

# Torfaen Voluntary Alliance

Your local county voluntary council



## 9. Assets

### 9.3 Land

The issues relating to the ownership and use of land are extremely complex. However, it is important that voluntary organisations have a basic grasp of the law, regulation and the practical matters that relate to them.

The terminology can be confusing, particularly as terms are often used imprecisely. 'Property' can cover the whole spectrum of ownership but more precisely should be classified as:

- **real property** covering freehold land
- **chattels real** covering leasehold interests in land
- **chattels personal** covering physical property other than freehold land
- **choses in action** covering intangible assets such as money.

### Land ownership and tenure

The major rights in land are:

- **Freehold** – this is the most fundamental right to land giving an absolute right to ownership and possession. However freehold land can be subject to a wide range of restrictions and obligations such as easements and covenants. Right to ownership of unregistered land can be lost through **adverse possession** (see below).
- **Lease** – this is a contractual relationship which grants the tenant a limited right to occupy land in return for payment (the rent) for a fixed period (the term) or succession of periods, with the right to recover the possession of land at the end of the term (the reversion). Whilst the lease sets out the terms of the relationship, there are also many statutory provisions that apply, particularly in relation to business leases (see below).

It is important to be aware of the distinction between a **Lease** and **Tenancy**. It is a lease if the term is for more than 3 years and the lease is signed as a deed. A Tenancy agreement relates to a term less than 3 years without a premium being paid, and does not therefore have to be executed as a deed, and can even be in the form of an informal written or oral agreement.

- **Licence** - this differs from a lease/tenancy in that it doesn't create any legal estate in land or confer exclusive possession, but is merely a contract for the use of premises or land. There is often confusion over the exact nature of smaller ad hoc transactions, say for example when a room is hired out in a village hall on a regular basis, but if exclusive possession is not granted and other indicators like the use of the terms 'tenancy' and 'rent' are not present, then the licensee does not enjoy any

protected occupation rights beyond those set out in the license. Tenancies and leases take a variety of forms including: *periodic*; *statutory*; *at will*, and *at sufferance*. Leases can also be **assigned** to another party whereby all the responsibilities to the freeholder under the lease are transferred to the new tenant for the remainder of the term. An **under lease** can also be created whereby the tenant remains responsible to the freeholder under the main or head lease, but creates a sub lease with a new tenant known as a **sub-tenant**, who takes occupation of the premises for the term of the sub-lease. These transactions will generally be subject to explicit conditions in the lease and require consent of the freeholder.

## Registration

Freehold transactions, the grant of leases over 7 years and certain other transactions such as charges on land and the grant of easements, are required to be registered with the **Land Registry** within 2 months. Registration provides proof of title, but failure to register can result in the loss of the relevant rights. Since the Land Registration Act 2002 it has become easier to register the title to unregistered land on a voluntary basis – this will help to guard against claims for adverse possession where a third party has exclusive occupation of unregistered land for 12 years. Where title is registered then a squatter's application can be made after 10 years, but can usually be successfully resisted using a procedure introduced by the Act. The Land Registry is offering a discount on fees to encourage voluntary registrations, particularly where several pieces of land are being registered.

Land ownership and use in the voluntary sector is extremely varied ranging from office premises, community buildings, residential facilities, performance venues, charity shops, recreational use, conservation and environmental projects. The land may be acquired for direct use or investment purposes, and specific rules relate to charity land transactions.

General guidance on the ownership and use of buildings is continued in our information sheet, *9.1 Buildings*, and on relevant insurance matters in our information sheet, *2.11 Insurance*.

## Holding title to land

A company is recognised as having a distinct legal personality and can thus hold property and enter into contracts in its own name. This is not the case with trusts and unincorporated associations where individuals - usually governing body members – or specific bodies have to hold land and enter into transactions on behalf of the organisation:

- **Holding trustees** - purely serve one role, to hold title to property for and to the order of the governing body, and in accordance with governing document. Individuals, a body corporate or the Official Custodian can act in this capacity. However, unlike Custodian Trustees (see below), they do not have to act in

accordance with the Public Trustee Act 1906. Members of the governing body can be holding trustees.

- **Custodian trustee** - is a corporate body which holds investments and land on behalf of organisations under the powers of the Public Trustee Act 1906, section 14. Typically this will be the Public trustee, Official Custodian for Charities or some other corporate body such as a bank, insurance company or local authority. They are entitled to charge fees and in the case of charities, whilst they have a general power to appoint a custodian, the governing document must have an explicit power permitting payment. Custodian trustees are limited to holding legal title to property, receiving income from assets and remitting income to the organisation. They must act on the instructions of the governing body.

