

THE BUSINESS OF CHARITIES: SOLUTIONS TO SUCCESS

Thursday 9th February

The Assembly House, Norwich

Presented by:

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Hugh Berridge, Senior Partner, Charities Department

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NEALE GREARSON

Partner and Head of Charities Department



WILLS & CHARITABLE LEGACIES



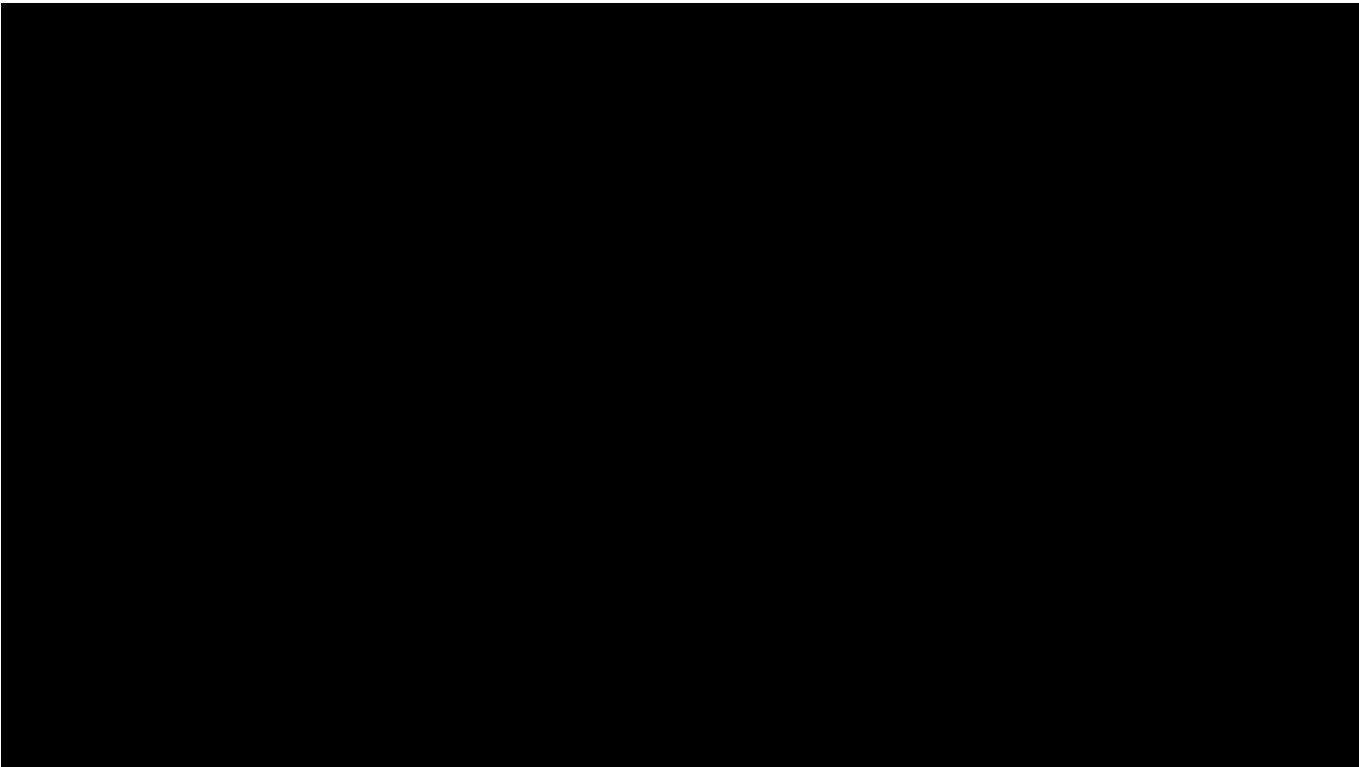
MELITA JACKSON CASE

- Ilott – v – Mitson
- Supreme Court hearing – 12th December 2016
- Inheritance (Provision for Family and Dependants) Act 1975
- Appeal by The Blue Cross, RSPB and RSPCA



WHY IS THIS CASE IMPORTANT?

