



Geldards LLP

Letting & Hiring

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Seminar Presentation Handout
Tuesday 13th May 2008

Let's Talk

Introduction

Charities are different from other organisations! Although the basic conveyancing principles don't change, charities also have to consider the effect of the Charities Act 1993 on its actions, particularly if the charity is to become a landlord.

This handout will highlight some of the issues to consider if you are a trustee of a charity planning to become either a landlord or a tenant. It will not consider sales or purchases of property.

Four areas will be considered:

- 1 How does the charity hold property;
- 2 Trustees' general duties and the Charities Act 1993;
- 3 To lease or not to lease?
- 4 The terms of the letting or hiring.

1. How does the charity hold property?

Unincorporated Association

A charitable unincorporated association may be established by a group of people who wish to co-operate to promote a charitable activity. The trustees will normally be those members who comprise the decision making committee. The governing instrument will be the unincorporated association's constitution or rules.

As the association is not a company it therefore will not:

have limited liability and a legal personality of its own (i.e. the charity trustees may be liable for the repayment of any debts which they have incurred on behalf of the charity).

be able to own land in its own name. (Property is either held by Trustees on behalf of the Charity, Holding Trustee, Custodian Trustee or the Official Custodian).

Trust (unincorporated)

This means that the charity is governed by a trust deed. The trust deed may take the form of a will, conveyance, lease, scheme or similar.

A trust cannot own land or sign documents in its own name. The trustees are appointed under the Trust Deed and any land or assets are held by the trustees for the time being on behalf of the charity.

The governing instrument will be the trust deed.

Always ensure that where the property is held by named trustees of an unincorporated charity that the Land Registry has been updated with the names of the current trustees. If not, the property will need to be transferred into the current trustees' names before proceeding with the transaction.

Incorporated

The charity is can be incorporated in one of three ways:

- Under the Companies Act 1985 usually as a company limited by guarantee without a share capital. The trustees will be the directors (but not the company secretary) of the company.

The company will have limited liability and be able to hold property and assets in its own name.

The governing instrument will be the company's Memorandum and Articles of Association.

- Under the Industrial and Provident Societies Act or Friendly Societies Act. The Trustees will be the members.

The company will have limited liability and be able to hold property and assets in its own name.

The governing instrument will be the company's Rules.

- By Royal Charter or by Statute. The trustees will be the Council or Members or similar. The company will have limited liability and be able to hold property and assets in its own name. The governing instrument will be the Royal Charter or the Act under which the charity was created.

Once the registered organisation becomes a “corporate person” the Trustees are simply means by which the corporate body makes decisions. The liability for any acts of the Trustee is borne by the organisation.

In respect of all of the above organisations, the constitution of the charity and the governing document will decide how the charity property is held.

The first place to look is at the official copies or unregistered deeds for the property.

Set out below are different ways in which the property can be held:

- **By the charity**

This is only where the charity is an incorporated charity as it will have its own separate identity and is able to own property in its own name.

The other ways that a property is held all relate to an unincorporated charity or a trust charity.

- **By the trustees of the charity**

Where the charity is either unincorporated (and may be a trust), the charity lacks “legal personality” it cannot itself hold land. In these instances, one option is for the trustees of the charity

The disadvantage of this is that every time a trustee who holds an interest in the property changes, the assets of the charity have to be transferred to the new trustees.

- **By a Custodian Trustee for the charity**

Where the charity is either unincorporated or is a trust, the governing document may specify that any assets are held by a Custodian Trustee. A Custodian Trustee is a corporate body and has the sole function of holding the legal title to the charity’s property or investments. The Custodian Trustee has no role in the charity’s management and must act on the instructions of the charity trustees (unless they are told to do something that is not allowed by the governing document or charity law).

The benefits of using a Custodian Trustee are as follows;

- Extra security against fraud as the funds are held by a third party
- No need to transfer the assets every time the individual managing trustees change.

The disadvantage is that some custodian trustees charge yearly fees.

Some Custodian Trustees are also statutory trust corporations and can convey the land as a sole trustee for the charity.

- **By a Holding Trustee for the charity**

Holding Trustees may be individuals or a corporate body. Sometimes the governing instrument specifically states that the property and assets are to be held by a Holding Trustee.

