Property law round-up

Chris Sharpe and Nick Ivey guide you through some of the key legal developments in the charity property world.

Serious incidents

The importance of serious incident reporting has been emphasised by the Charity Commission. Reporting serious incidents is an important part of a charity's regulatory compliance and also demonstrates that charity trustees are taking appropriate action to deal with risks that have materialised. A serious incident includes an event which risks significant loss of a charity's assets, damage to a charity's property or harm to a charity's reputation.

Such incidents might include loss resulting from a charity entering into a property transaction without complying with the provisions of the Charities Act, or from charity trustees acting beyond their powers. As ever, it is crucial for trustees, when dealing with property transactions, to understand the regulatory framework within which they are required to operate as charity trustees and to be aware of the importance of taking expert professional advice. In addition, it is now, even more so than before, important for trustees to take on board the necessity of working with the Charity Commission if they find themselves in a serious incident.

The direction of the Charity Commission

In October the Charity Commission released a new statement of strategic intent. Three of the Commission's five strategic objectives are: holding charities to account; dealing with wrongdoing and harm; and giving charities the understanding and tools they need to succeed. Among other principles, in the past year the Commission has focused on the need for trustees to comply with the property provisions of the Charities Act, in particular when dealing with property disposals, as well as the need for remuneration of trustees to be properly authorised – any payments to trustees must be permitted by the charity's constitution or otherwise authorised by the Commission.

Further, the Commission has reminded trustees of the need to follow the Commission's core principles when making significant or strategic decisions. Such decisions would include those affecting a charity's beneficiaries, assets or future direction, and should therefore include decisions about a charity's property. These core principles include that trustees must act in good faith and only in the interests of the charity, make sure they are sufficiently informed and manage conflicts of interest. We would strongly encourage any trustees considering entering into property transactions to consult the relevant Charity Commission guidance and to take expert advice.

Electronic signatures

The Law Commission has concluded, albeit provisionally, that electronic signatures are as valid as paper ones in certain circumstances. As part of its current programme of law reform, the Law Commission (which was established to ensure that the law is as fair, modern and as cost-effective as possible) is considering electronic signatures with the aim of addressing uncertainties in the area. It is worth noting that the Law Commission's work does not extend to registrable property transactions, since the Land Registry is currently working on a separate project regarding electronic conveyancing.

Uncertainty currently exists because the law does not expressly state that electronic signatures will be valid. The difficulties are compounded by the additional requirements for the execution of deeds, such as leases or land transfers, which require witnessing.

However, the Law Commission has concluded that "an electronic signature is capable of satisfying a statutory requirement for a signature under the current law, where there is an intention to authenticate the document". The Law Commission considers that a change of the law is not required but that an industry working group should be established in order to investigate the practical and technical issues of electronic signatures.

Where signatures require witnessing (such as in the case of deeds), the Law Commission proposes that an electronic signature can be observed when the witness is physically present, and that this should also be the case for a witness via video link, although the Law Commission's conclusion is that in the latter case a change to the law would be required for this to be established.

In the light of suggestions from some that the requirement for a witness should be dispensed with in the case of electronic deeds, the Law Commission's conclusion that witnessing fulfils an important evidential function which should not be dispensed with is to be welcomed.

While it is clear that the use of electronic signatures would improve the efficiency of document signing and allow for even faster commercial transactions, which can be of benefit, it will be of utmost importance that the safeguards that wet-ink signatures and traditional witnessing provide are not lost.

Charities are under greater restrictions and have arguably greater duties to the public than other organisations. Thus, the removal of the traditional requirements of execution – traditionally execution by two duly authorised trustees – may cause nervousness. Clients need to consider and then put in place their own procedures for dealing with the execution of documents.

Energy performance certificates (EPCs)

The regulation around property owners leasing their property has become more onerous in a move that may affect charities more than others. The Energy Performance of Buildings (England & Wales) Regulations 2012 are designed to make information on the energy efficiency of a property available to buyers and tenants. On 26 March 2015, the Energy Efficiency (Private Rent Property) (England and Wales) Regulations 2015 came in. They were designed to set a minimum level of EPC rating for commercial and residential property.

As a result, broadly speaking, from 1 April 2018, where a new lease is granted to a new tenant or an existing tenant including statutory renewal of commercial property and an EPC is required or already exists, a property will be required to have at least an "E" EPC rating. Properties with "F" or "G" ratings cannot be let without serious consequences. This requirement also applies to the residential sector.

Additionally, from 1 April 2023 all commercial lettings (not just those involving a new lease) with an EPC must have at least an "E" rating. This will include properties where a lease is already in place and an existing tenant is already in occupation.

While there is no mention of charities or of the charity sector in the regulations, and it was certainly not intended that the cost of compliance would fall on the sector, the charity sector is more strongly represented in tired and of course older buildings, all of which typically fall into these lower EPC ratings, and will therefore need work to be carried out to them.

Therefore while the legislation applies to all property owners and occupiers, charities, in particular, need to be aware of this issue more than many other owners. Property owners and occupiers who own or rent newly-built premises would expect to achieve, routinely, an "A" rating in the EPC gradings. Conversely, the typical charity property is more likely to be hovering around an "E" rating or below.

There are several exemptions but these are relatively restricted. One big point to be aware of is that the regulations will only come into play if an EPC is required or already in existence. So voluntarily obtaining an EPC is generally not advisable.

Leasehold consultation on home ownership

The Law Commission consultation on leasehold home ownership has been issued. Leasehold property has often been in the headlines in recent times and the consultation comes against the backdrop of the government's desire to address an actual or perceived imbalance of power that exists in some landlord and tenant relationships. In particular, a domestic residential interest – somebody's home – may be seen to be at risk in balance against a landlord's private commercial profit interest.

However, the proposals do not adequately take account of the distinctive context that applies in the charity sphere. There may well be a strong argument for excluding property from the proposed restrictions where the landlord's interest is held in trust for a charity.

Where a charity is the landlord, the situation is not about the competition between a home and profit – by definition, the charity landlord is doing things not for profit but for public benefit and that public interest may find itself being materially negatively affected by the proposals.

An example of the possible detriment to the charitable public interest if the restrictions were to be imposed on property held for public benefit is a situation involving a care village which has been developed by a charity for older people. The land let is part of a scheme for charitable purposes (with the intention of those purposes continuing), and the use of the lease structure benefits the whole scheme, again with care for the older person in mind. If the changes are introduced there is a risk that the running of the village would be undermined by the increase of private interests which could thwart the proper and full application of the charitable aims.

Charity rating relief

The Barclays review into non-domestic business rates published in August 2017 and commissioned by the Scottish government may give a forewarning of possible changes to the rating system and charitable rate relief. While limited to Scotland it considered a range of issues including:

- Incorrect awarding of rate relief especially to charity trading companies
- Substantial increases (well above inflation) in charity rate relief, and
- Unfair competition between charities and non-charities providing the same or similar services.

The Scottish government already appears to be proceeding with plans to remove charity relief from business rates for independent schools. The proposed time of implementation is April 2020. This is bound to bring the recurring question back into the spotlight elsewhere in the UK so we expect more discussion on this in 2019, although, of course, something else may continue to dominate parliamentary time for some time yet. ■

Chris Sharpe is a senior associate and Nick Ivey a consultant at Stone King