- Only £164,000 in dispute
- Legal costs far exceed this
- Money left to charities - £2bn pa
- Only 6.7% of charities receive income this way
- Guidance on best practice for Wills and charitable legacies



BEST PRACTICE

- Make a Will!
- Consider fully people that should benefit
- If you want to “disinherit” someone, have a separate letter explaining why
- Make some provision for all close relatives
- Have connection to particular charity
- Local rather than national charity?
- Make clear connection in letter

Post Jackson judgement? Watch this space...



HUGH BERRIDGE

Senior Partner
Charities Department



BACKGROUND AND FORMS OF CHARITIES



- The **act** that governs charities and land is the Charities Act 2011 which came into force on **12 March 2012** (the Act).
- Today I will be dealing with what are described in the Act as **non-exempt charities** as the vast majority of charities come into that category. Non-exempt charities are subject to restrictions on disposing of their land by virtue of **sections 117 to 121** of the Act.



OWNERSHIP OF LAND BY CHARITIES



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- Before dealing with dispositions I want briefly to touch on **different legal structures** and the way they affect how charities hold land. There is no problem with charities which are **separate legal entities** (i.e. can sue and be sued) – these are companies limited by guarantee and charitable incorporated organisations. However many charities are **Charitable Trusts or Unincorporated Associations**. These have no separate legal entity so any land has to be held by trustees on behalf of the charity. If you are involved in such a charity and are asked to be a trustee, be very careful.



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- I have come across people who have innocently signed their names to onerous leases granted to unincorporated charities who had no idea that they were jointly and severally liable under all of the tenant covenants, including the payment of rent, in the lease. It is a sad fact that many small charities struggle with funding so the last thing you want is to find yourself personally liable to pay the rent on a lease with several years to run as a charity is about to fail. If well advised wording can usually be agreed with the landlord to limit the liability of such trustees to the funds available to the charity from time to time but I have seen leases where such wording is absent.



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- **Another disadvantage** of having land held by trustees is that when a trustee retires or dies or a new trustee is appointed an application will have to be made to the Land Registry to register a transfer to new trustees. This can be avoided by an order of the Charity Commission that the land in question is vested in the **Official Custodian for Charities**. However remember that this is just a land holding service and all the covenants, liabilities and power to manage the land remains with the charity trustees. So the appointment of the OC helps on a practical level but does not relieve the trustees of any liability.





DISPOSAL OF LAND BY CHARITIES



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- When disposing of land the first thing to do is to check that there is nothing in the governing document that prohibits the proposed disposal. If there is no restriction then we have to turn to the Act.
 - **Section 117(1)** of the Act provides that no land may be transferred, leased or otherwise disposed of by a charity without an order made by the court or the Commission.
 - However provided the disposal is not to a **Connected Person** e.g. a charity trustee, an employee or a close relative of a charity trustee, or a disposal of **Designated Land** (i.e. land specifically designated for a charitable purpose) most disposals can be done without an order provided that **BEFORE** entering into any agreement to effect a disposal certain steps are taken as provided by **section 119** of the Act.

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- First, **what is a disposition?** A **disposition** will include a conveyance or transfer, grant of a lease, surrender of a lease, grant of an easement or grant of a wayleave. Note, the grant of an option although not a disposition itself, is a contract for sale and therefore the trustees will have to comply with section 119 before entering the option.
 - So **what does section 119 require?** Essentially the charity must obtain and consider a written report on the proposed disposition from a qualified surveyor instructed by the trustees and acting exclusively for the charity. The surveyor must be a fellow or professional associate of the RICS and have experience in valuing the same type of land and in the same area as the land being disposed of.