The governing document may confer other duties or responsibilities on the Holding Trustee and so it is important that the governing document is consulted in every case. Provided that the Holding Trustee only acts on the lawful instructions of the charity trustees it will not be held responsible for any action (or lack of action) of the managing trustees.

The benefits of using a holding trustee are the same as for the Custodian Trustee.

And the disadvantage is that sometimes the Holding Trustee will charge a fee.

- **By the Official Custodian for Charities**

The official custodian is a corporation created by statute to hold land on behalf of charities. In practice he/she is a member of the Charity Commission's staff who is appointed to this role. If land is to be held by the Official Custodian it has to be "vested" in him/her. There is no fee for using this service. Usually it is only unincorporated charities or trust charities that would need to utilise this service.

The Official Custodian for Charities only holds land on behalf of the charity to provide perpetual succession. It has no part in managing the land and does not become responsible for any debts attaching to the land. This is delegated to the charity trustees by Section 22 Charities Act 1993.

The charity will keep or have control of the title deeds to land that has been vested in the Official Custodian for Charities.

The interest in the land must already be held by the charity before it can be vested in the Official Custodian. The Official Custodian cannot be a party to any conveyance, transfer, lease or other deed which concerns the acquiring of an interest in the land before vesting takes place. If the property is being purchased and subsequently vested in the Official Custodian, this can take place simultaneously but there must be two documents, one transferring the property to the charity and a separate document vesting the property in the Official Custodian.

It is necessary to apply to the Charity Commission for an Order that a property be vested in the Official Custodian for Charities.

The benefits of using the Official Custodian to hold property is the same as for the Custodian Trustee and Holding Trustee.

2. Charities Act 1993 and general duties

The trustees of any charity which owns land have certain general duties in relation to it. These duties are prescribed by law. They apply whether the land is used by the charity for its own purposes or whether the land is let to produce an income for the charity. These general duties are that:-

- trustees are individually and jointly responsible for the protection, management and supervision of the land;
- in managing the land trustees must act only in the interest of the charity and its beneficiaries;
- trustees must act honestly and use the same degree of care as they would prudently exercise in dealing with their own business affairs;
- they must maintain overall control of the management of the land;
- trustees must seek advice from independent professional advisors acting exclusively for the charity;

- any decision to dispose of land must be taken by the trustees acting together and when disposing of land belonging to the charity trustees should not leave the conduct of the transaction unsupervised at the hands of a single trustee.

Particular considerations for trustees of a charity intending to let property.

The charity commission guidelines state that before disposing of land trustees should consider four issues:

- **Do they have the power to dispose of the land?**

Most charities have a power of sale in their governing document. If such a power exists the trustee should ensure that any conditions attached to that power are fulfilled. If the power of sale has a proviso that says that it must be subject to the consent of the commission of the Secretary of State then this power can be used without that consent provided that the regulations set out in section 36 are followed. These regulations are looked at in detail below.

If the trusts of the charity do not permit the disposal of land but the trustees wish to do so, they can often rely on the powers in the trusts of land and appointment of trustees at 1996. This gives trustees all the powers of an absolute owner including a power of sale.
- **Is the disposal beneficial to the charity?**

In respect of the grant of a lease this will mean taking into account the effect that this will have on the current and future use of the land and the value of it. This will also involve a careful consideration of the terms of the lease or tenancy agreement;
- **Are the terms of the disposal the best that can be obtained for the charity?**

Trustees should always secure the best terms reasonably obtainable when they lease land belonging to their charity. This will involve seeking professional advice on the timing and method of the disposal, ensuring that the land is marketed in a way which will encourage the most offers and accepting the best financial offer made except where there are other special factors.
- **Is charity commission consent to the disposal needed?**

Usually not if trustees follow the statutory requirements in relation to the type of disposal they are carrying out before entering into an agreement for disposal. The Charity Commission will only give its consent to a disposal where trustees are unable to follow the statutory requirements. Charity Commission consent is required if:-

- The disposal is to a connected person;
- The surveyor is unable to recommend the terms of the transaction;
- The trustees do not wish to use a surveyor;
- The surveyor the trustees use is not qualified as required under the Charities Act 1993; or
- The trustees fail to follow the statutory requirements before they enter into an agreement to dispose.

