used as a backstop. With this in place we conclude that a change to our legal status should be considered to mitigate the impact of a key group of risks, namely those arising from our running of a hostel and campsite. The particular issue is to deal with an unlikely but catastrophic incident such as major injury or fire.

- We consider that the nature of the change is not so much dictated by the 'right' legal way as what would fit well with the Club.

- By examining various scenarios, we conclude that wholesale conversion to an IA would not be acceptable to the membership (until after a major incident).
- We also conclude that a step change in our operations, such as employing someone, might lead to a change.
- We felt that if the Club was being formed from scratch this year we would start out as an IA.
- We have tried to look ahead as to what the Club's future may be and find this difficult.

What does seem clear is that we are unlikely to return to a scenario of considerably reduced risk exposure, say a couple cottages for a core of 60 or 70 active caving members and significantly reduced influence. Nevertheless this is a possible outcome of the general reduction in club based caving and should not be completely disregarded.

If our business activities of running the hostel and campsite (over 50% of the income from which comes from non-members) are to continue we recommend the following:

- To reduce liability from our biggest source of risk, a lease for the cottages should be granted to a new IA which will operate the hostel and campsite on behalf of the Club and would have the income from them.
- This IA would probably be the simplest form – a company limited by guarantee. All Club members would be members of this company and an AGM would appoint say 3 Directors to step down 3 yearly in rotation, but be eligible for re-election. It may be that the Chairman of the Club would also be Chairman of the board.
- Thus Club Members would still be in control but liability in relation to these risks would be limited by virtue of the company to £1 and the Club's assets protected.

Other organisations like ours have not become 'companies limited by guarantee' but Independent friendly societies, because of the tax bill on acquiring the assets. In our scheme as proposed above no assets would transfer to the company. The company would acquire only a lease granting the right to operate the HQ and campsite..

Fell and Rock did look at this possibility but rejected it as too complex. We will certainly need the right sort of legal expertise to steer us through the changes.

Our assessment of the plus and minuses are:-

For	Against
Removes some important risks from committee and trustees Further protects members with certainty of liability Would be more acceptable to members than complete incorporation	Complicated admin Need to find directors Members may misunderstand purpose. It could be used to encourage divisiveness Insurance split needs careful thought

<p>Gives stability to running of cottages Does not expose ownership of property (including OFD1) to loss Could offer financial reward to Directors to run it if club agreed. Would be answerable to AGM. Devolves management of a function, thereby easing load on main committee. Can be reversed, unlike full incorporation.</p>	<p>More expensive than current arrangements (unless incident occurs) Board of directors will be a scapegoat for lack of policy decision about what club should be. Directors' remuneration will be an issue with members (if it occurs).</p>
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It is important to remember that, under SWCC's present structure as an UA, if a claim is made, Committee members could find themselves personally liable without limit. Insurance (if valid) will provide financial protection, and the members could vote the Club's reserves for use (£50k) if constitutionally permitted. As an UA we would be unable to mortgage the property we own. Until settled it is unlikely Committee members will sleep easily at night. Similarly Members, whilst previous appeal cases have offered them protection, may have to defend a speculative action. Both Committee and ordinary members appear to be liable jointly and severally and thus can be cherry picked for wealth. On this point further legal advice is needed.

Under our proposed scheme, SWCC would still own most of the existing land (including OFD1) and thus there would still be the potential of action under which committee members and members could be liable. However, we believe that in this case suitable risk management and insurance cover could reduce the relevant risks to an acceptable level.

For a sensible debate involving members on this subject much must be done to build an understanding of the issues. At the start of this work we were conscious of the wide spread of opinion and misinformation circulating in the Club and there are many examples of members being unaware of what goes on despite the best efforts of those who manage communications. We cannot stress too strongly the need to use all media to communicate key messages consistently and repeatedly (and correctly and unambiguously!). There are those who do not use the internet, mobile phone or Facebook and all graduations between that and those who would not contemplate visiting the lavatory without a 3G enabled smartphone. We recommend special briefing sessions at the Club prior to the next AGM.

At the next AGM guidance can be obtained as to a general course of action which will involve expenditure on legal advice. At the AGM in 2015 a formal vote would be taken to set up the proposed company and create the lease.

Many questions will arise, some to be answered now, others can wait for a preliminary decision. The following arise from our 'brainstorming' exercise.

Question	Answer
Do we need to use a very modest working title for the company to help avoid accusations of empire-building?	The company would be an integral part of the Club, just a legal device to reduce individual liability, like we use trustees to own property. We therefore suggest a pragmatic title such as 'Powell St. Ltd' ('PS Ltd.')
How can we make sure it doesn't look like 'free-rein for the working week crowd'? (There are already feelings among some SWCC members that the working week team have too much freedom, but of course in other quarters there is resistance to doing anything much!)	Being a Director of this company will require different skills to actually maintaining the building. Working week may remain an important part of how we keep the property in good condition. The Directors will answer to an AGM
If "PS Ltd" held the building on a repairing lease, what control would/should SWCC have over work done on the building?	As much as any leaseholder, i.e. reference back over structural changes. In any event PS Ltd would answer to the membership at an AGM
How much land would be leased to PS Ltd. along with the building? Lawns? Car park? Gardens/camp site? Sheds? Gas tank location?	All of this to maximise the amount in a 'protected' environment. This is what the insurance company recognise as 1-10 PS.
Should access rights to HQ and relevant land vest in PS Ltd or should SWCC members retain right of access under the lease?	The lease should give access rights to PS Ltd and thus to members
What length of lease would be appropriate?	10 years
How could SWCC ensure that hut fees are maintained at a reasonable level for members?	Members will vote at the company AGM. Accounts will show the true cost of operating our HQ.
How could SWCC ensure that members still feel that the HQ is theirs, rather than purely an independently run hostel? Or should the latter be allowed to happen?	This is a legal device, a holding company. The policy on how it is used is already a critical (and controversial) matter. It must be clearly settled in the run up to creating the company
How do we head off any (consequent?) move for SWCC to set up a new HQ independently of PS Ltd?	The company is part of 'SWCC' just like the trustees, answerable to an AGM. Such an attempt will bring the Club to an end
What arrangements should there be for termination of the lease?	Not known
Will/should PS Ltd be required to be entirely self-financing?	Not known
Would/should SWCC seek to derive income from PS Ltd beyond the rent specified in the lease?	Not known
Would the rent be peppercorn or real?	Probably peppercorn, this is just a legal device

Should PS Ltd be entitled to borrow money?	It could do, a matter for the articles
Would there be any aspect of HQ liability which would remain with SWCC, rather than PS Ltd.?	In relation to the HQ, certainly as little as possible
Given the extra administrative formality required of PS Ltd., could SWCC's current tax status etc. be in jeopardy?	SWCC's tax status should not change, but registration as a charity would be easier with our trading arm separated. As the company's tax status, not known
Should we consider acquiring charitable status for SWCC as part of this process?	Possibly
Administration of PS Ltd should be at arms-length from SWCC Committee. Should overlap of directors/committee members be prevented?	This is not necessary in law, but overlap does not spread responsibility and work load
Would there be potential VAT benefits available to PS Ltd?	Possibly

8. Trustees.

Not yet discussed