## Charity land transactions

Non-charitable organisations will acquire and dispose of land in the normal way, subject to any requirements or restrictions in their governing document (GD), but special restrictions apply to charities.

### Acquiring charity land

A charity is free to acquire land as long as it has the power to do so in the GD. Where it does not, it should consider amending its GD, but charities can also rely on certain statutory powers. Unincorporated charities can use the:

- Trusts of Land and Appointment of Trustees Act 1996 (96 Act), section 6, if they **already** hold land – this power can not be overridden by the GD, or
- Trustee Act 2000, section 8, which can be used even if the charity does not already own land – this power can be overridden by the GD.

The power of a corporate charity to acquire land will be contained in the Memorandum of Association.

Trustees of unincorporated charities are subject to the *Duty of Care* set out in section 1 of the **Trustee Act 2000** (2000 Act) when acquiring land, which requires trustees: to exercise such care and skill as is reasonable in the circumstances, having regard in particular:

(a) to any special knowledge or experience that they have or hold themselves out as having, and

(b) if they act as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

If land is being acquired as an investment due regard should be taken of the charity's investment powers in the GD, and section 5 of the 2000 Act imposes the above duty of care which requires trustees to take proper investment advice.

The Charity Commission (CC) provides detailed guidance in its publication, *Acquiring Land* (CC33)

## Disposing of charity land

Charity land dispositions bring their own peculiar requirements by virtue of sections 36 to 40 of the **Charities Act 1993**, (as amended by section 27 of the **Charities Act 2006** in relation to mortgages).

These are dealt with in the CC publication, *Disposing of Charity Land* (CC28).

Charities can dispose of land if they have the power to do so in their GD. Where no such power exists trustees of unincorporated charities can rely on section 6 of the 96 Act above, and trustees of corporate charities can also rely on this section if the organisation holds land as a trustee (otherwise it will have to rely on the power in its Memorandum of Association).

Trustees of unincorporated charities are subject to the above 2000 Act duty of care when disposing of charity land (and trustees of incorporated charities should consider themselves similarly bound).

For most charities disposing of land in England and Wales, the requirements of the Charities Act 1993 will need to be observed. If the disposal is to a person connected to the charity an Order of the CC is necessary but, in most other cases, it is possible for the trustees to follow the prescribed procedure to satisfy themselves that the terms of the disposal are the best reasonably obtainable. In both cases, unless the disposal is a lease for up to seven years, a report satisfying the Charities (Qualified Surveyors' Reports) Regulations 1992 will be needed. This surveyor's report must include advice on whether to repair or divide the property as well as how best to advertise the disposal.

These requirements can be broken down into 3 categories:

- **Disposals requiring no consent of the CC and to which no special conditions apply** – these include disposals to exempt (but not excepted) charities; transfers of title on the appointment of new trustees, and disposals of land outside England and Wales. Even though no conditions apply trustees still have to act prudently and in the best interests of the charity, and may decide that advice is still required for a particular transaction.
- **Disposals requiring consent of the CC** – these primarily include disposals to 'connected persons'. Connected persons are basically trustees, donors, officers, employees and agents of the charity, plus their spouses, close family and any companies controlled by them.
- **Disposals requiring no consent but to which special conditions apply** – these conditions vary depending on the type of transaction, and may be as simple as providing a suitable statement in the documentation (such as in the case of a disposal to another charity). Trustees must take advice on the grant of a lease for 7 years or less (where no premium is paid and it is not to a connected person) from a person they believe to have the necessary expertise. For all other disposals (including leases over 7 years), a surveyor's report will be required as described above, and there can be serious consequences for failure to obtain a report in the correct form, or consider or approve it.

The disposal of certain types of charity land can give rise to complex questions and legal restrictions, especially if it has been classified as:

- **permanent endowment** – where the charity is obliged to hold it permanently under the terms of the gift with a view to generating income, or meeting a particular purpose (see: *Expenditure and Replacement of Permanent Endowment* CC38),
- **specie or functional land** – where the land performs a central role in delivering the charity's purposes (see: *Disposal of Charity Interests in Property* OG54 B3), or
- **reverter** – where land transferred to a charity under specific educational, scientific and church related legislation reverts back to the original transferor. The situation is now addressed by the Reverter of Sites Act 1987 (see: *Reverter of Sites Act 1987* OG27).

Expert advice should be sought in these circumstances, and further guidance can be found in CC28 above.

### **Mortgaging charity land**

Every charity has an implied power to borrow to further its purposes unless the GD prohibits this, but an express power is always preferable. Trustees of unincorporated charities can rely on section 6(1) of the 96 Act above where they **already** hold land. Corporate charities will invariably have a power in the memorandum of association.