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- What the report must contain is set out in the snappily titled 'Charities (Qualified Surveyors' Reports) Regulations 1992. I am not going to list all the prescribed matters but essentially the report must state that the surveyor believes that the proposed disposition is in the best interests of the charity and, if not, give the reasons for that opinion and advise on alternative ways of disposing of the land.
 - In addition the trustees will need advice from the surveyor on the extent, if any, to which they must **advertise** the proposed disposition.
 - Having considered the surveyor's report the trustees must satisfy themselves that the terms of the proposed disposition are **the best that can reasonably be obtained for the charity**.

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- In the case of the grant of leases for **not more than 7 years** without a fine or premium the requirements are less onerous in that a surveyor does not have to be instructed – the requirement is for advice from someone with requisite ability and practical experience to offer advice, i.e. usually a surveyor!
 - That is all I intend to say about the holding of land by charities and the disposition of land by non-exempt charities. There are additional requirements in terms of the documentation. To conclude on this topic, the essential point is to take proper advice before embarking on any disposition to ensure that the correct procedures are followed.



PROBLEMS WITH FIXTURES AT THE END OF A LEASE





- **At the end of a lease** if the tenant leaves the premises having failed to carry out the repairs that are required by the tenant covenants in the lease the landlord will generally have a dilapidations claim for which the starting point is the cost of putting the premises in the condition in which the tenant should have left them. In addition the landlord may be able to claim a sum equal to the rent during the period it ought reasonably to take in order to carry out the repairs. There are **important statutory limitations** upon the landlord's right to claim damages for dilapidations but they are not relevant to what I have to say today so I am going to do no more than just mention that they exist.

FIXTURES

- So much for the background. I now want briefly to touch upon some of the difficulties that arise in connection with dilapidations and **fixtures**. Here we are dealing with objects in or on the premises, ranging from lifts, cranes, boilers down to carpets. Generally if articles have been **affixed to or brought onto** the premises by **the landlord** there will be little difficulty in classifying and treating them for the purposes of dilapidations as they will form part of the subject matter of the repairing covenants.
- More difficult are items brought onto the premises by **the tenant**.
- (1) To what extent are such items covered by the repairing covenants?
- (2) Can they be removed by the tenant or should they be left behind as part of the premises?
- (3) Is the tenant obliged to remove them and so liable if he fails to do so?

- To answer these questions we need to consider whether an item is an integral part of the premises; or a fixture (and then whether a landlord's fixture or a tenant's fixture); or a chattel which is personal property. A fixture is something which was a chattel but which has become real property because it has '*acceded to the realty*' – in other words become attached to the premises.
- How does the law decide when a chattel becomes a fixture? There are **2** main tests: **(1) The degree of annexation**, the more firmly an item is fixed, the more likely it is to be a fixture. Even very heavy items like sheds and machinery, if resting on their own weight, will remain chattels. Conversely carpet tiles fixed to the floor screed will be fixtures whilst carpets laid on the floor and fixed with gripper rods have been found to be chattels. **(2) The purpose of annexation**, if they are intended to be fixed and to improve the premises they are likely to be fixtures. In a 1996 case *Botham v TSB Plc* the court decided that bathroom fittings, mirrors and marble panels, kitchen units and a fitted sink were all Fixtures. Whereas fitted carpets, curtains and blinds and light fittings were all chattels.

- The consequences of an item being either a chattel or a fixture can be considerable.
- **(1) A Landlord's fixture** cannot be removed by the tenant and will usually be subject to the repairing obligations of the lease.
- **(2) A Tenant's fixture** is removable by the tenant whilst the tenant is in possession. Once the tenant leaves the right to remove the item will be lost. In the case of substantial machinery belonging to the tenant this could be costly.
- **(3)** if the tenant decides **to leave a tenant's fixture** the tenant will be in breach of covenant if the item is not left in repair, entitling the landlord to claim damages either for the cost of repair or the reasonable cost of removal.
- **(4)** the tenant will be **liable to make good** any damage to the premises caused by removal of tenant's fixtures.
- **(5)** a tenant is liable **to remove all its chattels** at the end of the lease. If it fails to do so the landlord is entitled to damages based on the cost of removal and disposal.

