

The Company Structure

The purpose of this paper is to consider the constitution of a company as a possible appropriate structure for the private protection and maintenance of monuments. The examination will be carried out by reference to English law but it would appear that the salient features of English law are largely paralleled in other legal systems.

There is a very good reason for carrying out this examination by reference to English law. The English legal system does not yet have a special kind of incorporated body designed purely for not-for-profit activities. Thus, as a matter of practice, the English legal system does currently use the structure of a company as a vehicle for the protection of the heritage. This means that there are practical examples available supplying conclusions to be drawn which can prove or disprove any theory derived from legal concepts.

The first question to address is what is meant by a company in this context. In its most basic form, a company is created when a group of people, operating together, employ some legal mechanism whereby they create, out of that co-operation, a legal entity which has a separate legal identity distinct from those of the individuals involved.

All legal systems have a number of mechanisms for achieving incorporation. Under English law a body can be incorporated by Royal Charter; by its own individual statute; under the Industrial and Provident Societies Acts; as a Friendly Society, as well as under the Companies Acts. There is even machinery (currently under the Charities Act 1993) whereby the trustees of a trust can incorporate the trustee body alone, leaving the trust and their role as trustees intact.

If one examines very briefly the characteristics of these different types of incorporated body, most can swiftly be discounted for the purposes of this exercise. Bodies incorporated by their own particular statute tend in the English system to be quasi public bodies, such as national museums, and are thus outside the remit of this discussion. Similarly, bodies incorporated by Royal Charter have either been established for a very long time, or are being established to further government policy. They tend, therefore, to be schools, universities, hospitals and institutions of that nature. An Industrial and Provident Society's constitution must by law follow a very rigid format, which is not easily adapted to the preservation of the heritage. Thus the types of corporate body to be considered for the purposes of this discussion are those incorporated under the Companies Act 1985.

Legal systems other than the UK similarly all have a number of different types of incorporation, though in Sweden there is only one type that affords the benefit of limited liability. France, indeed, to a casual observer appears to have a different kind of incorporated body for every conceivable type of activity! Be that as it may, all jurisdictions have a cor-

porate body equivalent to the company which has broadly similar characteristics. These are:

- separate legal personality;
- the limitation of liability for the debts of the company to the company's assets;
- the concept of fragmented ownership with the individual entitlement of separate owners being represented by shares in the company;
- a similar structure of government, having the members of the company meeting in regular general meetings with the management of the company delegated to a management board.

There is one distinction here between the different jurisdictions, in that many jurisdictions require a company to have a further supervisory board to oversee the management board, but that is perhaps a point of detail. Most jurisdictions also distinguish between public companies where the shares are freely available to members of the public and can be bought and sold on the Stock Exchange, and private companies where the ownership and transfer of the shares is more restricted and the shares are not quoted and purchasable through the market.

Accordingly, it seems safe to assume that for the purposes of examining the company as a suitable vehicle for maintenance of the heritage, English law is sufficiently similar to that of other jurisdictions, to justify confining the examination to consideration of the forms under English law.

There are two types of companies incorporated under the Companies Acts: a company limited by shares on the one hand and a company limited by guarantee on the other. In a company limited by shares the liability of the shareholders to meet the debts of the company is limited to the amount paid for the shares at the outset. Once the shares have been allotted to an individual at a particular figure and that figure has been fully paid up, whether by the original owner or a subsequent owner, then the shareholder of the individual shares will not be liable for any further sums in respect of debts incurred by the company. In the case of a company limited by guarantee the situation is precisely the opposite. A member of such a company does not actually subscribe any money at all unless and until the company reaches a situation where it is unable to pay its debts. Instead the member, when he becomes a member, whenever that might be, agrees to guarantee the company's debts up to a certain sum. Should the time ever come when the company needs to call upon the guarantee, it is then that the member must provide the sum in question. This is usually somewhere between £ 1 and £ 10 so the guarantee is scarcely an onerous one.

The two types of companies tend to be used for totally different purposes. A company limited by shares is a vehicle for investment. Shareholders buy differing numbers of shares and receive a corresponding proportion of the income of the company and its assets on dissolution. It is used for normal

commercial ventures. A company limited by guarantee on the other hand does not allow for any distinction between the financial involvement of the various members of the company. Thus the members all guarantee the same sum and all share equally in any dissolution. It is this type of company which in England would be used for the preservation of the heritage, and it is probably only its equivalent in other jurisdictions that would similarly be appropriate for this purpose.

