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Charities and Social Housing Newsletter

Charitable Incorporated Organisation – delayed again

The Charitable Incorporated Organisation ("CIO") is now not likely to be available until at least 2011 and it remains to be seen whether it will become "the white elephant" of the charity sector which is a concern voiced by some people.

There was insufficient time to introduce the law setting out the detailed framework for the CIO to Parliament in time for the General Election and the Charity Commission also needs more time to gear up for its implementation. The Charity Commission's gearing up for the implementation of the CIO has been made even harder because it is having to make redundancies and is operating under a reduced budget.

The demands being placed upon the Charity Commission in terms of its more limited resources are now quite great in terms of overseeing the implementation of the Charities Act 2006. This creates additional work in terms of the introduction of the CIO, new procedures and the registration of previously exempt and excepted charities. There is a concern that even routine enquiries by charities including straightforward consent applications will take longer to process. This emphasises the importance of involving the Charity Commission as soon as possible if transactions or proposals require consent and there is some urgency about getting these through to fulfil a deadline.

It is still necessary to watch this space and any unincorporated charities waiting to incorporate upon the introduction of the CIO might wish to seriously consider incorporating as a company limited by guarantee. It will be possible for existing charitable companies to convert to the CIO structure when it becomes available although they will not be forced to do so.

For anyone who is unaware, the CIO will be a new incorporated legal structure designed specifically for charities with the benefit of its own "legal personality" to hold property and enter into contracts in its own name and limited liability for its members. It will be an alternative to the company limited by guarantee structure which is used by many incorporated charities and will not be regulated by Companies House or required to comply with company law. It will only be regulated by the Charity Commission. Until the detailed legal framework within which the CIO will operate is finalised we cannot give charities specific advice with regard to the other benefits adopting the CIO structure might bring.

We will however be keeping charities updated on the CIO's progress through our legal alert publications and at our annual charities legal update seminar which takes place in October or November each year and is free to attend to all charity trustees, employees and representatives.

In this issue

Charitable Housing Associations and the TSA

Charitable Housing Associations, Registered Social Landlord's or Registered Providers (RPs) (as they are now called) need to carefully consider the changes to the regulatory regime brought in by the first full General Consent from the Tenant Services Authority (TSA).

Since the formation of the TSA in November 2008 the TSA has been operating in reliance on the Housing Corporation general consent issued in April 2008 which was, at the time, the latest publication of the Housing Corporation governing how RPs dealt with disposals of land.

The old rules

All RPs (whether they are charitable or not) had to comply with the requirements of their regulatory body, previously the Housing Corporation, but now the TSA, when disposing of land.

This article is not intended to go through those requirements in detail but suffice it so say that the vast majority of land transactions required a formal consent of sorts from the TSA. This could be either a disposal using a full section 9 consent obtained from the TSA or a disposal using the general consent, effectively meaning that certain transactions could be "self-certified" by the RP in question thus avoiding the need to go to the TSA for a full section 9 consent. Such self-certified transactions were still made with the formal consent of the TSA but without having to go directly to the TSA for a full formal section 9 consent.

For RPs who are charities this regulatory process provided a form of relief from the requirements of the Charities Act 1993.

Non-exempt charities who are disposing of land have to follow the formal requirements set out in section 36 Charities Act 1993. However, (amongst other things) those provisions do not have to be formally complied with where a disposal is carried out:

"With general or special authority (without the authority being made subject to the sanction of an order of the court) by any statutory provision contained in or having effect under an Act of Parliament or by any scheme legally established ."

So far as RPs were concerned the above provisions (which are contained in section 36(9)(a) Charities Act 1993) meant that if consent was obtained from the TSA whether by way of a full consent or a "self-certified consent" they fell within the s36 exemption. This meant that they did not also have to comply with the provisions of section 36. The reasoning being, presumably, that the requirements are largely similar and there would be little sense in RPs having to jump through the same set of hoops for two different statutory regulatory bodies.

The new rules

The most recent general consent relaxes the TSA regime in relation to disposals of land by RPs. Consent is no longer required for commercial land or, indeed, any land which does not form part of a "social housing dwelling".

The definition of "social housing dwelling" is vague but what is clear is that dwellings in the course of construction do not count and land which is on a development but which is not actually part of a dwelling, e.g. roads for adoption, common areas, (which might be disposed of to a management company) or even surplus land, does not fall within that definition.

The relaxation of the regime is good news for RPs who are not charities, however, for charitable RPs the relaxation is not such good news.

It means that where charitable RPs are dealing with commercial land or, indeed, any land that does not form part of a social housing dwelling, they will now have to ensure that they comply with the provisions of section 36.

Far from making the disposal of land easier this does, in fact, add an additional layer of bureaucracy to the disposal process that did not exist previously..

Charities Act requirements

In general, before disposing of land Section 36 requires charity trustees (amongst other things) to obtain and consider a written report from a qualified surveyor that complies with the Charities (Qualified Surveyors' Reports) Regulations 1992. We can advise with regard to the detailed requirements if required.

Practical steps

Charitable RPs should consider whether their internal governing procedures allow them to easily deal with convening meetings for the trustees to consider the surveyor's reports. Charity trustees are required to give a certificate in the disposal documents that the provisions of section 36 have been complied with. Some charitable RPs will have regular trustee meetings meaning that whilst the rule change is a further regulatory requirement to consider, it will not have any undue impact on the day to day running of the RP.

However, for those RPs which have an executive board or board of governors (some or all of whom are not trustees) they need to consider very carefully whether their governing document and rules allow the executive board to deal with such matters or whether it has to be formally referred to a full trustees meeting.

This will, of course, depend upon the regulations of each RP and also the level of delegation that has been instigated by the trustees and is permitted by law and the charity's governing document.