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- Finally, the 2016 case of *Riverside v NHS* illustrates how important the distinction can be. In that case the tenant, with the landlord's consent, installed partitioning in an open plan office. The tenant then purported to exercise a tenant's break to end the lease. The break clause contained the not unusual provision that the break was conditional upon the tenant giving up vacant possession. The court decided that the partitions were chattels and not fixtures. The result was that the tenant's failure to remove the partitions invalidated the break so the tenant could not get out of the lease. Perhaps a surprising result but undoubtedly a very costly one for the tenant.

That concludes what I have to say. Again the important point is to take advice at the start of the lease and again at the end of the lease to ensure all items are categorised and then treated correctly.



JADE TINNEY

Solicitor
Charities Department



BIG IS BEAUTIFUL

- Continued growth
- Geographical expansion
- Cost savings
- The challenges facing the voluntary sector

COLLABORATION

- What it means
- What should be considered
- The options available
- The benefits
- Why charities don't collaborate

MERGERS

- The key questions:
 - Can you merge?
 - Should you merge?
 - How should you merge – deciding on a suitable structure?
- What to consider:
 - the financial, legal and regulatory issues
 - Sourcing suitable merging partners
 - Due diligence
 - Considerations for trustees
 - Life after the merger



MICHAEL OLMER

Consultant Solicitor
Charities Department

RISKS & LIABILITIES

"...time and again we see boards stick their heads in the sand and fail to take heed of well meaning advice"

*Peter Litchfield, Chief Executive Eastside Primetimers and chair, Computer Aid
(Guardian Voluntary Sector Newsletter 6th February 2017)*

WHO AND WHAT IS AT RISK?

- People

 - Trustees

 - Stakeholders

 - Staff and Volunteers

 - Service Users

- Reputation

- Assets

SOURCES OF RISK

- Ignorance
- Exceeding Authority
- Negligence
- Non-compliance
- Misconduct
- Malice
- Mendacity

TYPES OF RISK

- Physical
- Personal
- Reputational
- Financial

CONSEQUENCES

- Physical Harm
- Loss or damage to reputation
- Direct Financial Loss
- Loss of Funding and Sponsorship
- Resignation of Staff
- Resignation of volunteers

RISK ASSESSMENT (1)

- Can you do it?
 - Unincorporated Charity:
Trust Deed or Constitution
 - Company Limited by Guarantee:
Memorandum and Articles of Association
 - Charitable Incorporated Organisation:
Foundation Constitution
Association Constitution

RISK ASSESSMENT (2)

- Is it viable?

 - Financial Information

 - Financial Control

- Do you have the right staff or volunteers?

- Are your aims well defined?

RISK MANAGEMENT (1)

Charity Commission Guidelines

Effective Safeguarding policy for Staff, Volunteers, and Users

- Effective and Efficient Administration to reduce
 - Accidental losses
 - Intentional physical, reputational, and financial harm

RISK MANAGEMENT (2)

- Insurance
- Awareness of responsibilities and potential liabilities

LIABILITY OF TRUSTEES

- Trustees of Unincorporated Charity personally liable for losses from:

Breach of trust

Liability to third parties for breach of contract

Losses from authorised conduct of staff and volunteers

Vicarious liability for acts of staff and volunteers

Where there is a “close connection” between the work of the charity and the loss

LIABILITY OF TRUSTEES (2)

- Trustees are entitled to be indemnified out of the assets of the charity if:

Acting within the scope of their authority

Acted 'properly'

BUT if the assets of the charity are not sufficient to meet a claim they may have to fund the shortfall personally

LIABILITY OF COMPANY LIMITED BY GUARANTEE

- A separate corporate entity
- Liability is limited
- Maximum liability is the amount the 'guarantee' given by each member
- No personal liability of any officer unless:
 - Reckless
 - Criminal
 - For a regulatory penalty for which the officer must personally comply with

LIABILITY OF C. I. O.

