

## **The River Stour Trust Limited – Notes on our constitution**

These notes are to try and help River Stour Trust members understand the legal framework and rules in which the Trust operates. These notes cannot be a definitive statement of law - I am not a lawyer or legal expert - but the company secretary is normally expected to advise the Trust in this area.

### **How the Trust was formed:**

The River Stour Trust was set up in 1968 by people who were concerned that the right of navigation on the Stour was in danger of being lost, and believed that group action was the way to prevent this. A voluntary organisation like ours usually takes one of 3 legal structures.

A club, run by members directly;

A charity, run by members directly;

A charity, run as a non-profit making company.

### **The Trust as a Company & Charity:**

We are set up as both a charity and a non-profit distributing private company limited by guarantee. There are several important benefits as a result:-

The Trust is a separate legal entity which can own property or employ people, rather than having to do this in the name of all members which would be the case for an unincorporated body,

As we have no shares we cannot be bought or sold,

Some significant VAT & tax benefits,

Absolute limit of £1 for members' liability,

A structure widely perceived as trusted and accountable.

But there are disadvantages:

It is run solely by the directors, but they are appointed or removed by members,

Must follow company as well as charity law and our constitution, called the Memorandum & Articles (M&As),

Aims must be approved by the Charity Commission,

Directors cannot avoid personal responsibility for decisions,

Membership register is a 'public' document,

Slightly higher running costs than a club or unincorporated charity,

The costs of non-compliance with company law can be severe.

The River Stour Trust Limited is not a trust in the usual legal sense of the word, despite its title, but members of the Council - the directors - have the position of Charity Trustee as well as director.

### **The rules that apply to the Trust:**

Every company has its own rules in its M&As. A company memorandum states the purpose and the powers of the company. Our memorandum says our purpose is *the preservation, maintenance in good order and improvement of canals, navigable rivers and inland waterways for the use of the public*, but we naturally concentrate on the Stour. Our powers are numerous and wide but are only legal if directed towards our purpose. Our Articles are our own rules for running the company. But these CANNOT alter or dilute absolute obligations under the Companies Act or other acts. For example our articles make no

mention of proxies at general meetings, so that right never existed before under our constitution. But a change in the Companies Act 2006 now gives members an absolute right to appoint a proxy; that right cannot be removed by our articles. Our constitution is available to read on our web-site, [www.riverstourtrust.org](http://www.riverstourtrust.org).

### **Our M&As:**

The Charity Commission publish model constitutions as a help to charities. These are not compulsory but they offer the advantage of a constitution that will be easily accepted by the Charity Commissioners. Our M&As were set up with help from the IWA and are similar to theirs, and not at all similar to the current Charity Commission model. However the IWA constitution has changed over the years. Ours has had only 2 significant changes I believe; once to allow Charity Trustee indemnity insurance to be implemented and recently to allow a full audit to be replaced by an accountants report.

Our M&As are also written in the legal language of 40 years ago. Our articles seem to be derived from model articles defined in the 1948 Companies Act. They do not seem to have been generally reviewed or altered after the 1985 Companies Act or the Charities Acts of 1992 and 1993. For example most references to the Companies Act relate to the 1948 version, a copy of which is difficult to obtain nowadays. One problem with our articles concerns the election of members to Council. At the 2006 AGM, there were more candidates than vacancies on Council. Our articles simply do not deal with contested elections and this created problems. One member resigned as a result of these troubles. I believe we need to fix this, but it is not the only change needed. I believe a wholesale review is needed and the fullest consultation with members on this seems essential. The Council has agreed that our constitution needs review.

One of the inherent features of charitable private companies is that members give control of the company to the directors, who then run it to achieve the aims of the charity. In return members' liability can ONLY ever be £1, while directors are personally responsible for all company actions. The directors MUST act collectively but only a simple majority is needed in their voting (article 50).

### **Members of Council:**

Our articles allow not less than 2 and not more than 15 directors, who must be company members. At each Annual General Meeting one third of the directors must resign (the ones who have served longest since last election go first), but they can be immediately re-elected if members agree. Directors can appoint a member to fill a casual vacancy at any time. Such appointments must be ratified by the members at the next AGM. Vacancies on the Council can also be filled by members own nominations at the AGM. Only a simple majority vote is needed to appoint or remove a director.

Directors appoint their own chairman of the Council from amongst their numbers, and this can be done at any time and must be done at least once a year after the AGM. There is no Chairman of the Trust and there is no period of appointment of a Chairman. Our article 49 says *The Council shall at its first meeting every year after the Annual General Meeting and from time to time appoint from the Council Members a Chairman of the Council*. There is no definition of the chairman's role in our articles or in the Companies Act, only references to his duties in chairing meetings. The current model constitution for a charitable company produced by the Charity Commissioners says quite plainly *The Directors shall appoint a Director to chair their meetings and may at any time revoke such appointment..... The*

*person appointed to chair meetings of the Directors shall have no functions or powers except those conferred by these articles or delegated to him or her by the Directors. Our constitution does not have those words.*

### **Current Company Law:**

The Directors must follow several general guiding principles, which used to be part of common law but are now codified in the Companies Act 2006:-

They have a duty to act only within their powers;

The director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole (but in a charitable company like ours this rule changes to mean that the aims of the company replace the promotion of the success of the company for the benefit of its members);

They have a duty to exercise independent judgement;

They have a duty to exercise reasonable care skill and diligence;

They have a duty to avoid conflicts of interest;

They have a duty not to accept benefits from third parties;

They have a duty to declare any interest in a proposed transaction.