Section 36 of the Charities Act 1993

The basic proposition in section s36(1) is that it prohibits any land held by a charity being leased or disposed of without a court order or an order of the Charity Commission. As stated above there are some exceptions to this and ways to avoid having to obtain those consents. The requirements that must be followed differ depending on whether the disposal being made is a lease for more than 7 years or a lease for less than 7 years.

1. If the proposed lease is for more than 7 years, or a lease that is being granted subject to the payment of a premium, then the consent of the Charity Commission will not be required if:
 - a) the trustees obtain and consider a written report on the proposed letting from a qualified surveyor acting for the charity only;
 - b) advertise the proposed disposition for the period and in the way that the surveyor has advised in its report; and
 - c) the trustees decide that they are satisfied, having considered the surveyor's report that the terms on which the disposition is proposed are the best that can reasonably be obtained for the charity.

A surveyor is a "qualified surveyor" for these purposes if:

- he is a fellow or professional associate of the Royal Institution of Chartered Surveyors or of the incorporated Society of Valuers and Auctioneers or satisfies such other requirement or requirements as may be prescribed by regulations made by the Minister; and
- he is reasonably believed by the charity trustees to have ability in and experience of the valuation of land of the particular kind and in the particular area in question.

The surveyor's report must be in writing and must deal with the matters laid down in the Charities (Qualified Surveyor's Report) Regulations 1992. When instructing a surveyor it is the trustees' responsibility to make sure that the surveyor is aware of these regulations as the surveyor's report must cover everything which is contained within them. Amongst other things these regulations require the surveyor to comment on:-

- whether the land or buildings are in good order and if any work needs to be done before the sale;
- whether the land or buildings are subject to any restrictions or easements;
- advice on how best to sell the land; and
- the surveyor's opinion on the value of the property.

The trustees can ask the surveyor to report to them on matters which are not covered by the regulations if the trustees feel that they are relevant or if the trustees wish to receive advice on those issues. The trustees could, if they wished, ask the surveyor to assess the offers being made for the land and give a positive recommendation if the surveyor believes that one offer represents the best value obtainable in the circumstances. Or, the trustees may, for example, wish a surveyor to give specific advice about the effect of a sale on the value of adjoining land.

2 Where the proposed disposal is a lease for less than 7 years the trustees must:

- a) obtain and consider advice from a person who is reasonably believed by the trustees to have the requisite ability and practical experience to provide them with competent advice on the proposed disposition; and
- b) decide that they are satisfied having considered that advice, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.

In these circumstances, the choice of surveyor is the trustees' responsibility alone and they must be satisfied that the person that they wish to consult has the ability and experience to advise them competently on the terms of the lease. This includes advice on the covenants and the rent and on whether

the lease is, overall, one which it would be advisable to enter into. In particular, the trustees will want to take advice on the need to avoid giving the tenant security of tenure which would allow the tenant to renew the lease at the end of the term and which is discussed in more detail below.

- 3 There are specific rules governing the disposal of land which is required under the Charities' Trust to be used by the charity for particular purposes which are not explored here. Further advice should be taken by trustees if this is the case.
- 4 If trustees of a charity wish to lease land for less than its full value to another charity and if this disposal is authorised by the trusts of the disposing charity then the trustees need not comply with the statutory requirements for a disposal set out above. The consent of the Charity Commission will not need to be obtained to the transaction. A disposal is authorised by the trusts of the disposing charity if:-
 - there is nothing in the trusts which specifically prohibits the disposal;
 - the disposal is a means of making use of the charity's assets in furtherance of its charitable purposes;
 - it has power under its trusts to dispose of its land to the recipient charity.

3 To lease or not to lease?

The next question for trustees is how to decide what the best method of "disposition" for the Charity would be. Two different methods of disposition are:

- leases;
- licences.

The implications of each method are slightly different.

Leases

A lease is the grant of a right to the exclusive possession of land for a determinable period of time. The period of time for which a lease is granted must be less than that held by the landlord, and the term of the lease must be certain. A lease is both a contractual relationship and an estate in land.

One of the key elements of a lease is exclusive possession. A person has exclusive possession if it can exercise the rights of the landowner and exclude both the landlord and third parties from the land (except for the extent that rights of entry are reserved for the benefit of the landlord in the lease document itself).

Possession is not necessarily the same as occupation.

