Newsletter

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Lord Salisbury is reputed to have once said, “One of the nuisances of the ballot is that when the oracle has spoken, you never know what it means.” The legal arguments over the Brexit referendum seem to bear that out, as does the widespread perplexity over the election of Donald Trump as the next US President. Here in the East of England, it remains uncertain whether the oracle will be asked to speak on the election of a mayor and a combined authority for Norfolk and Suffolk. A final decision is expected later this month. Whatever the decision, we hope that our Practice Director, Victoria McNeill, will provide a debriefing in the next edition of this newsletter.

In this edition of our newsletter, our Assistant Practice Director, Chris Skinner, reports on the changes to the definition of “qualifying persons” that were introduced by the Housing and Planning Act 2016. We also report on the establishment of charitable incorporated organisations and the consideration of appeals against dismissal for misconduct by local authority Appeals Committees, and we include an update on the self-build and custom housebuilding regime.

Compulsory purchase order land referencing just got a whole lot easier!

Lawyers dealing with compulsory purchase orders will be familiar with the need to identify “qualifying persons” in relation to the order land. Qualifying persons need to be listed in the schedule to the order, and served with notice of the making of the order. There are two categories of “qualifying persons”. The first is easy to identify. It includes owners, lessees, tenants and occupiers. The second can be more problematic. It includes those who could, theoretically, be entitled to a notice to treat. This might include mortgagees. It also includes any person who the acquiring authority thinks may be entitled to make a claim for compensation under section 10 of the Compulsory Purchase Act 1965 (“CPA”). This article is concerned with this latter group of people.

When land is compulsorily acquired for a statutory function of the local authority, such as a new road, covenants and easements (“rights”) affecting the order land that are incompatible with the project are extinguished during the period that the land is used for the project. If someone owns land that is not being acquired under the CPO, but who has rights over the order land that will be extinguished, he or she can make a claim for compensation under section 10 CPA. This type of compensation is known as “injurious affection”. It is equivalent to the amount by which the land is devalued by reason of it no longer enjoying the rights.

If land is being compulsorily purchased for development by a private sector partner, rights affecting the order land are not automatically extinguished. In the past, CPOs made under section 226 of the Town and Country Planning Act 1990 (“TCPA”) allowed the ultimate developer to take advantage of section 237 TCPA. If land acquired under section 226 was subsequently developed in accordance with a planning permission incompatible with rights affecting the land, they were permanently extinguished. Section 237(4) TCPA provided that compensation should be payable under section 10 CPA on the basis of it amounting to injurious affection. Because the claim for compensation under section 237 TCPA was specifically linked to an injurious affection claim under section 10 CPA, it seemed sensible to treat people with rights that were to be extinguished by the development as qualifying persons. Consequently much time would be spent examining title to the order land and title to adjoining land, just to see what rights might exist that needed to be included in the CPO schedules. It does not take much imagination to realise what a big task this could be for a multi plot CPO project.

Sections 203 to 206 of the Housing and Planning Act 2016 ("HPA") have now removed this problem entirely. Section 237 TCPA has been repealed and replaced with new provisions. Whilst the basic principle that rights are extinguished upon development is continued by section 203 HPA, the compensation provisions have been altered significantly. Section 204 HPA provides as follows:

- A person is liable to pay compensation for any interference with a relevant right or interest or breach of a restriction that is authorised by section 203 (section 204(1) HPA);

- The compensation is to be calculated on the same basis as compensation payable under sections 7 and 10 CPA (section 204(2) HPA).

So now, although compensation is *calculated* in the same way as compensation payable under section 10 CPA, it is *payable* under section 204 HPA. This subtle change in wording means that people with rights that will eventually be extinguished by the carrying out of the development will no longer be "qualifying persons", since they no longer have a claim for compensation under section 10 CPA, but a claim for compensation under section 204(1) HPA.

Of course, you will still want to know the extent of any rights that may be extinguished so that you know what the total compensation package for the project is likely to be. And you will want to make reference to these rights in your report seeking authority to make the CPO, so that members are aware of this fact when making a decision to approve the CPO. It does, however, mean that you don't have to fill up your CPO schedule with a myriad of adjoining landowners who have rights over the property.

Chris Skinner

A version of this article first appeared in the Local Government Lawyer Newsletter.

Charitable Incorporated Organisations

Charitable incorporated organisations ("CIOs") were introduced by the Charities Act 2006 in response to pressure from the National Council for Voluntary Organisations, but implementation was slow and it was not until March 2013 that the first CIO was registered with the Charity Commission. Since then, nearly nine thousand CIOs have been established. What are the benefits of a CIO? And should existing charities consider changing their structure to become a CIO?

A charity will usually take one of four legal forms:

- a CIO;
- a private company (usually limited by guarantee);
- a trust; or
- an unincorporated association.

Of these, two are corporate structures: the CIO and the company limited by guarantee; and two are unincorporated: the trust and the unincorporated association.

A charity that is incorporated is a legal person. This means that the charity itself can own land and enter into contracts, including employment contracts. The liability of its members is limited to the amounts that they have agreed to pay in the event that the charity is insolvent on winding up, and the liability of its trustees is limited by statute and arises only in specific cases of wrongdoing.

By contrast, a charity that is unincorporated cannot own property or enter into contracts in its own name: this must be done by the charity's trustees acting on its behalf. This can result in problems (and expense) when trustees retire or die and new trustees are appointed. If the charity becomes insolvent, the members are liable for its debts and its trustees may be liable for breach of trust in circumstances where the trustees of an incorporated charity would not incur liability.

