

LEGAL

AND PROFESSIONAL

CHARITY BEGINS WITH THE LAW

Charities are in the public spotlight following recent bad press. Jonathan Fowles urges those who run them to tread carefully and avoid pitfalls when dealing with real estate

Those who run charities, and their advisers, need to take special care when dealing with real estate. The risk otherwise is that legal pitfalls, of which too few in the property sector are aware, will make a transaction invalid and may result in personal liability to compensate the charity in question.

Generally speaking, purchasers from charities or institutions lending to charities on mortgages are protected so long as they act in good faith. But it will generally be better for them to be aware of what their counterparties need to get right to ensure that the transaction is not subject to expensive re-examination.

Charity trustees and the Charity Commission

The charity sector is generally perceived to have had a difficult time in the press in the past couple of years.

Two frequently cited examples are the collapse of Kids Company and the suicide of poppy seller Olive Cooke.

One consequence of this is that the administration of charities is in the public spotlight. The Charity Commission, the registrar and regulator of charities, has also been under pressure to be more proactive in its interventions.

The directors of charitable companies or the trustees of charitable trusts, or indeed anyone with the general control and management of a charity's administration, is in law referred to as a "charity trustee".

Charity trustees are subject to duties the same or similar to those of trustees. These include:

- a duty single-mindedly to act in the best interests of the charity;
- a duty to comply with the

charity's constitution and with charity law; and

- a duty of reasonable care and skill.

The Charity Commission has extensive statutory powers to investigate the administration of charities and to take protective and remedial measures where it finds misconduct or mismanagement.

In the past year, its powers have been reinforced by additional legislation (the Charities (Protection and Social Investment) Act 2016), which strengthens existing powers and gives it new powers to, among other things, issue official warnings and disqualify individuals from acting as charity trustees.

Professionals such as surveyors retained to act on behalf of the charity will also obviously owe duties of reasonable care and skill to the charity (in the case of a

company or charitable incorporated organisation) or the charity trustees in that capacity (where the charity is a trust or unincorporated organisation).

For reasons of history rather than logic, a charity's ability to deal with its real estate is substantially restricted by a layer of statutory requirements which are overlaid on the restrictions imposed by general law on the charity trustees.

These requirements are contained in sections 117-126 of the Charities Act 2011 and the Charities (Qualified Surveyors' Reports) Regulations 1992 ("the 1992 Regulations").

It may be that in the next few years the law will be reformed (the Law Commission will be producing a report and draft bill on charity law in September 2017) but these are the current legal requirements.

Rules on real estate

A charity is not free to sell land in any way the charity trustees choose, even if the charity trustees consider that the sale is in its best interests. The focus in this article is on the rules generally applicable to the sale or other disposal of property, but it should be noted that there are also (less stringent) requirements applicable to the mortgaging or charging of charity land to secure loans and debts.

The starting point is a general rule that no land held by or in trust for a charity can be transferred without an order of the court or the Charity Commission. In most cases, an exemption to this will apply so long as statutory self-help procedures are complied with (or even, in limited cases, if not). But if the other party to a transaction is connected with a charity trustee or the charity in certain, particular ways, giving rise to concern that the transaction may not be arm's length, there will be no avoiding the need to seek an order from the Commission.

In all cases, the eventual sale agreement and transfer will need to contain statutory statements as to compliance.

CHECKLIST FOR SURVEYORS

- Be careful to check, as far as possible, that you are being instructed by the charity trustees and that you are not acting for anyone except the charity
- Consider whether more than one report will be required and, if more than one, when
- Reports will need to follow the requirements of the 1992 Regulations
- Do not assume that following the specific bullet points in the regulations will be sufficient. The advice should be directed at ensuring that the charity enters only into transactions in its best interest
- The advice ought, if appropriate, to include consideration of ways in which the value of what is being sold might be improved, eg by enfranchisement or the release of restrictive covenants
- Be aware that if the land is "designated land", your advice as to advertisement will need to take into account that public notice will have to be given of the proposed transaction in any case

Self-help procedures

In most cases, to avoid the need for an order, the law requires the charity trustees to obtain a surveyor's report before agreeing a sale, lease or other transfer (though not a lease of seven years or less).

In practice, a report will be required before the marketing process has begun. Further, it will usually not be sufficient to obtain just one report from the appointed surveyor: circumstances may change significantly after the land has been marketed for sale, and input may be required on the

including whether and how the property should be advertised.

Once the surveyor's report is obtained, the charity trustees will be required to follow its advice in advertising the property and, having considered the report, decide whether they are satisfied that the proposed terms are the best that can reasonably be obtained for the charity. Only if they decide that they are can they enter into the agreement.

There are additional requirements of publicity where the trustees propose

the upkeep of the property. But the lease contained a restrictive covenant against use other than as the HQ of a non-profit, learned or charitable or cultural association or society, or as an embassy.

The charity managed to sell the lease for £6m in 2010 to a BVI company, but later in 2010 the company was able to sell the lease to another BVI company for over £21m. Reports in the media of this apparent loss caused the Charity Commission to investigate and in due course to open a statutory inquiry.

The Charity Commission found that the process leading to this sale amounted to "basic and serious mismanagement by the charity trustees". The problems identified included:

- Before entering into a sale agreement in 2009 with a company associated with the eventual purchaser, the charity trustees failed to obtain a surveyor's report, rendering the agreement unenforceable.
- The surveyor instructed to report before the eventual sale in 2010 was not suitably qualified and did not address the question of whether and how the property should be marketed.

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sale process itself.

Such a surveyor (FRICS, MRICS, or AssocRICS) must be a person who the charity trustees reasonably believe has ability in, and experience of, the valuation of the particular kind of land and geographical area in question. He or she must be instructed by the charity trustees and act exclusively for the charity.

To be a compliant report, the surveyor's report must contain the information prescribed in the 1992 Regulations. There is no substitute for full consideration of the Regulations themselves, but the required information includes:

- a valuation; and
- advice as to how to achieve the best terms that can reasonably be obtained,

to sell but not replace "designated land", ie land that is required by the charity's constitution or other trust to be used for particular purposes, eg a church or almshouses.

A recent case demonstrates what can go wrong where such requirements are not followed.

The case of the Spiritualist Association of Great Britain

The Spiritualist Association of Great Britain is a registered charity. In 2009 it owned a long lease of a property in Belgravia, though by the relevant time, the lease had fewer than 40 years to run. The charity trustees felt under pressure to sell the lease because they were being asked by the landlord to pay substantial amounts towards

- The charity trustees failed to obtain proper advice about the scope for the value of the property to be increased after disposal (eg, enfranchisement or change of use). In fact, it seems that the purchaser had obtained a change of use that enabled it to sell the property for considerably more.

A more optimistic note

All is not lost if there is a negligent failure to comply – the Charity Commission considers that it may grant an order validating a transfer (though not an underlying sale agreement) which fails to comply with the rules. But this cannot be the working assumption.

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