In fact, in England, unlike many other jurisdictions the preservation of the heritage is capable of qualifying as a charitable purpose. Provided the company limited by guarantee has a memorandum which prohibits the distribution of the assets to the members on any winding up and requires instead that the assets be passed over to a similar charitable body, the company will almost certainly qualify as a charity. It will accordingly have to register with the Charity Commission. Whilst this may add a slight complication to the lives of those running the company, since it would introduce another level of regulation by the Charity Commission in addition to the regulations imposed by virtue of the Companies Acts, most companies would regard this as more than outweighed by the benefits of charitable status which it brings, not least the relief from certain taxes. Accordingly, in most cases those establishing companies designed to preserve a heritage asset will take steps necessary to ensure that registration as a charity is possible. This will mean, for example, including in the memorandum a prohibition against the remuneration of the directors and ensuring that the company's activities do not involve political activism.

All of what has been said so far is really by way of introduction to explain why, in considering how appropriate a vehicle the company is for the protection of the heritage, this paper will do so by reference to the charitable company limited by guarantee. Its suitability for this task will be examined under five heads as follows: Limited Liability; Conflict of Duties; Answerability; Flexibility and General Concept.

1. Limited Liability

As has been said above, it is a common characteristic of a company that it has separate legal personality. It is also a common characteristic that this is carried through to its logical conclusion, namely that the activities of the company are not those of its shareholders, and vice versa. Thus, creditors of the company are unable, should the assets of the company be insufficient, to look to the shareholders to make good the shortfall. This clearly makes it a very attractive vehicle for use in the preservation of the heritage. Ownership of stately homes or even of monuments can be a rather risky endeavour since they tend to cost a good deal to maintain. In addition a large number of visitors to such a monument means a large number of opportunities for such visitors to harm themselves in some way, particularly where the heavy costs of maintenance have meant that such maintenance is perhaps not carried out as thoroughly as it might be. Visitors who have suffered harm as a result tend to look to the owner for compensation. It would, therefore, be very difficult to find people ready to take on responsibility for the maintenance of such a monument if their personal assets would be at risk as a result.

If this limited liability is good for those running the organ-

isation, however, it is not necessarily good for the monument or heritage asset itself. In 1993 the company which ran the Chatterly Whitfield Mining Museum went into liquidation and the museum's collection was sold for the benefit of the creditors. This event sent shock waves through the museum community in the United Kingdom. As a result museums which are currently being set up as corporate bodies tend to ensure that the ownership of the collection is in a separate company (or perhaps even a trust). This means that should the company running the museum get into financial difficulties the collections would not be available to meet the operating deficit. This, of course, brings a number of difficulties of its own which are outside the scope of this discussion. The point serves, however, to indicate the limitations of the company structure in this regard.

2. Conflict of Duties

There are fundamental conflicts between the fiduciary duties of a company director and the fiduciary duties of a trustee of a charity whose objects are the preservation of the heritage.

Such a trustee is under a duty to care for the item of heritage entrusted to him and to do so in a way that benefits the public. This will usually involve a degree of public access. The fiduciary duties of a company director on the other hand are primarily to act in the interest of the company. He must in principle consider first the interests of the company's creditors, at least up to the extent of the company's indebtedness to them. Secondly he owes a duty to the members of the company for the continued business of the company for their benefit. Thirdly he must be concerned with the interests of the company's employees. Whilst the carrying out of his heritage objects might be said to fall within the second of these duties, nonetheless it is clear that, as a company director, his concerns and fiduciary duties are much wider than the more focused requirements of simply protecting and maintaining the heritage.

Under English law this has recently been proved beyond peradventure when in the recent case of *Re ARMS (Multiple Sclerosis Research Limited)*; 'The Times', 29 November 1996) the court held that a legacy left under a will to a corporate charity which had since gone into liquidation (though was not yet dissolved) should pass to the creditors of the company rather than be applied elsewhere in the furthering of objects similar to those of the charity. This clearly was not in any way the intention of the testator.

3. Answerability

There are two aspects to this: first answerability to an external regulator, and secondly answerability to an internal membership. Given that ancient monuments are part of the heritage and given that in England a company protecting them will normally have the benefit of tax relief, it is clearly in the interests of the public that those running such companies should be answerable to public regulators. The problem with a charitable company, of course, is that it is answerable to two such regulators. As a company, the directors must produce their accounts in a certain format and send them in each year to the Registrar of Companies, together with an annual return, specifying details relating to membership and the board of directors. This information is available to the

public at large. As a charity, however, similar information, but prepared in a different format, must also be sent to the Charity Commission where it will again be available to the public to inspect. Whilst this can be irritating, the information required by both regulators is not vastly dissimilar and the duplication of effort is not of major concern to those who have to operate in this way.

