

# trust or company? a guide to the distinctions

- 1 If you are intending to set up a new charity for a church or other Christian ministry, you have a choice between two main structures. These are:-
  - (i) The charitable trust (with a Declaration of Trust or Trust Deed as the constituting document) or
  - (ii) A charitable company limited by guarantee (governed by Memorandum and Articles of Association)
- 2 The first point to make is that both are equally charities. A charitable company is no less a charity than a charitable trust, it simply has a different legal structure. Both structures can provide the full range of charitable objects and powers that you may need. With either structure, the trustees remain subject to general charity law and must always act with appropriate care and must keep within the charitable objects and powers. Trustees (directors) of a charitable company are, of course, also subject to the Companies Acts and various company law requirements.
- 3 As a general point, the Trust is simpler to administer and cheaper to establish and operate. The chief attraction of the company structure is that it provides protection for the individual trustees/directors from personal financial liability in some circumstances where trustees of an unincorporated charitable trust would not be protected.
- 4 There may be an important change with a new 3rd alternative being introduced in early 2010. This is the proposed Charitable Incorporated Organisation (CIO). This will permit charities and their trustees to gain the benefits of limited liability outside the usual Company Law/Companies House framework. Clients who are interested in going the CIO route, who do not wish to wait may be advised to start with a company and then convert to a CIO later. There would be an automatic statutory power to convert to a CIO.
- 5 **The Liability Issue**
  - 5.1 There are two sets of potential liabilities that charity trustees face.
    - (a) The first is in respect of the **duties owed to the charity** to act with the necessary care and not to act outside the objects and powers of the charity. If trustees cause a loss to the charity, either through a lack of proper care or by spending money for purposes outside the charity's objects, they can be called upon to refund the charity out of their own resources. This applies as much to directors of a charitable limited company as to the trustees of an unincorporated charity.
    - (b) The second set of liabilities has to do with **potential claims by third parties**. Examples of these would be: claim for damages for personal injuries; claim for compensation for unfair dismissal by an employee; claim for breach of contract by a supplier of goods and services (e.g. building contractor on building project); claim for damages in respect of "wrong" counselling advice. It is in respect of these potential claims that protection is afforded to trustees of a charitable company.

- 5.2 In the case of a company, a separate legal entity exists. This means that any debts owed by the company are indeed owed **by the company** and not by the trustees personally. This assumes that the trustees have not given personal guarantees or entered into contracts in a personal capacity. In the case of a Trust, there is no separate corporate entity, and therefore the debts and potential liabilities of the charity, which cannot be met out of its own resources, can become the liability of the trustees personally.
- 5.3 It should be added that in the case of a company, if the directors/trustees continue to trade/operate whilst knowing that the company is insolvent, they can then become personally liable for debts owed by the company.

## 6 Holding Legal Title to Property

As a company exists as a separate legal person, title to buildings, stocks and shares, etc., can be held in the name of the company and not in the names of the trustees for the time being. This saves legal costs and fees associated with a change of legal title of land/buildings when Trustees change.

## 7 Formalities, Filing Requirements, Penalties

- 7.1 The charitable trust structure has the benefit of greater simplicity. Trust Deeds usually leave the trustees to decide how often they meet and how they convene their meetings, etc. They ought to keep minutes of their meetings, although this is not a formal legal requirement.
- 7.2 Companies face stricter requirements under the Companies Acts. An AGM has to be held at the right time with proper notice given of it. Annual returns and notices of changes of directors or secretary or registered office have to be notified to Companies House within certain time limits. Year end Accounts must be sent to Companies House within strict time limits. Late filing of the annual accounts brings an immediate fine of £150 which rises if the delay is more than 3 months.

## 8 Accounting Requirements

The requirements are broadly similar for charitable trusts and charitable companies in that the Charities Accounting Regulations have placed equally onerous requirements to keep accounting records and to produce annual accounts to certain standards on unincorporated charities as apply to companies. Having said that, even at the lower income levels, charitable companies will usually need technical accountancy advice and help as the regime is more complicated.

The headline differences in terms of audit/examination:

- Both **company and unincorporated charity** (Trust) are required to have their accounts examined (like a mini-audit) when the income or expenditure exceed £25,000 per annum.
- Both a company and a trust require full audit is required when the income exceeds £500,000 **or** the gross assets exceed £3.86 million and income exceeds £250,000.
- A trust (but not a company) where income is below £250,000 per annum is able to prepare a single form of year end accounts called "receipts and payments" accounts.

## 9 Set-up Costs

If you use our services, the cost of setting up the company are about 25% higher than those of the Trust because of the additional and more complicated documentation and the need to make application both to Companies House and the Charity Commissioners.

## 10 The Feel

Particularly for churches, the idea of being formed as a company could cause some cultural problems! Legally there are no problems, but it may have an unusual "feel". Please note that charitable companies do not have to have the word "limited" at the end of their name.

### SUMMARY OF MAIN DIFFERENCES

ASPECT	TRUST	COMPANY
<b>Personal liabilities</b>	<input type="checkbox"/> Trustees have potential liability to third parties, and could be liable for breach of trust	<input type="checkbox"/> Trustees/directors are protected from personal liability to third parties (unless entered contracts, etc., in a personal capacity). Could still be liable for breach of trust.
<b>Holding legal title to property</b>	<input type="checkbox"/> In names of trustees - cost of transferring title each time trustees change	<input type="checkbox"/> In name of company so unaffected by changes of trustees - avoids costs.
<b>Formalities</b>	<input type="checkbox"/> Simpler to operate	<input type="checkbox"/> Various Companies Acts requirements - quite onerous
<b>Accounting requirements</b>	<input type="checkbox"/> Slightly less onerous. When income exceeds £250,000 pa, the requirements are virtually equivalent.	<input type="checkbox"/> Slightly more onerous and complicated, <u>especially</u> at income below £250,000 pa
<b>Set-up costs</b>	<input type="checkbox"/> Cheaper	<input type="checkbox"/> More expensive.