Trustees of unincorporated charities are subject to the above 2000 Act duty of care when mortgaging charity land (and trustees of incorporated charities should consider themselves similarly bound).

Section 27 of the Charities Act 2006 has greatly extended the situations in which charities can mortgage charity land without the need for consent from the CC or the courts. As long as charities take proper written advice as prescribed under the section they may now, without consent, grant mortgages to secure the repayment of a grant, and to secure the discharge of other sorts of obligation, as well as to secure specific loans. Also, they no longer need consent to grant mortgages to secure any future loan, grant or obligation that they as the lender might make to the borrower, as well as the loan, grant or obligation under immediate consideration.

Further guidance can be obtained from the CC publication, *Borrowing and Mortgages* (OG22).

### **Stamp Duty Land Tax**

Charity property is generally exempt from liability for Stamp Duty Land Tax (SDLT) – whereas non-charitable voluntary organisations will be liable to this tax in the normal way. SDLT is a self-assessment tax and any exemptions are not automatic; they must be claimed by filling in the appropriate land transaction return forms. Only a partial exemption will be available where property is used partly for charity purposes (e.g. administrative facilities), and partly for other purposes (e.g. any parts let out for business or residential occupation). Charities must meet the strict statutory criteria in order to qualify for exemption. Failure to submit the required forms within 30 days after the effective date of a transaction means that penalties and interest charges will begin

to run, while failure to complete the land transaction return fully and accurately (disclosing any non-charitable use) can amount to a fraud on HM Revenue.

### **Formalities relating to charity land**

- Various statements and trustee certificates are required under the 1993 Act when acquiring, disposing of or mortgaging charity land.
- It is important to correctly specify the proper parties to all documents, such as the current holding trustees (see below), or the use of the word 'charity' where a company is a party to a document.
- Different forms of execution of documents will be required depending on the legal status of the parties to the transaction.

**NB** In all cases – the above guidance should be referred to for further detail.

### **Business Tenancies**

Where a lease is granted, or a tenancy created, for the purposes of the tenant's business then **Part II of the Landlord and Tenant Act 1954** (1954 Act) will apply. This means that at the end of the lease the tenant will be entitled to remain in occupation ('holding over'), or to call for a new lease on the same terms as the expired lease, except that the level of rent will be decided by the court if the parties cannot reach agreement.

Where a business tenant is holding over, the landlord cannot bring the tenancy to an end unless he/she serves notice in the form prescribed by section 25 of the 1954 Act showing reliance on one of the very limited statutory grounds set out in section 30. In essence, these break down into

- 1) 'bad tenant' grounds - for example, where the tenant has been persistently in default of its obligation to pay rent or to repair the premises, and
- 2) 'compensation' grounds - for example, where the landlord has a settled intention to demolish and redevelop the premises, or requires the premises for the purposes of its own business.

Unless there is a serious breach the courts are reluctant to award possession based on (1). Possession is usually awarded based on (2) and in these circumstances the landlord must pay compensation to the tenant based on a prescribed formula.

The landlord and tenant can agree to exclude the 'security of tenure' provisions of the 1954 Act. This process is known as 'contracting out', and requires the landlord to serve a warning notice on the tenant stating that security of tenure will not apply. This notice must be served before the tenancy is created, and before the tenant is contractually bound to take the tenancy. The tenant must then sign, pre contract again, a declaration confirming that they understand the security of tenure provisions will not apply to the tenancy. If more than 14 days notice has been given by the landlord then the tenant's declaration is simply signed by the tenant, or by someone duly authorised to sign on their behalf. If less than 14 days notice has been given (e.g. where a tenant needs to get in to the premises quickly), then the tenant must swear a statutory declaration. If the contracting out process is properly followed, then the tenancy will

end at the expiry of the lease, and the tenant will have no further rights in respect of the premises.

## Miscellaneous

- Health and safety issues are covered in our information sheet, *2.1 Health and Safety*.
- Issues specifically relating to buildings are covered in our information sheet, *9.1 Buildings*.
- Insurance issues are covered in our information sheet, *2.11 Insurance*.

## Further information

*CC33 Acquiring Land*

*CC28 Disposing of Charity Land*

*OG54 B3 Disposal of Charity Interests in Property*

*OG22 Borrowing and Mortgages*

*CC38 Expenditure and Replacement of Permanent Endowment*

*OG27 Reverter of Sites Act 1987*

*CC13 The Official Custodian for Charities' Land Holding Service*

Charity Commission for England & Wales

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## Disclaimer

The information provided in this sheet is intended for guidance only. It is not a substitute for professional advice and we cannot accept any responsibility for loss occasioned as a result of any person acting or refraining from acting upon it.

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