RPs should consider their position as soon as possible to avoid being caught out on disposals of non-social housing dwelling land.

Trustee expenses

The Charity Commission has published new guidance as to how trustees' expenses should be reported in charities' annual reports and accounts.

In the light of the MPs' expenses scandal there have been some calls for greater transparency over the disclosure of trustees' expenses in charities' annual reports and accounts.

The Charity Commission's report highlights the importance of good internal control procedures on the payment of expenses to charities' trustees, staff and volunteers. Preserving a charity's reputation is paramount and any question mark over the expenses paid out by a charity to its trustees, staff and volunteers could cause the charity to suffer not only a Charity Commission investigation, but potentially reputation-damaging publicity.

Despite the recent furore over expenses, the Charity Commission emphasises that trustees should not be out of pocket as a result of the work they carry out on behalf of their charity. The role of a charity trustees should not be limited only to people who can afford any costs associated with travelling to meetings or to spend their own money on postage, correspondence, supplementing the charity etc. A refund of a properly incurred and reasonable expense by a trustee as a direct result of fulfilling their trustee role is not regarded by charity law or the Charity Commission as being a "personal benefit" to the trustee concerned.

The Charity Commission guidance describes how trustees' expenses should be reported in charities' annual reports and accounts.

It also includes a summary of the Charity Commission's recommendations that –

- A formal expense policy should exist and apply to all trustees, staff including the charity's senior management and volunteers;
- The policy should be clearly communicated within the charity and be included within trustee induction training;
- Expense claims should be authorised by someone other than the claimant and checked for accuracy before payment;
- Expense claims should contain a self-declaration that the claim is accurate and incurred in connection with the business of the charity;
- Any mileage rate paid for motor travel should be at H M Revenue & Custom's published rates that do not result in a tax or national insurance liability for the charity or the claimant;

Charities can run into problems if there is no expenses policy and a third party complains to the Charity Commission or the press about the expenses the charity apparently pays to trustees, staff or volunteers. If a complaint is made and the Charity Commission investigates having an expense policy which the charity can demonstrate has been clearly communicated to its trustees, volunteers and staff is a superb defence.

People complain to the Charity Commission about charities for many reasons, some of which may or may not be legitimate and the person complaining may have his or her own axe to grind. As a Regulator the Charity Commission has the power to investigate charities and will also look into such complaints if it sees that there is real justification for doing so. Once again, an adequate paper trail and evidence of a proper policy and its communication to all the people concerned can quickly end the Charity Commission enquiry and minimise disruption to the charity and potentially damaging criticism.

New HMRC "Fit and Proper Persons" Rules criticised as a threat to Charity Tax Relief

The Finance Act 2010 introduced new rules that if a charity's managers are not "fit and proper persons", the charity will no longer qualify for tax relief until HM Revenue & Customs decides that the tax relief claim is not prejudiced or tax relief is reasonable. The Finance Act unhelpfully provides no definition of a "fit and proper person". HM Revenue & Customs guidance includes trustees and also staff or cheque signatories within the definition of a charity's managers.

The requirement is that managers must be "fit and proper persons" to be managers of the organisation. Where a manager of a charity is found not to be a fit and proper person, a charity will not necessarily automatically lose entitlement to its tax relief, but HM Revenue & Customs will be able to treat it as failing to qualify for its tax relief if it deems the charity does not meet the management conditions.

The fit and proper person's test is designed to ensure that charities are not managed or controlled by people who present a higher risk of prejudice to the charity's tax position. This could include a person who has previously been convicted of fraud, theft or financial mismanagement or is barred as acting a charity trustee under the Charities Act 1993.

If HM Revenue & Customs decides that the management condition is not satisfied it will have the discretion to decide whether or not this prejudices the charity's purposes. Its guidance states that if a charity innocently appoints a person who is not a fit and proper person the charity will not necessarily automatically lose access to its tax relief. However HM Revenue & Customs will have discretion to refuse the charity's claims to relief if it does not amend its organisation in response to a challenge from HM Revenue & Customs (e.g. by not removing that person from the position).

There has been widespread condemnation in the charity sector about HM Revenue & Customs introducing yet another layer of bureaucracy to regulate charities that

are already regulated by the Charity Commission. Lobbying is taking place for an amendment to the Finance Act 2010 and if amendment is made to the Finance Bill it will come after the next Budget.

If charities are concerned we would recommend they clearly read HMRC's guidance and seek advice if in doubt.

Gift Aid update

The new government is being urged by the charity sector to consider extending the transitional relief which is due to expire in April 2011. The old government reduced the basic rate of income tax from 22% to 20% which had an impact on charities claiming Gift Aid on voluntary donations. The reduction in the basic rate of income tax clearly meant that the charities claiming Gift Aid on voluntary donations would be at a disadvantage and many charities rely upon Gift Aid income to supplement their annual income. To appease charities the old government announced that charities would still be allowed to claim Gift Aid on the old basic rate of tax at 22% until April 2011. However the date of the expiry of the transitional relief is drawing closer. We will report if the new government announces any plans to extend the transitional relief, but in the current environment we would advise charities to take the potential

withdrawal of the transitional relief in April 2011 into account when setting their budgets/financial projections.

The new government is also being urged to consider introducing legislation to reduce the bureaucracy charities currently face when implementing the Gift Aid scheme. If any plans are announced either to extend the transitional relief or to reduce the bureaucracy involved in implementing the Gift Aid scheme we will report these through our legal alert publications.

Information

If you have any queries on any articles in this newsletter, or any charity matters in general please contact: Gerry Morrison on (01904) 625790 or email gerry.morrison@rollits.com

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull HU1 1YJ.

The law is stated as at 26 July 2010.

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