Three types of leases are looked at below:

- **A fixed term lease**

This is one that is granted for a stated number of years. Such a lease is capable of existing as a legal estate and if granted for more than 3 years must be a deed.

- **Periodic Tenancies**

A periodic tenancy runs by reference to a stated period, for example a week, a month or a year until it is terminated by either party giving notice. The notice that has to be given by either party is the same length as the period of the tenancy, so if a tenancy is one that is stated to be a yearly tenancy then a years notice must be given. Either party has the right to terminate the lease at the end of any of the period.

A periodic tenancy does not have to be in writing or by deed if the tenant takes possession and the rent is the best rent reasonably available. This means that periodic tenancies can often arise informally or unintentionally if a person is given exclusive possession of a property in return for a periodic payment.

If the trustees of a charity allow a third party to use their property must be very careful to avoid unintentionally entering into a periodic tenancy if the property is going to be used for a business. This is because a periodic tenancy cannot be contracted out of the rules relating to security of tenure and this

could allow the tenant to gain a right to renew the lease at the end of the term. Comments on security of tenure are set out below.

- **Tenancies at Will**

A tenancy at will exists where there is a tenancy on terms that either party can terminate it at any time. It is determinable by the landlord demanding possession or the tenant giving up possession. No time period for the demand for possession needs to be specified and therefore the possession must be given back immediately, if requested. A tenancy at will is different to the types of leases set out above because it is a personal relationship between the landlord and tenant and is not an estate in land. Tenancies at will are often used where the parties are in negotiations for a lease to be granted for a fixed term and the tenant goes into occupation. They are not business tenancies within the Landlord and Tenant Act 1954 and so no security of tenure can be obtained by a tenant.

Licence

An alternative method of letting or hiring property is by a licence. A licence is simply permission to do something on the landlord (or licensor's) property. This permission given to the tenant or licensee prevents the permitted act from being a trespass. A licence is not a lease; it is a personal right or permission. A licence entitling the licensee to use the land for the purpose authorised by the licence does not create an estate in land.

Under a lease the tenant has exclusive possession, this is not the case in a licence and this is one of the key distinguishing factors.

Labelling a document a lease or a licence does not mean that it will be construed in that way. For example, if a document is referred to within it as a licence, but in fact grants exclusive possession to the tenant, it may well be that the document is in fact a lease. It is the substance as well as the form of the agreement which is important. A licence is not a licence if it grants exclusive possession, is for a fixed term and reserves a rent. These are all factors which indicate a lease.

Why is the distinction important?

The distinction between a lease and a licence is vital if the premises are being used for business use. This is because of the provisions of Part II of the Landlord and Tenant Act 1954 ("1954 Act")

Under Part II of the 1954 Act a tenant occupying premises for the purposes of its business generally has a statutory right to renew its tenancy at the end of the term. This is known as security of tenure. The landlord can only oppose renewal on certain limited grounds. This can make it extremely difficult for a landlord to remove a tenant at the end of the term of the lease. It is therefore extremely important as a landlord to ensure that trustees do not inadvertently grant security of tenure to a tenant.

The right to a new lease applies to all tenancies where the property is occupied (at the end of the term) by the tenant for the purpose of the tenant's business, subject to certain exceptions. There are two "major" categories of exceptions, and several "minor" (or less usual) ones.

The major exceptions are:

- Tenancies at will; and
- Leases granted for a term certain of six months or less, unless either:
 - The tenant, together with any predecessor in business, has been in occupation for more than 12 months. The 12 month period relates to the date the lease will come to an end. So, for example, if the tenant's predecessor in business was in occupation for nine months and the tenant is granted a lease for four months, that lease will be one to which Part II applies;
 - or the tenancy contains provisions for renewing the term or for extending it beyond the initial six months.

The less usual exceptions are:

- mining leases;
- certain leases of agricultural holdings;
- farm business tenancies;
- leases where the tenant occupies by reason of an office or employment;
- leases of certain railway property; and
- leases of certain military establishments.

Contracting out

A landlord and tenant may, however, agree that the security of tenure provisions in the 1954 Act will not apply in relation to a tenancy to be granted for a term certain. This can be done by inserting clauses within the lease and by the landlord serving a notice on the tenant advising it of the rights that it is agreeing to give up. The tenant will then either sign a declaration or swear a statutory declaration to confirm that it understands that it is agreeing to give up its right to security of tenure.