The same can by no means always be said of answerability to the membership, if "membership" means membership for the purpose of the Companies Acts. Many charitable companies will wish to have a large membership. This gives them a body of individuals who are committed to the aims of the organisation and who are likely to donate funds to it. They may even be required to pay an annual subscription which is a useful means of securing regular core funding. Those companies who are well advised, however, will ensure that such "membership" is not the same thing as membership for the purpose of the Companies Acts. This can be achieved by referring to such individuals as "Supporters" or "Friends" or even "Associate Members". To do otherwise means that any individual who has an interest in the particular monument being maintained by the company and who is prepared to guarantee £1 in support of the company's ultimate debts can become a member of the company with full constitutional rights. This gives such an individual voting rights at the annual general meeting and a role in appointing the directors of the company. It also means that no general meeting, either annual or special, can be held, and no business passed at that meeting, unless appropriate notice has been given in writing to each member. Any changes, therefore, to the constitution of the company, however minor and however necessary in the interests of smooth administration, become a major exercise which will cost the company significant sums in postage alone. Worse still, it exposes the company to exploitation. It is usually only a vociferous committed minority who will bother to turn up to an annual general meeting, whilst those who are content with the way things are going tend not to exert themselves. It is thus by no means unusual to see a corporate charity being taken over by a small faction of the membership, who may not be motivated by altogether altruistic concerns. Whilst the principles of democracy cannot be questioned, it is very dubious whether they are the ideal principles by which to run a body dedicated to the preservation of historic monuments.

4. Flexibility

From the point of view of flexibility, however, the company structure does have a great deal to offer those seeking to protect the heritage. Within the corporate structure, it is possible to give differing powers and voting rights to different classes of member. Similarly, because the members ultimately control the appointment of directors and also control changes to the memorandum and articles of association this fact can be used to supply checks and balances to the powers of the directors in running the charity. By structuring, for example, the membership or the criteria for directorship one way or another, subtle variations of control can be put in place. Where, for example, a company is established to protect a particular monument and the original promoters do

not have the time to devote themselves to running the charity, they may, nonetheless, wish to make sure that it goes along the track that they have envisaged in establishing it. In such circumstances, they might become the members of the company and, perhaps, be given enhanced powers of sacking or appointing directors. In this way the original promoters can effectively keep overall control of what happens.

5. General Concept

The company is primarily a creature of commerce. Its underlying principles are those of ownership and profit. These conflict directly with the public-spirited and disinterested job of caring for the heritage. Two quite separate bodies of law govern a charitable company and the two are likely more often than not to be in conflict. For example, the standard of care required of a charity trustee is based on trust law and requires a trustee, in carrying out the charity's affairs, to exercise the same degree of care as an ordinary businessman would when carrying out his own. The standard of care required of a company director is based on commercial reality and is less stringent. It remains very unclear how far the obligations of trust law are imported into company law when assessing the standard of care required of a director of a charitable company. Similarly, a company director can use the company's funds to insure himself against the results of his own negligence. A charity trustee cannot. There is continued disagreement between the Charity Commission and charity lawyers as to which of these rules applies to the director of a charitable company.

Thus, any person running a company whose purpose is the preservation of the heritage must constantly be balancing the requirements of company law on the one hand, which is designed for commercial organisations whose shareholders have invested money in the business and who are looking to make a profit from it, and the requirements of charity law on the other, which is designed to govern non-profit distributing entities carrying out works for the benefit of the public whose members have no financial stake in the organisation. It is not to be wondered at if sometimes the schizophrenia that this approach engenders leads to some rather anomalous results.

This paper began by making the point that English law has not yet developed a specific type of incorporated body designed for not-for-profit organisations. It will end on the same theme. Some two or three years ago a working party was established to consider the problems that charities were encountering because the constitutional forms available to a charity were all primarily designed for some other purpose. A survey of 1,500 charities was carried out and a response rate obtained of approximately 40%. The replies indicated that many charities had had considerable difficulties as a result of their constitutional structure. Research was also commissioned into the practices of other jurisdictions in this regard. The working party concluded that there is a demonstrable need for there to be a new form of legal structure available to charities which will be an incorporated body offering limited liability but will not be a company. The proposals for this new structure are at a fairly advanced stage and are largely based on structures established in other jurisdictions for not-for-profit activity. The Charity Commis-

sion is very much in favour of the proposal and the Government also seems inclined to support it.

