

THE CORPORATE LIABILITY OF HUNTS
JOINT ADVICE

Introduction

1. This joint advice is given to the Masters of Foxhounds Association following the pleas of guilty by Heythrop Hunt Limited to offences under the Hunting Act 2004.
2. We have been asked to review the advantages and disadvantages of incorporation for hunts in the fields of criminal and civil liability. We recognise that there may be other considerations which we do not cover, and on which specialist advice should be sought. In particular, we do not deal with:
 - (1) Property law. There may be advantages in having property held by a body which stays the same through regular changes of personnel. There may also be advantages in ensuring that hunt property is not held by any individual. An alternative to a company would be to have hunt property held on trust, but we do not advise specifically on that.
 - (2) Taxation. Each hunt will have to consider the taxation effect of incorporation when compared to being an unincorporated association or holding property through trustees. We do not advise on that aspect either.

Criminal Liability

3. The basic offence under the Hunting Act 2004 is committed if a person hunts a wild mammal with a dog unless the hunting is exempt (Section 1). Trail hunting is not an exemption. It is not an offence simply because it is not hunting a wild mammal.
4. Section 10 is headed “Offence by Body Corporate”. In fact this section does not create the principle of corporate liability but recognises that the offence under Section 1 can be committed by a corporate body. Accordingly it provides for the prosecution of any officer of a company who has consented or connived in the offence committed by the corporate body.
5. Section 10(2) states that “the officer as well as the body shall be guilty of the offence”. The section then goes on to identify company officers as including not only directors, managers or secretaries of the company, but also persons purporting to act in those capacities, or a member of the corporate body if the affairs of the body are managed by its members.

6. The two High Court cases in 2009 (those relating to Tony Wright and to the Devon and Somerset Stag Hounds) affirmed that the commission of this offence must be intentional. Section 11(2) of the Act provides a partial definition of hunting to include any case where a person engages or participates in the pursuit of a wild mammal. It is difficult to envisage circumstances where the body corporate could commit an offence under Section 1 other than through the acts and intentions of its officers. Accordingly, it does not appear that this is an offence which can be committed passively.
7. The position taken by the Defence in the Heythrop case was that if a company director commits the offence then his or her intention to hunt unlawfully is attributed to the company. The prosecution position was initially put in much wider terms, based on the utilisation of assets and intention on the part of hunt staff to commit offences. In the end that issue was not litigated and the prosecution accepted pleas from the company on the narrow basis of attribution through the acts and state of mind of a director.
8. The attribution principle accepted by the defence in the Heythrop case, where the company is identified with a “controlling mind”, is based on the approach taken by courts in other areas of the criminal law. It follows that where a director is hunting in circumstances where he or she is likely to be aware of the exact nature of any pursuit then a prosecution against the company may be taken unless that director is acting on what might be called a “rogue basis”. It is in general no protection that the hunt company has resolved only to engage in lawful hunting.
9. There might incidentally be another option to a prosecutor under Section 3(2) which states that a person commits an offence if he knowingly permits a dog which belongs to him to be used in the course of the commission of an offence under Section 1. If it could be proved that there there was a wholesale intention to hunt foxes on the part of the Hunt then the body corporate could be prosecuted as the owner of hounds used in the commission of offences by others. In such circumstances the prosecution would not have to prove that any director was out hunting on the particular day, let alone in a position to observe or control what was going on. Section 3 has not yet been used in any prosecution under the Act.
10. In terms of penalty there is no difference between a corporate defendant and a human defendant. The penalty is a fine not exceeding level 5 (£5,000 at present). This applies to all offences under the Act.
11. Forfeiture of the hounds, hunting articles or vehicles are dependent on whether they were used in the commission of the offence rather than on the basis of ownership. It is therefore no protection to keep the ownership of these away from individuals in the hunting field.
12. The single most likely distinction between a corporate defendant and a human one is that the assets of the body corporate may well be greater. Accordingly

they may have a significant potential liability for prosecution costs. This has not been the case to date in relation to convicted defendants who almost invariably have been of limited means. The distinction is shown by the order that the Heythrop Hunt Limited should pay £15,000 costs, compared to orders of £2,500 and £2,000 against the master and huntsman.

13. The choice of course is whether the Hunt should be incorporated or run on an unincorporated basis. Here are some considerations.

Corporate structure

14. There is a risk not simply of prosecution but of duplication of summonses with a possibility of two penalties for what is essentially the same unlawful act. This would become three penalties if the approach taken by the RSPCA in the Heythrop case were adopted widely, of charging the director both individually under Section 1 and also for consenting to or conniving at the company's offence under Section 10.
15. The company may have deeper pockets which make it a more attractive target for prosecution, in that it could be ordered to pay a much larger sum for prosecution costs.
16. Of course the deeper pocket element could be tackled by keeping company assets to a minimum but this raises potential problems of :
 - (1) poor public relations issues through insolvency, sales of assets etc;
 - (2) issues of directors' disqualification; and
 - (3) in any event what would be the point of incorporating other than for the purpose of holding assets separately from the Mastership?
17. The risk of the company being prosecuted under Section 1 would clearly be reduced if those who might act illegally in the field were not directors or officers of the company which was set up to manage the Hunt's business affairs and assets. Such an arrangement would not prevent the prosecution of the company under Section 3.
18. However a company is set up, it provides no shield against the personal criminal liability of directors or members who are involved in unlawful hunting.