It is impossible to give a comprehensive summary of the changes that the Companies Act 2006 brought to company law, but I believe that amongst the most important changes are:-

The codification of directors' duties;

The absolute requirement for all companies to allow a proxy to act on a member's behalf at a general meeting;

The removal of the need for an AGM (unless articles compel it);

A substantial reduction of voting numbers needed to pass written resolutions, making this a simpler way of passing resolutions that have widespread support without calling an EGM;

Failure to declare a conflict of interest in an existing transaction becomes a specific offence;

The right of the public to inspect the membership register is no longer absolute – limits are placed on it;

Removal of the need to have a Secretary (unless the company articles demand it);

The major changes in the Charities Act 2006 are:-

The change from 4 general types of charity to 13, with the stipulation that there must be a demonstrable public benefit by all charities;

A change in the income limits which affect the need for an audit or accountants report for charitable companies (if less than £90,000 income then no independent report on the accounts is needed for a charitable company; more than £90,000 but less than £500,000 income only an accountant's report is needed. These limits will probably change again next year to resolve an anomaly between company and charity law);

A new alternative legal structure for charities called the Charitable Incorporated Organisation. This is intended to give most of the benefits of Company status while avoiding the need to comply with company law, as it will be administered by the Charity Commission. The precise details have not yet been decided by government and will need secondary legislation;

There should be slightly less 'red-tape' in dealing with the Charity Commissioners.

### **General Meetings:**

The directors run the company by collective action through the Council (our Article 44 states this specifically but it is also inherent in Charity law). As directors run the company, it is

they who normally propose resolutions at general meetings of the company. These resolutions usually have the purpose of electing directors or amending the constitution. Members can propose resolutions at General Meetings, but they need 10% of the voting members support to place them on the agenda. In addition such resolutions CANNOT conflict with the law or our articles. If they do so they are improper and can have no effect, even if somehow they are passed by a General Meeting (Companies Act 2006 section 303). This is not a legal nicety but a fundamental way of running a company; the company must follow its own rules. Members have the right to propose a resolution to remove a director if they can gain the support of 10% of voting members.

Most resolutions need only a simple majority to pass, these are called Ordinary Resolutions. But resolutions to change the articles are called Special Resolutions and require the support of 75% of those members voting to be passed. Resolutions must be stated in the agenda to a General Meeting; they cannot be introduced on the day. Amendments to Ordinary Resolutions are allowed during the meeting, at the discretion of the Chairman, but they must be of a form that modifies the resolution. Amendments which negate a resolution or change the sense of it, so that a different matter is being voted on, cannot be allowed. No amendments to Special Resolutions are allowed (except to correct obvious errors such as spelling mistakes).

### **Charity Trustee duties:**

These derive mainly from the Charities Act 1993. Some examples include:

- A duty to act strictly within the objects, powers and rules as defined in the governing document – in our case this is the Memorandum & Articles,
- A duty to act in the best interest of the beneficiaries of the charity; in our case the general public,
- A duty to safeguard the assets of the charity,
- A duty to avoid conflicts of interest,
- A duty to safeguard the charity's assets,
- A duty not to profit from their position as trustee,
- A duty of care (a slightly higher duty than a company director),
- A duty to act personally (a trustee cannot have someone else act for him),

### **Alternative structures:**

If members want a structure that is run directly by themselves rather than by director/trustees, then they need a different format such as a club or an unincorporated charity. But they will have to accept the responsibility and disadvantages that come with such a structure. The main disadvantage is the need for all members to accept liability plus the inability for the organisation to make legal agreements; these would have to be done in the name of an individual. It is most probable the organisation would still have a committee to run itself. My personal opinion is that the benefits of incorporation outweigh the disadvantages, but members must decide what they want.

### **Charity Commission guidance:**

The Charity Commissioners publish and endorse a guide to Good Governance. This aims to make clear what the best practice should be in voluntary organisations, how they should operate and be held accountable. It has 7 key principles;

- Every organisation should be led and controlled by an effective Board of trustees which collectively ensures delivery of its objects, sets its strategic direction and upholds its values.

The trustees as a Board should collectively be responsible and accountable for ensuring and monitoring that the organisation is performing well, is solvent, and complies with all its obligations.

The Board should have clear responsibilities and functions, and should compose and organise itself to discharge them effectively.

The Board should periodically review its own and the organisation's effectiveness, and take any necessary steps to ensure that both continue to work well.

The Board should set out the functions of sub-committees, officers, the chief executive, other staff and agents in clear delegated authorities, and should monitor their performance.

The Board and individual trustees should act according to high ethical standards, and ensure that conflicts of interest are properly dealt with

The Board should be open, responsive and accountable to its users, beneficiaries, members, partners and others with an interest in its work.

We are trying to follow this code.

We are in a period of change concerning company and charity law. There were major reforms in both areas last year, with a new Companies Act 2006 (with over 300,000 words and over 1200 sections and exceeding 700 pages when printed) and a new Charities Act 2006 (the first major charities act for decades). Only parts of each act have come into force so far, but most parts will be in force in the next couple of years.

### **Future possibilities:**

I have no doubt that The River Stour Trust Limited should change to adapt to some of the new laws, but there are lots of different possibilities, many of which are not yet clear or where the law is not yet enacted. This is an area where much information and advice is still needed and where some details are still being finalised. I believe we are at the start of a period of consultation with members about how we should change and adapt.

Michael Finch

Company Secretary to The River Stour Trust Limited

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