All of this would seem to be proof, if proof were needed, that those who practice this type of law in England are satisfied that the company, even the charitable company limited by guarantee, is not, in the final analysis, an appropriate

form of structure for the carrying out of not-for-profit activities which include the protection and maintenance of the heritage. Until such time as the new structure has been developed, however, it remains the most appropriate alternative.



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Foundations

At the approach of the year 2000 it is interesting to examine what expectations people had some time ago about foundations at that fateful point in time.

About thirty years ago, Alan Pifer, President of the Carnegie Corporation of New York, pronounced in Kansas City an address entitled "The Foundation in the Year 2000"¹; I myself presented ten years ago in The Hague a study taking stock of foundation laws worldwide.

Mr Pifer followed a seemingly safe method of predicting the future. On the basis of available statistics on the number of US foundations and their annual expenditure in 1968, as compared to the situation thirty years earlier, he extrapolated that there would be a vast number of foundations in 2000, but a decline in average resources. By pure mathematical calculation, he arrived at the astronomical figure of 1,400,000 US foundations with a total sum of \$ 48 billion to spend. The annual grant-making per foundation would decline however from \$ 117 thousand in 1936 to \$ 34 thousand in the year 2000, all this without taking into account the devaluation of the dollar over sixty years. So, many more applications for foundation grants would have to be turned down, but one could advise each applicant: "there are more than a million other foundations with whom you can try your luck".

Mr Pifer's scenario, like that of Malthus, will not come true. While between 1936 and 1968, the number of foundations had increased 70-fold, it has just doubled over the 30 years that followed. The Council on Foundations in Washington² estimates that by the year 2000, there will be 43,000 US foundations having approximately US \$ 235 billion (depending on the stock market), to spend among them (i.e. \$ 546 thousand per foundation).

Yet, Mr Pifer's note of warning was useful. He reminded us that increasing the number of foundations does not necessarily mean increasing the amount of foundation money available for noble causes, such as heritage conservation. We were recently informed of the excellent initiative of the French Minister of Culture to set up a *Fondation pour le Patrimoine*³. But will this new foundation generate new funds for heritage? Or will it simply be a new competitor for existing funds?

The number of charitable causes is on the increase which means that more and more causes compete for support from the same finite pool of charitable funds and donations. Just

to mention one new cause which is very popular in ex-Communist countries and has already consumed vast sums of money: it is loosely called 'civil society', i.e. activities in support of citizens' voluntary action for the benefit of society. This receives support from new funders, such as the Soros foundations. An interesting question which a reporter might wish to put to Mr Soros is this one: "If you had not invented the "open society", would you have considered giving your money for heritage conservation?" While new causes may open up new fountains of support it is also the case that some funders simply shift from time to time their grant-making policies. Since heritage, almost per definition, has always been around, there is a risk that its continued presence is also taken too much for granted and not given a sufficiently high priority, except after major calamities such as floods, earthquakes, fire or war.

When the first draft of my own study on foundations, written together with Professor van der Ploeg (Free University, Amsterdam) for ultimate publication in the *International Encyclopedia of Comparative Law*, was finalised in 1987, we indicated that there were then in Central and Eastern Europe hardly any foundations. Only a few years later, we have had to swallow those words and thoroughly revise our study. In Central and Eastern Europe there are today thousands of foundations and many foundation laws or draft laws.

In a more recent study, submitted in 1994 to the Vienna Symposium on Legal Aspects of International Trade in Art, I have called the foundation a "time honoured model for heritage conservation"⁴. Foundations fulfil a wide array of functions with regard to heritage conservation. First and foremost, the property of heritage objects can be entrusted to foundations. The purpose clause in a foundation's constitution can help ensure that the building or site will only be used for the specified purpose (e.g. museum, concert hall). This is an advantage over state ownership or private ownership which does not necessarily guarantee use of the building in keeping with its historical importance. Secondly, foundations can channel support for a monument or site. Apart from grant-making (as envisaged by the French *Fondation du Patrimoine*) a foundation can handle a fund-raising campaign. Thirdly, foundations can act as organizers of activities taking place within a monument (e.g. concerts)