

Leisure Trusts – The reasons, the models and the benefits by Hywel Griffiths

In the early years of the 21st Century Local Government was struggling with the twin dilemmas of how to balance their need to provide constructive leisure opportunities for their communities and the increasing financial pressures imposed upon them by successive Governments at Westminster. A number sought advice on the option of transferring the operation of their sports centres to “Leisure Trusts.” What follows is an analysis carried out in 2009 of how this balance was analysed and the benefits and disbenefits identified at the time. These pressures intensified as the century has progressed and so more and more Councils opted to pursue the Trust option but many of the issues identified remain relevant. The problems for leisure operators associated with the closure of facilities in 2020 due to the Coronavirus pandemic has once again raised the spectre of financial shortfalls in the models used by operators and forced Councils to consider the delivery options available for leisure services.

The idea of leisure trusts is not new as we see in Chapter 8. Indeed, the first generally recognised public sports centre in the UK, opened in Harlow in 1964, and the replacement centre, Harlow Leisurezone, continues to be managed by the same trust. For the purposes of this section the term “Trust” is taken to include all forms of Non-Profit Distributing Organisation (NPDO), Community Interest Company (CIC) or Social Enterprise (SO).

The revival in interest in the idea of leisure trusts dates from the mid 1990’s, when concern over the second round of Compulsory Competitive Tendering in leisure management and increasing pressures on local government discretionary expenditure gave new impetus to the search for new models of service delivery.

Research by the Centre for Public Services (CCPS) suggest that the most common reasons for considering, but rejecting, trust proposals are:

- The loss of direct democratic control.
- Uncertainty over the continuation of National Non Domestic Rates (NNDR) and VAT savings.
- Political opposition to externalisation.

The CCPS report also notes some disquiet about the tax avoidance issues involved,

“more accurately it is a form of tax evasion by local government, which ultimately reduces government income.”

(“Leisure and Library Trusts” – Centre for Public Services 1997)

A survey by Thurrock Council (1997) found that the predominant reasons for considering a trust transfer was as shown in the table below:

Table 1 Reasons for considering a Non Profit Distributing Organisation (NPDO)

Reason	% of Respondents
NNDR Savings	95
Tax Advantages (VAT)	70
External Funding Opportunities	75
Community Involvement	50
Employment Security	40
Management Stability	25
Diversification	5

Trusts – the legal position

The long history of leisure provision and management by leisure trusts would suggest that there is little legal doubt about the ability of local authorities to transfer these discretionary

services to NPDO's. However, there have been a number of lingering uncertainties, mainly linked to the charitable status and VAT position of trusts. The main issues have been the boundary between "trading organisations" and "charities." In the mainstream charity sector this distinction has been overcome by the establishment of independent trading companies by charities. These companies covenant their income to the parent body and thus receive the tax benefits of charitable status. An example is the relationship between Oxfam and Oxfam Shops Ltd.

Leisure trusts on the other hand are normally free standing organisations, with the provision of sport (or other forms of leisure activity) as their primary purpose. There has also been some debate about whether "sport" is a charitable purpose within the Charity law.

These uncertainties were resolved in favour of the trust movement by a ruling of the Charity Commissioners in February 2005. The ruling concerned two leisure trusts in the north west of England, the Trafford Community Leisure Trust and the Wigan Leisure and Culture Trust, both of which had initially been refused charitable status, as they provided both statutory and discretionary leisure services.

In reviewing its earlier decision, the Commission ruled that a charity may provide the whole of a statutory or discretionary service, provided that it can demonstrate independence from the local authority and charitable benefits. A key consideration in these cases was the argument that the local authority did not have sufficient finance to deliver the level of service demanded by the public and that inadequate service delivery led to the demand for the service outstripping the local authority's ability to supply.

However, the Commission's change of stance is not a change in the law and it is therefore open to others to challenge the ruling, or for the Commission in future to consider the individual merits of specific cases.

In another ruling in relation to three leisure trusts in Scotland, a VAT tribunal ruled that the funding contributions provided by local authorities to trusts are subject to VAT. This has a significant impact on trusts, who will be able to recover unpaid VAT. However, there are issues of transferability of this ruling to England and Wales due to differences in the 1972 Local Government and Planning Act (Scotland) and that applying in England and Wales, but it is likely that VAT tribunals will consider it when looking at the VAT status of trusts.