Because a licence is not a lease, security of tenure cannot be conferred on a licensee.

It is vital for a landlord to decide whether it wishes the tenant to retain its security of tenure or not before entering into a document. Many landlords will want to ensure that security of tenure is not conferred on the tenant.

A licence and a tenancy at will, if properly drafted, will not confer security of tenure on a tenant. A lease for more than six months however, unless specific action is taken to prevent it, will.

In granting a licence to occupy for more than 6 months, there is always the risk that the licence could be construed as a lease, and that the tenant will gain statutory rights to remain in the property.

If the intention is therefore for a tenant to remain in the property for more than 6 months, trustees may wish to consider entering into a short term lease that includes provisions for contracting out, rather than granting a licence. This will ensure that the issues around security of tenure will not arise.

Clauses indicating a licence

If the trustees of a charity do wish to grant a licence rather than a lease they should ensure that clauses similar to those set out below are included in the agreement. These clauses are not conclusive in avoiding the creation of a tenancy but are an indication of how the courts have interpreted arrangements in the past.

- 1 A clause providing that the occupier should not interfere with the owner's right to possession and control of the premises. This is because this clause is inconsistent with the grant of exclusive possession;

- 2 A clause entitling the owner to require the occupier to transfer his occupation to other accommodation selected by the owner. This clause can negate the grant of exclusive possession;
- 3 Provisions prohibiting the use of the property for a period in each day or granting the right to use the property only for a part of each day. This too is an indication that exclusive possession has not been granted.

Clauses indicating a lease

There are also certain clauses which may indicate that the document is a lease rather than a licence. These are clauses that indicate that exclusive possession has been granted to the tenant. For example, if a landlord preserves for itself within the document a right to go onto the property to view it or repair it then this is an indication that it has given up this right by granting exclusive possession of the property to the tenant. A document granted for a fixed or periodic term at a rent points to a tenancy rather than a licence. Any clause giving the owner limited rights to enter the property indicates exclusive possession and a tenancy. Any covenants prohibiting assignment or underletting hints at a tenancy arrangement.

What are the advantages and disadvantages of a lease, licence and tenancy at will?

Advantages

Lease	Licence	Tenancy at Will
<p>At the end of a short term lease which has been contracted out of the security of tenure provisions the landlord is entitled to possession of the property. It will be protected from spurious claims by the tenant that it can remain in the premises from the lease expiry.</p> <p>A lease confers a secured period of income for the landlord.</p> <p>Flexibility for both parties can be introduced under the lease by the insertion of a mutual rolling break clause.</p> <p>A lease offers security and certainty for the tenant as an occupier of land. The landlord generally has limited rights of access.</p>	<p>A licence is usually a shorter document than a lease and can be prepared and completed more quickly and therefore more cheaply.</p> <p>There is a little more security where an occupier occupies premises as a licensee rather than a tenant at will as a tenancy at will can be determined instantly.</p> <p>The circumstances in which a party can end the licence are dependant on the terms of the licence and the licensor will not necessarily determine the licence at will.</p> <p>A contractual licensee is entitled to the occupation that the contract provides and where the contract is determined on notice the licensee is entitled to the notice that the contract provides.</p> <p>The property constitutes a licence to occupy is outside the Landlord and Tenant Act 1954 and confers no security of tenure on the licensee.</p> <p>There is no stamp duty land tax payable.</p>	<p>A tenancy at will is generally a short document and can be prepared and negotiated very cheaply and quickly.</p> <p>A properly drawn up tenancy at will is outside of the Landlord and Tenant Act 1954 and confers no security of tenure on the tenant.</p> <p>A tenancy at will favours the landlord in retrieving possession of the premises from the occupier. The landlord may state that the tenancy is at an end and that possession is to be given back immediately.</p> <p>There is no stamp duty land tax payable.</p>