Unincorporated Body

19. Since an unincorporated body has no separate legal existence it cannot be a "person" against whom a prosecution could be brought under this legislation.
20. Although Section 10(3) refers to a potential liability for members, that is only where a body corporate is managed by members e.g. a limited liability partnership.

21. Accordingly, there would be no issues here of duplication of prosecution or attribution of liability from one defendant to another.
22. There is a decision (in relation to a golf club) where it was held that a pollution offence committed by “the Club” could be charged against any or all of the members concerned. This could not apply to an offence which can only be committed intentionally as the intention of one such member could not be imputed to all the other members.
23. It may be reinvention of the wheel, but if a Hunt is run as an unincorporated body then its assets might be held outside the membership by trustees. In that way there is no obvious way for penalties or costs to be paid from such assets on a compulsory basis, although the Hunt might obviously choose to utilise those assets to indemnify individual members. Assets such as hounds or vehicles could in any event be forfeited if used in the commission of any offence and forfeiture would be irrespective of ownership.

Civil Liability

24. Many forms of civil liability potentially arise due to the activities involved in running a hunt. This is not the place to examine them all in detail. Four principal areas of liability for injuries and damage exist:
 - (1) Occupier’s Liability in respect of the kennels and any other property owned by the hunt.
 - (2) Employer’s Liability in respect of hunt staff and others who work at the kennels.
 - (3) Public Liability to those who suffer damage as a result of the activities of the hunt.
 - (4) Pollution Liability from kennel effluent and carcasses.
25. A hunt may be held liable in one of two ways, directly or vicariously.
26. Direct liability may arise by the imposition of liability by statute. An example is the Animals Act 1971. Strict liability for certain types of damage is imposed on the keeper of the animal concerned. A keeper is defined as the owner or someone who has the animal in his possession. Thus a hunt company which owns the hounds would be directly liable in cases where the Act applies. Direct and non-delegable duties also arise under other Statutes and a number of Regulations.
27. Vicarious liability arises where the servant or agent of a principal party is responsible for the loss and damage. In general, the principal will then be liable to pay compensation.

Insurance

28. In general, the civil liabilities of hunts should be covered by an appropriate insurance policy. We understand that the standard policy available to hunts

- offers public liability cover of £10m for any one occurrence. This is the same as it was in 2002.
29. Whilst this may seem a lot, awards of damages for personal injuries have increased very substantially in the past 10 years. This is largely because of care costs in catastrophic injury cases, and the effect of the working time directive and manual handling regulations, which together have increased the amount of care required. Outer Temple Chambers has recently been involved in a case where the damages for a single claimant were assessed at £23m.
 30. In addition, a single occurrence could easily lead to multiple claims for personal injury, for instance if hounds ran across a fast and busy road or motorway and caused a multiple pile-up.
 31. For these reasons it would be advisable for the standard terms of cover to be reviewed.
 32. In most cases the existence of insurance sufficient to cover liability for any damage caused by hunt activity will mean that only the hunt itself is sued. If incorporated, the company will be sued. If unincorporated, the association can be sued through its principal officers. The practicalities become irrelevant because the insurers will deal with the action.

Uninsured liabilities

33. If insurance cover is not available, or not enough, the existence of a limited liability company will not necessarily provide a shield to members of the hunt who are personally involved in the decisions, acts or omissions which are said to give rise to the claim. At best it would protect officers from personal liability if they had no personal involvement in the management of the hunt or the acts or omissions complained of.
34. Equally, an unincorporated association may be liable for the wrongful acts of its members. The most recent example of the approach of the courts is in relation to abuse by catholic priests, where the Supreme Court held that the Institute which provided a Brother as Headmaster of a school could be liable for sexual abuse of boys at the school by that Brother, even though the Institute did not either own or manage the school.
35. The Supreme Court also held that such vicarious liability for a member was possible even if the wrongdoer's act was in breach of the duty he owed to the association and even if it involved a criminal act. This principle will apply whether the hunt is a corporate body or unincorporated. It will apply potentially to the acts of both members and employees.
36. From a civil liability point of view, therefore, we think that there is no advantage in a corporate structure. The best protection will come from having adequate insurance cover.

Conclusion

37. As can be seen, in respect of civil liability the position is relatively neutral. The use of a hunt company will not allow all members to escape liability. If there is no insurance, or inadequate insurance, members with available assets are likely to be the subject of a compensation claim.
38. There may be other reasons why having a company structure would be beneficial. These include property ownership and taxation, but hunts should take separate advice on these matters.
39. The potential criminal liability introduced by the Hunting Act 2004 has changed the landscape. Hunts operating through a corporate body expose themselves to a risk of more charges, higher fines, and significant costs orders. Since a hunt company will go on indefinitely, there is a greater risk of repeat convictions. By contrast, masters and huntsmen come and go. Repeat convictions would make it more likely that a court one day will consider using its forfeiture powers in respect of hounds, hunting articles or vehicles.
40. In the light of this, some may well consider it better to abandon the corporate structure so that future prosecutions are limited to individuals.

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