In another case in Cornwall, a local authority payment to a trust for capital works was deemed to be subject to VAT and the local authority (with the agreement of the trust) withdrew from the arrangement and continues to maintain and redevelop premises managed by the trust from within its own budget.

In summary, it would appear that there are no legal impediments to the creation of leisure trusts and to them managing statutory or discretionary services, but the VAT position on contributions to capital works by trusts is less certain. Trust deeds and the leases between local authorities and trusts, however, need to be drawn up carefully, based on existing good practice guidelines, to avoid some of the pitfalls, and it is often necessary for both the "proto-trust" and the local authority to obtain external legal advice, which although essential may be costly.

Trust Models and the Main Forms of Trusts

"Trusts" can take one of three main forms, although there are other possible models, common in the charity sector, but which have not yet been applied to leisure.

A. Voluntary or Unincorporated Charitable Trust – This is the most common type of small charity or trust in the voluntary sector and can be established by an individual, a group or a public body. The charity has to be registered with the Charity Commission and Charity Law regulates its operation.

The purpose of the body must fit one of the categories for charitable status, which are sufficiently broadly defined to allow the provision of leisure for the social good of the residents of an area to qualify. These purposes are set out in a charity deed, which has to be approved by the Charity Commissioners and can only be amended with their approval. This can lead to problems if the purpose is narrowly defined. "Trading" by such charities is legally constrained and often requires the establishment of a separate trading company whose profits are dedicated to the charity.

Such charities are managed by Trustees, who have a “Duty of Care” to the charity imposed on them by the Commission. Trustees of such charities have unlimited personal liability, which makes them difficult for local authorities operating leisure centres with high and variable turnovers. Finding willing trustees can be difficult under this structure.

The Charity Commissioners have also recently expressed concern about the number of small scale charities, which are experiencing financial difficulties, failing to find experienced or skilled trustees and failing to understand and fulfil their charitable objectives and obligations. For this reason, the Commission is becoming increasingly reluctant to register small trading charities.

B. Charitable Company Limited by Guarantee

This is the most popular form of trust established by public bodies, as the trustees or directors of the company have a limited personal liability, although the responsibilities of the trustees are the same as those for unincorporated charities described above. The organisation is often managed by a Board of Directors, or management committee, with a company secretary and finance director, making it a better understood corporate model.

Such companies are still required to register with the Charity Commissioners, but like trading companies, will have “Memoranda and Articles of Association”, which define their role and purpose. These can be more flexible than a Charitable Trust deed and can be varied by the Annual General Meeting of the company, provided that the alterations do not breach the company’s charitable status. Thus, for example, a charitable company operating a theatre could resolve to stage cinema shows as part of a variation.

The relationship between a public body and a charitable company established by the authority is governed by the same rules as any other activity carried out by a local authority or public body. The local authority must have the statutory power to carry out the activity to be pursued by the charitable company and must ensure that the interests of local residents are protected. Leisure is one of the purposes for which such companies are commonly established.

The most common relationships between a local authority and a charitable company are:

- Board representation by local authority nominees.
- A lease for use of local authority premises/land by the company.
- Capital or Revenue Grant Aid from the local authority to meet either all or part of the operating costs of the company, which may be a fixed sum or one which varies over time, as a result of a business plan submitted by the company, and conditions imposed by the local authority.

Board representation on the charitable company is also controlled by the rules governing local authority “controlled” or “influenced” companies. If more than 50% of the directors are nominated by the local authority, the trust company will be deemed to be a controlled company and may only operate in the way in which the authority itself operates, and therefore the benefits are limited. If between 20% and 50% of the directors are nominated by the local authority, then it will be deemed to be “influenced” by the authority, and must make the same returns to central government as a local authority, but will be less restricted in its operation. If less than 20% of the directors are nominated, then there is no restriction on its operations. Persons who are deemed to exercise control or influence, if nominated to a company, include Members and senior officers of a local authority, former Members (up to four years), and Members or officers of any other local authority controlled company.

The directors of the company, even if nominated by a local authority, have a primary duty of care to the company and its charitable purposes, not to the authority. This requires local authority nominees to be particularly careful in balancing their role as directors and their role as community representatives, particularly in relation to the use of monies grant aided to the company from the public purse.