Disadvantages

Lease	Licence	Tenancy at Will
<p>Leases (even for a short term) tend to be longer documents than a licence to occupy or a tenancy at will. It takes more time to negotiate the terms of the document. The costs associated with producing a lease are likely to be higher than those associated with producing a licence or tenancy at will.</p> <p>Stamp duty land tax may be payable on the lease.</p>	<p>Even if the document is labelled a licence, if exclusive possession is in fact granted there is always the risk for the landlord that the arrangement may later be challenged by the occupier. If the arrangement has lasted for more than 6 months the land owner could be exposed to a claim that the licence is really a lease which is protected by the security of tenure provisions conferred by the Landlord and Tenant Act 1954.</p> <p>An occupier does not have the same degree of control over the land and as it would have if it were granted a lease. A licence is a personal privilege which makes lawful that which would otherwise be unlawful.</p>	<p>Tenancies at will can be determined instantly consequently that may not offer enough security or certainty for an occupier of land.</p> <p>Because they can be determined instantly by the occupier, a landlord may not have a sufficiently secure period of income that can be relied upon.</p> <p>The tenancy at will if not properly drawn up could quite easily end up being a periodic tenancy. If a tenant enters into a lease it is important that it ensures that the post completion requirements are dealt with. There are two particular issues to look at. The first being stamp duty and tax and the second being Land Registry registration.</p>

The terms of the disposal

These are issues that have to be considered carefully by a landlord and a tenant, but each from a different perspective. When trustees have decided the form that a letting or hiring is going to take, they should think carefully about the terms of the document. Below are some of the issues that trustees may wish to consider.

1 The extent of the Property to be let.

This is important, particularly if the trustees are not intending to let or hire an entire building. If the intention is only to let or hire one room or a few rooms in a building, it is important to be exact about the boundaries of the property that are being let. Both parties will also need to consider what rights a

tenant may need to have over the remainder of the building, for example, does the tenant need to be granted a right of way to enable it to get from the front door of the building to the part of the property being let? Is the area being let self contained or do rights need to be granted to access toilet or kitchen facilities? These rights will all have to be set out in the lease.

2 The term of the lease

How long is the term of the lease going to be? Landlords may wish to take a surveyor's advice on this, in conjunction with the amount of the rent that is to be paid, as to what is usual in the market at that moment. How long can the landlord charity be sure that it will not need this space itself? How long does a tenant wish to be tied in to the lease for?

3 The rent that is to be paid and other costs that the tenant should meet

It is important for a landlord to speak to a surveyor about what is an acceptable rent for the property. What other costs are is the tenant going to be asked to pay? Will the tenant pay all outgoings for the building or a percentage of them if the use of the property is shared? Will the tenant pay a service charge in respect of the maintenance and repair of the parts of the property that are being shared? If a service charge is to be paid, tenants should look very carefully at its terms and make sure that the landlord is obliged to carry out the services for which the tenant will be paying.

4 The use that the property can be put to

It is very important to consider carefully the extent of the use provisions. The landlord trustees may hold strong views on what the property can and, importantly, can't use the property for. This should be spelt out very clearly, with restrictions put on certain uses if necessary. Tenants must be very clear of what any restrictions are.

5 Can the tenant sell the lease to a third party or sublet it? (Alienation)

Does the landlord want the tenant to be able to allow other people or organisations into occupation of the property? The trustees' views on this may be different if only part of a building is being rather than the whole. Is the tenant to be able to sell the whole lease to a third party or not? If so what conditions

will the landlord want to impose before any such sale goes ahead, if any? Such conditions could be that the new tenant must be financially acceptable, or that a rent deposit must be paid by anyone coming in.

Is the tenant to be allowed to sublet all or part of the property? If so, on what grounds?

From a tenant's point of view if the lease is a long term lease, it may wish to be able to dispose of the lease or to underlet it to third parties. This is less likely to be required if the lease is for a short term.

If a longer lease is taken of a property the ability to sell the lease or underlet all or part of it may be very important for a tenant. If the whole or part of the property is no longer required by the charity, but it is unable to end the lease at that time, then underletting the whole or part of the property is a useful way to pass on the liabilities and obligations under the lease to a third party. The tenant is still obliged to comply with all of the obligations and meet the liabilities that it entered into in the lease, but in turn, the tenant can pass these obligations on to an undertenant and make sure that a third party carries the cost of paying the rent and outgoings or repairing the property.

