WHN SOLICITORS WOODCOCKS HAWORTH & NUTTALL

Briefing Paper

Currently NARPO operates as an unincorporated association.

Various court cases have considered what an unincorporated association is. From those cases, an unincorporated association can be characterised as:

- a non-temporary group of two or more persons with a common non-business purpose;
- who are contractually bound by mutual duties and obligations in the form of rules.

It is essential to remember that **an unincorporated association has no legal personality separate from that of its members**. Whilst it is tempting to think of NARPO as an entity in its own right and the branches as entities in their own right, in law they are not. They are simply groups of individual persons.

That means that if any person wishes to bring legal proceedings against "NARPO", that claim must be brought against one or more of the members personally. Bear in mind that claims could include (without limitation):

- claims for breach of contract;
- claims in relation to death or personal injury;
- claims for breach of health and safety legislation;
- claims for breach of data protection legislation; and
- employment related claims.

To the extent that any liability resulting from such a claim is cannot be met by insurance or the financial resources of NARPO, the member or members liable in respect of the particular claim will be personally liable to meet that claim and if they are unable to pay, their personal assets including houses will be at risk.

Which member or members a claim is brought against will be a matter for the person bringing the claim to decide which of the members the claim can be brought against with the benefit of legal advice. This is an extremely complex area and much will depend on the circumstances surrounding the particular claim. For this purpose, it suffices to note that there may be claims for which all of the members are potentially liable and others for which a smaller number (which could be as few as one) of them are liable. However, even if action is brought against only one or two members, they would be, in principle, entitled to seek a contribution from any other members liable so it is perfectly possible for other members to become embroiled in the action – they could either find themselves added to the proceedings as a third party or the subject of a separate claim.

I have mentioned insurance and, obviously, to the extent a claim is met from insurance, individual members won't need to pay it. However, not all claims will be covered by insurance. For example, if NARPO were to get into financial difficulties and is unable to discharge its debts, it is unlikely those claims would be covered by insurance. You may also encounter circumstances where a claim which you expect to be met by insurance is not because either the insurer claims there is some issue (for example, material non-disclosure) which entitles it to decline to meet the claim or the claim is in excess of the amount insured. Insurance should not therefore be seen as an answer to the risks of personal liability. It will, of course, be prudent to maintain equivalent insurance if NARPO becomes a limited liability company as it is undesirable for the limited company to end up being wound up by reason of becoming insolvent i.e. having liabilities it cannot meet.

The position within an organisation as large as NARPO is further complicated by the national, regional and branch structure. If liability arises as a result of the activities of one branch which cannot be met from the monies held in the accounts of that branch or insurance, the question is whether this could affect members of other branches. Unfortunately, the answer to this is not clear cut and, if this issue were ever to come before a court, this could be the subject of legal argument. My view, however, based on the existing rules is that NARPO is a single unincorporated association divided into branches for operational purposes and that therefore all members could be potentially at risk from liability arising as a result of the activities of one branch.

This brings us on to the question as to what "autonomy" means in the context of the relationship between branches and the wider association. In the context of the existing rules, "autonomy" means the considerable rights conferred by the rules to hold branch monies in separate accounts and to use those monies for the purposes of the branch holding subject to the rules as to what monies can be used for. Autonomy does not equate to independence. However, in the light of what I have said above about liability and the personal risks, independence is not necessarily desirable.

The principal benefit of incorporation is to give the members of NARPO the benefit of limited liability status. A limited company is (in contrast to an unincorporated association) a legal entity in its own right. This means, by of example, that a limited company can contract in its own name and the contract will be with the limited company rather than with members (as is necessarily the case with an unincorporated association). That, in turn, means that any claim for breach of contract will be against the limited company rather than against some or all of its members and if the limited company is unable to pay, it is the assets of the limited company that are at risk rather than the personal assets of the relevant members. This peace of mind should be regarded as a benefit for every single member. However, unlikely it is felt that personal liability of members will become an issue, nonetheless the risk is real and it would only take one very serious claim for this to become a real problem. In short, there is a strong argument that it is not prudent in modern times to operate an organisation as large and complex as NARPO as an unincorporated association. What may work well for a village social club (which would generally also operate as an unincorporated association) won't necessarily work as well for a national association.

The aim of the draft articles of association and new rules is to replicate, subject only to necessary changes to reflect the requirements of company law, the existing rules and operational practices that apply at present. Thus, the intention is that branches will have exactly the same level of autonomy as they have at present. All branches would operate as divisions of the proposed limited company (it is not proposed that there be 106 separate companies) and would, as now, form part of a single association. The difference would be that the single association would have the benefit of limited liability status as described above. This does mean that the limited company would be responsible for liability arising as a result of the activities of one branch but, as noted already, I believe that to be the case at present. The potential for that liability makes it important that branches operate within the rules (as at present) and that individual branches make information available as to their financial position (as per the current requirement to submit accounts to the national organisation). That is a matter of good governance.

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