These concerns can be overcome by careful drafting of the trust deeds of charitable companies and by the careful selection of trustees, to ensure the independence of the company. The degree to which a Council wishes to control the activities of the trust will have a significant impact on its ability to succeed in the long term.

C. Industrial and Provident Society

The third form of Charitable Trust, the Industrial and Provident Society (IPS), has become more popular in leisure management in recent years. The original model was based on employee or community involvement and was common in establishing financial or friendly societies in industrial communities. The role of employees as stakeholders has made this a popular model for management buyouts, where the existing employees of a public body set up a trust to carry out the functions of a local authority outside of its control.

Industrial and Provident Societies have model rules and deeds, approved under the Industrial and Provident Society Act 1965. These can be varied by the Societies' board according to the individual activities to be pursued. The shareholders and trustees, or board members, have limited personal liability. Such societies are not automatically charities, but can register by adopting charitable purposes and rules.

Industrial and provident societies are regulated by the Registrar of Friendly Societies, rather than by Companies House, which regulates limited companies. At present there is a perception within the sector that this regulation is slightly more "light touch" than that to which companies are subject, but the growth of the sector has led for calls for greater regulation and the future amalgamation of the two schemes of regulation cannot be ruled out in the short or medium term. The same rules regarding local authority "controlled" or "influenced" companies apply to IPS's, as apply to Companies Limited by Guarantee.

Co-operative Societies, where the employees are shareholders, cannot register as charities, which is why most leisure IPS's are community benefit (Bencom) trusts. The benefits of involving staff as trustees are often seen as a strength of the IPS model of trust.

Like charitable companies, such societies are commonly supported by the local authority by leases on buildings or grant aid. Long leases enable them to provide security against borrowings to re-invest in the buildings and this is often a condition of local authority support. Should such organisations fail, or become insolvent, the lease reverts to the local authority. As with trading companies, "trusts" seek long-term leases in order to maximise the benefit of capital investment. Twenty-five to thirty year leases are the most common, in order to enable long-term investments.

Trust "Partnering" or using an existing Trust

Until recently, any public body wishing to operate its facilities through a charitable body has had to establish a new trust locally. This can be an expensive and time-consuming process (one leisure trust in the south east took six years from conception to establishment and cost the Council over £500,000 in legal and other costs). The majority of costs are in legal fees and ensuring financial viability and probity. Both parties need to separately evaluate the terms of any proposed agreement, which can double the initial set up costs, as the trustees will need to ensure that their duty of care to ensure the viability of the operation is assured, while the local authority will need to secure the best value for the use of community assets and ensure that the governance arrangements of the trust comply with its own probity requirements. Locally established trusts have the benefit of being specifically designed for the intended purpose. Established and well-designed trusts will have clear goals, objectives and long-term financial plans and strategies, with contingency plans to cope with change. However, as mentioned above, initial set-up costs can be high.

Recently some of the existing trusts have established themselves in such a way as to enable them to expand their activities to adjacent or remote areas in similar ways as contracting organisations.

"Partnering" with such trusts saves the authority the cost and administrative burden of establishing its own trust and removes some of the complexities associated with "influenced" companies. However, the authority will need to ensure that the incoming trust has the legal status, capacity and local community support to perform at arms' length from both the host authority and the original trust base. The establishment of a local "board of advisors" or an "associated trust" can be ways of ensuring local representation and a degree of influence over the operation.

A number of trust companies have also established trading arms to offer their expertise in trust establishment or their management skills to other local authorities. In a recent example, a local authority in the south east advertised for expressions of interest to operate

their leisure facilities from existing trusts only and received sixteen expressions of interest and seven firm bids.

This approach has become increasingly popular in recent years as a number of larger more commercially orientated Trust Companies have come to dominate the market. The “partnering” process can also be achieved through a tendering or open procurement process.

2.3.2 Hybrid Approaches

Some mixed or “hybrid” approaches, involving elements of more than one of the approaches listed in the paragraphs above, exist in certain circumstances. There is a wide variety of possible hybrid approaches, but some types are:

Commercial: Charity Hybrids

Some commercial leisure companies have established subsidiary charitable companies to offer some of the benefits of trust status to clients specifically seeking a more “community” approach to leisure management; companies such as DC Leisure and SLM have established “community model” companies, which claim to provide trust benefits to clients.