- Liability is limited to the assets of the C. I.O.
- No personal liability of any officer unless:
 - Reckless
 - Criminal
 - For a regulatory penalty for which the officer must personally comply with

LEGAL ACTION

- New Charity Commission Guidance August 2016
- Before taking or defending legal action must always:
 - Take advice, and
 - Act properly, and
 - Contain costs liability
- If the dispute is about the structure or administration of the Charity itself must obtain consent under S115 of the Charities Act 2011
- Failure could result in personal liability for legal costs

YOUR STAFF AND VOLUNTEERS

- Most valuable resource
- Recruitment
- Work
- Departure

RECRUITMENT

- Specifying the job
- Avoid 'Mission Creep'
- Specifying the person
- Do not discriminate, Equality Act 2010 applies
 - Age
 - Gender
 - Race
 - Disability
- Disclosure & Barring Checks

EMPLOYEES PAY

- Minimum Wage / National Living Wage rules apply

Age of Employee	Current Minimum	Minimum from April 2017
Under 18	£4.00 / hour	£4.05 / hour
18 - 20	£5.55 / hour	£5.60 / hour
21 - 24	£6.95 / hour	£7.05 / hour
25 and over	£7.20 / hour	£7.50 / hour

EMPLOYEE PENSIONS

- Workplace Pension Rules Apply
- What is your 'Staging Date'?

EMPLOYEES AND VOLUNTEERS

- Health and Safety
- Safeguarding
- Conflicts of Interest
- Confusion of Responsibilities
- Grievance procedure
- Ongoing monitoring

EMPLOYEE DEPARTURE

- Resignation
- Retirement
- Dismissal
- Redundancy
- Disciplinary process
- Unfair Dismissal

STAFF AND INSOLVENT CHARITIES

- CIO and Company Limited by Guarantee

If assets insufficient to pay arrears of staff salaries then staff can claim against the National Insurance Fund

- Unincorporated Charities

If assets insufficient to pay arrears of staff salaries then Trustees can be personally liable for any shortfall

Staff cannot claim against National Insurance Fund unless Trustees are bankrupt

TRUSTEE INDEMNITY INSURANCE (1)

- Premium payable by Charity if
 - Authorised by Governing Document, and
 - Also permitted by S.189 Charities Act 2011 unless the governing document forbids
- Trustee can also pay premium personally

TRUSTEE INDEMNITY INSURANCE (2)

- Cover

 - Breach of Trust

 - Negligence

- Exclusions

 - Fines



 - Regulatory penalties

 - Criminal Defence costs

 - Acting Recklessly or Deliberately against the interests of the charity

OTHER INSURANCE

- Fidelity
- Events
- Legal Expenses
- Public Liability
- Employers and Volunteer Liability
- Buildings
- Contents
- Motor



“Charity Sucks” - organised charity has failed and will continue to fail. Most charitable organisations are lazy, complacent and wedded to an outdated model of noblesse oblige.

Iqbal Wahhab – October 2016

QUESTIONS....



UPCOMING BRIEFINGS

- 'The risks that could KILL your business' Tuesday 28th February
- Spring Briefings – 'Family disputes after death: Where there's a Will' (March – April)
- Trustee Training Day – May (Further details to follow)

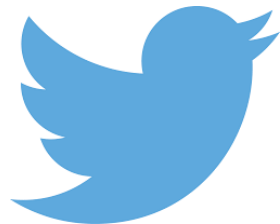
(Full details of briefings are included in information packs)

THANK YOU

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Important Note:

These notes should not be relied upon. They are a summary of the law for the purposes of a talk. Important details have been omitted. Clapham & Collinge LLP will accept no liability in respect of actions taken or not taken in reliance on these notes.