6 Should the tenant have security of tenure?

This is a very important issue for a landlord to consider and has been looked at above in respect of the difference between a lease and a licence. As a landlord, the trustees can protect the charity's position by ensuring that the lease is contracted out of the provisions of the 1954 Act so that the tenant gives up its right to remain in the property after the end of the term. Ensuring that the lease is contracted out gives the landlord choices. It does not stop the landlord renewing the lease to the same tenant at the end of the term, but does give it an opportunity to review the terms of the lease before it is renewed and makes it easier to remove the tenant at the end of the term if it wishes to do so.

As a tenant it may be important that the charity retains its statutory rights to remain in the property after the end of the term. This is a matter for negotiation between the landlord and tenant and will often depend on which party is keener for the transaction to take place.

7 The extent of the obligation to repair

Who is going to be obliged to repair the structure and interior of the property? Will the landlord repair the structure and recover the costs from the tenant through a service charge, or will the tenant be obliged to carry out all repairs necessary? If there is more than one tenant in a property the best way may be for the landlord to repair the structure, and recover its costs by way of service charge payments from the tenant, but oblige the tenant to repair the interior.

If a landlord wants to impose a full repairing covenant on the tenant under which the tenant is going to be liable to repair the structure and the interior of a property, but the property is not in very good condition, the tenant should try to water down the obligation by suggesting that what is known as a schedule of condition be attached to the lease. This can be a written description or photographs of all of the areas of disrepair at the property. The obligation in the lease will then only be to put the property back into the same conditions as is shown in the schedule. This effectively limits the repair to damage which occurs during the term of the lease, not previous damage.

8 Insurance provisions

The Landlord will often choose to insure the property itself and collect the premium or a part of it from the tenant. Alternatively it could ask the tenant to insure if the landlord does not wish to.

9 Break clauses and forfeiture

The landlord will want to be able to be sure that it can end the lease if the tenant breaches its obligations as set out in the lease. Standard forfeiture provisions allow for the landlord to do this if the tenant is late in paying the rent, if any of the covenants in the lease are breached, or if the tenant becomes insolvent.

The landlord may also wish to consider whether it wants the chance to end the lease before the end of the term without any breach of covenant having taken place. If so, a break clause can be included within the lease which will state that the lease can be ended after a certain period of notice has been given. If

the landlord does want to end the lease early, the lease must be contracted out the security of tenure provisions or it will be unable to do so.

A break clause allowing the tenant to end the lease early after a period of notice having been given to the landlord can be very important for a tenant if it is not sure that it will need the property for the length of time that is on offer. A tenant should try to make sure that there are no strings attached to the right to end the lease. For example, a landlord may only allow a tenant to break the lease if it has paid all monies due under the lease and complied with all of the obligations in the lease.

11 Rights reserved to the landlord

Finally, does the landlord want to have any rights reserved for its benefit over the property? Such rights may be to allow access to the property in specific circumstances, to allow the landlord to use the pipes wires and cables running through the property if these also serve land owned or occupied by the landlord. In order to be able to reserve such rights the landlord must own land near to the property which does not form part of the lease and which will benefit from those rights. If there is no other land, no rights can be reserved for the benefit of the landlord.

Issues peculiar to the Tenant

Stamp Duty Land Tax and Land Transaction Returns

A land transaction return must be completed and sent to the HM Revenue and Customs if a lease is entered in to which is:-

- For a term of 7 years or more for chargeable consideration whether or not any SDLT is actually payable; or
- Granted for a term of less than 7 years and is granted for chargeable consideration which means that SDLT is payable.

Any SDLT payable and the land transaction must be submitted to the stamp office within 30 days of the effective date, which is usually the date of completion of the lease.

There is a relief from Stamp duty land tax for charities which intend to hold the land for their own charitable purposes or as an investment, the profits of which are applied to the charitable purposes of the purchaser. The relief is limited to charities established for charitable purposes only. The transaction must not have been entered into for tax avoidance reasons. There are claw-back provisions if the land stops being used for charitable purposes within three years.

Registrations of the lease.

If the lease entered into is for 7 years or more then the lease must be registered at the Land Registry. This will mean that it is given its own title number. There is an obligation on the tenant to register the lease within 2 months.

There is no obligation to register a licence at the Land Registry.

This briefing note is intended solely as an overview of the law. It was last updated on 23 April 2008. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

For further information please contact Harriet Morgan at our Cardiff office on (029) 2023 8239.