This approach has recently been challenged by the Inland Revenue in a case involving De Vere Hotels Group, which established a similar charitable company in the tourism sector. As a result of this challenge, a number of leisure management contracting companies have stopped bidding under their community model brands until the legal position is clarified.

Public: Trust Hybrids

Commonly, trusts have been established with the primary purpose of managing a local authority’s leisure buildings. However, examples exist of where a trust has taken on a role on the management of services as an “agent” of the local authority, although the services themselves are retained as the responsibility of the local authority for either statutory or operational reasons. An example in a related field concerns housing LSVT (Large Scale Voluntary Transfer) transfers to Housing Associations, where the Association takes responsibilities for the Council’s statutory homelessness function or for managing community alarm schemes on behalf of the Council. The 2005 Charity Commission ruling on statutory functions may have an impact on such arrangements in future.

In leisure such arrangements have been created for non-building based services, such as sports development and coaching services

“Community Interest Companies”

The Community Interest Company (CIC) is a new type of company, designed for social enterprises that want to use their profits and assets for the public good. CIC’s will be easy to set up, with all the flexibility and certainty of the company form, but with some special features to ensure they are working for the benefit of the community. CIC’s will report to an independent regulator on how they are delivering for the community and how they are involving their stakeholders in their activities. The legislation to allow CIC’s was only passed in July 2005 and therefore the concept is very new. Further details can be found at www.dti.gov.uk/cics or www.cicregulator.gov.uk. However, CIC’s are not charities.

The Current Trust “Market”

Community Leisure UK (formerly SPORTA) is the representative body of leisure trust management in the UK. Community Leisure UK claims an overall membership of over 100 trusts, some managing single facilities and some managing all of the facilities in a single local authority area. A few of these district-wide trusts have expanded beyond their original core area to manage the facilities in other areas.

All trusts in membership are Non Profit Distributing Organisations (NPDO’s) and are committed to the ethos of social enterprise. The Government has used leisure trusts as a good example of community social enterprise and one leisure trust was among the case studies for the government’s proposals to introduce a new type of social enterprise organisation, the Community Interest Company. Of the trusts in membership of SPORTA, about 60% are Industrial and Provident Societies (IPS); about 30% are Companies Limited by

Guarantee (CLG), and a small number of small individual trusts have other origins or structures. Many of the early trusts were established in the 1950's "New Towns", Harlow, Basingstoke etc. and have an existence based on earlier New Town legislation. These trusts are generally not able to operate outside their designated local area

A survey of 12 leisure trusts found that typically the Boards of the organisations are made up of between 16 and 20 trustees. Depending upon the type of trust and the attitude of the originating authority, up to 3 or 4 of these would be local authority members (although this must not exceed 20% of the total.) In IPS trusts up to 50% of the Board may be made up of staff of the organisation, although this is typically about 25-30%. The remaining trustees are generally drawn from customers, interested individuals within the community and in one case a local benefactor.

In early Trusts most Trust Chief Executives were typically existing service managers or directors, who transferred from the local authority to the trust. However, the later, larger Trusts are often managed by corporate or financially trained CEOs. CEO transfers can occur up to a year in advance in order to provide a degree of independence for the forming "proto-trust". All trust Chief Executives stress the importance of the role of the Chairman of the Board of Trustees in acting as the trust's "champion" in ensuring independence from the Council, encouraging community acceptance and accountability, ensuring probity in the negotiations between the Council and trust and safeguarding the trust's interest in ensuring that the business plan, drawn up by the Chief Executive, is realistic and sustainable.

Most modern trusts have ensured that their trust deeds allow them to operate in areas away from their original base, in order to "grow the business". Some growth has also occurred by existing trusts establishing associate organisations with separate trust deeds in other areas.

Benefits of Trust Operation

From the Trust Perspective:

- Freedoms and flexibilities – the removal of democratic constraints is frequently quoted by trusts as a benefit.
- Market responsiveness – often linked to the above, the ability to react quickly to market changes.
- Sourcing capital – trusts believe they have the borrowing capacity of Councils without the constraints, and have an equal ability to tap into lottery and other funds.
- Staff involvement – particularly in the IPS model.
- Greater public involvement – through a wide range of trustees.
- Benefits "in kind" – trustees can bring skills at low or no cost, e.g. legal expertise.
- Clear responsibilities – if leases and contracts are well designed.
- Longer term stability – based on 25-30 year contracts or leases.
- Single focus – trusts concentrate on their primary responsibility of delivering services to customers

From the Council Perspective:

- Scope to make financial savings – the most common claimed benefit, but needs careful testing.
- VAT benefits – dependent on individual circumstances.
- Allows prioritisation of resources – if leisure seen as low priority, allows resources to be diverted, if savings can be made.
- Community involvement – widens the base of community involvement.
- Investment and employment – secures jobs and the future of public building assets.
- Longer term stability – commitments agreed in advance avoids annual budget arguments.
- "Trust" built on trust – if a new leisure trust is created locally, the trust which Members have in existing staff can be demonstrated.

From the Community Perspective:

- Should see very few changes initially, but consultation with customers in the foundation stages will engender a greater sense of community involvement and help source prospective trustees.

- Long term benefits from reinvestment.
- Should be more customer focussed, due to exclusive nature of operations.

Common Problems with Trust Operations

From the Trust Perspective:

- Over-optimism – many trusts, particularly those which are “officer driven”, have been set up with unrealistic expectations of revenue growth and have struggled to meet their financial obligations.
- Ageing buildings – many leisure buildings are reaching an advanced age and, in some cases, have been poorly maintained. Client expectations of full repairing leases are, in these cases, unrealistic.
- Client greed – attempts by the client to secure all available current and future savings.
- Inexperience of managing complex operations – in-house teams often lack experience of directly managing building maintenance, legal costs, catering etc., as these have commonly been done for them by others within the Council.
- Political interference – some trusts complain of Members’ unwillingness, in some cases, to step back from day to day involvement, particularly when complaints driven.
- Competition – some trusts are established on the expectation of no further competition in the market, and can be caught out by the growth, particularly in commercial health and fitness.
- Staffing – some trusts overestimate the loyalty or resistance to change of staff. Early and full consultation is vital, particularly relevant to IPS model.
- Limited horizons – successful trusts need the capacity to grow and change the nature of their operations, particularly in a dynamic market such as leisure. Restrictive trust deeds can sometimes limit growth.

From the Council Client Perspective:

- Unrealistic expectations – either of levels of financial benefit, the capacity of a trust to generate additional capital or revenue, or of community willingness to volunteer.
- Incomplete market understanding – often linked to the above, the client’s information on the local market is often held by the operator and it may be difficult for an inexperienced client to understand and account for market changes.
- Short-termism – most trusts run into problems after 5-10 years, when the original founders and the original politicians/officers who created the trust move on, leading to a lack of understanding of roles and responsibilities.
- Trust greed – attempts by the trust to secure all of the available benefits.
- Inadequate risk management – trusts have been known to fail and, in most cases, the client does not have a contingency plan.
- Underestimate the corporate impact – the externalisation of a sector of a local authority’s portfolio can have a disproportionate impact on the corporate core, particularly if other services, such as cleansing or housing, have previously been externalised without making realistic corporate reductions. The fixed costs have to be spread over a smaller range of retained services or difficult choices have to be made.
- Inexperience in drawing up relevant contracts – in-house teams often lack specific experience.
- Over-reliance on documents – all good relationships need a good written contractual basis, but in a flexible market such as leisure such documents need to be interpreted flexibly. Some clients become too reliant on documents and fail to grasp the opportunities to build and develop the relationship.
- Understanding inherent problems – the client should not expect the contractor to resolve problems which have been inherent in the service for some time. The largest trust failure in the UK leisure industry (Bristol Community Leisure Trust) was largely due to the attempts of the trust to close uneconomic facilities. The trust understood that there was an agreement with the client that these facilities would close, but when public pressure against the closures built up, the client was unwilling to support the trust and sought to enforce the letter of the contract. The financial and political pressures that arose led to the collapse of the trust.

- Unrealistic timescales – experience suggests that trust formation generally takes longer than anyone involved expects.

From the Community Perspective:

- Barring catastrophic failure, the community should not experience problems with a trust transfer.

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Hywel Griffiths 2009 (some updating to 2020)