Unincorporated charities were, however, regarded as simpler, more flexible and subject to less regulation than charitable companies. Whereas a charitable company must register with both the Companies Registrar and the Charity Commission, a charitable trust or association need only register with the Charity Commission. The CIO was introduced to offer both the lower level of regulation previously only available to unincorporated charities and the advantages of legal personality and limited liability available to corporate charities. It sounds perfect, but are there any disadvantages? How does a CIO compare with a company limited by guarantee?

Registration

Advantages:

- There is no requirement for dual registration: a CIO need only register with the Charity Commission.
- The Charity Commission currently does not charge any fees for registration.
- A CIO can be established either as an Association CIO (where membership is open, that is the trustees are not the only voting members) or as a Foundation CIO (where membership is closed, that is the only voting members are the trustees) using one of two model constitutions published by the Charity Commission.

Disadvantages:

- It can take up to 40 working days for the Charity Commission to process an application to register a CIO. A company limited by guarantee can be incorporated within a few days.
- A company limited by guarantee can enter into contracts even before it is registered with Companies Registry. A CIO has no legal existence and cannot therefore contract until it has been registered with the Charity Commission.
- If a CIO loses its registration with the Charity Commission it will cease to exist. A company limited by guarantee that loses its registration with the Charity Commission will remain in existence (albeit without charitable status).

Regulation

Advantages:

- The reporting and accounting regime applicable to CIOs under the Charities Act 2011 is less onerous than that applicable to companies under the Companies Act 2006.
- The Charity Commission currently does not charge any fees for filing returns.

Disadvantages:

- There is no public register of charges over the property of a CIO and the Charity Commission currently has no plans to introduce such a register. Consequently, although CIOs can create charges (including floating charges), a CIO may find it difficult to access funds through borrowings.

Day-to-day operations

Disadvantages:

- Suppliers may not be familiar with the CIO as a legal structure and may therefore be unwilling to contract with a CIO. This is likely to become less important as time passes and more CIOs are established.

Verdict

A CIO does appear to be cheaper and easier to set up and run than a company limited by guarantee, and the structure works well for small and medium-sized charities which own property, enter into

contracts and/or employ staff. (An early requirement that a charity must anticipate an annual income of at least £5,000 has now been removed). The lack of a public register for secured debts means that a CIO may not be suitable for charities that wish to raise money by means of secured loans or debentures. This is likely to affect larger charities in particular. It is clearly essential to consider a charity's aims, objectives and characteristics when advising on its legal structure.

Should existing charities consider changing their structure to become a CIO?

At present, the only way that an existing charity can become a CIO is to set up a CIO, transfer its assets and liabilities to it and then wind itself up. The government has issued draft regulations: The Charitable Incorporated Organisations (Conversion) Regulations 2016, which will enable a charitable company to convert to a CIO directly, but these are not yet in force.

Appeals Committees – Misconduct

nplaw's Andrew Brett is a specialist employment lawyer who regularly gives talks on employment law to our local authority clients. In September's edition, he considered local authority Appeals Committee procedure. In this edition, Andrew looks at some of the issues that an Appeals Committee may face when considering a dismissal for misconduct. Appeals Committees are the last avenue of the internal appeal procedure for disciplinary and grievance proceedings.

The "range of reasonable responses" test

When determining whether or not a dismissal is fair, an employment tribunal must consider whether the decision to dismiss falls within the range of reasonable responses available to the employer. If it does so, the dismissal will be fair. Whether or not an employment tribunal agrees with the employer's decision to dismiss is irrelevant. There are three key elements to the test:

- Does the employer genuinely believe that the individual is guilty of misconduct and have reasonable grounds for doing so?
- Has the employer conducted a reasonable investigation?
- Is the sanction of dismissal reasonable in all the circumstances?

Scenarios to make you think!

1. John is employed as a planning officer. He wrote on Facebook that, "The Council made a rubbish decision when it allowed 300 homes to be built close to Little Wallop as it will ruin the area". John has been dismissed for these comments.
   - Do you think this is fair?
   - Would your answer be different if John was a licensing officer?

2. Yasmin's contract states that she has to work the core hours between 10am and 4pm. She regularly starts her working day at 8am but has frequently been seen leaving work at 3.53pm. When questioned, she said that she works more than her contracted hours, regularly giving the Council over half an hour of voluntary time per day.
   - Do you think that any sanction is merited?
   - To what extent, if at all, would you base your decision on her seniority or years of service?
   - Are there any other factors that you think are relevant?

3. The Council's smoking policy says that employees must not smoke inside Council premises. Nigel has been caught smoking an 'electronic' cigarette. He argues that these are not covered by the Council's policy. The Council accepts that the policy was written before the introduction of electronic cigarettes. Nigel has been given a final warning.
   - Do you accept that the Council can do this in view of the apparent gap in the policy?
   - Do you think that a final warning is appropriate?

- Do you think that it would have been fair to dismiss on this set of facts?

4. Lucy has worked closely with a well-known retailer, on a new out-of-town development. Following the grant of planning permission, it sends her a crate of prosecco (retail value £39.99) as a "thank you" gift. Lucy has frequently worked over and above the call of duty on this matter. She accepts the gift and does not declare it to anyone. The Council's policy states that gifts worth over £20 must not be accepted. She is given a first written warning.

   - Do you think that this is too harsh or too lenient?
   - If Lucy had declared the gift on the gifts and hospitality register, would this make a difference to your views?

If you would like to know more, please contact Andrew Brett at andrew.brett@norfolk.gov.uk or on 01603 223101. In future editions of this newsletter, Andrew will be considering appeals where an employee has been dismissed by reason of: sickness or ill health; performance; redundancy; or for other substantial reasons, as well as appeals relating to grievances.

Self-build and custom housebuilding

In our September newsletter we reported that the Self-build and Custom Housebuilding (Time for Compliance and Fees) Regulations had been laid before Parliament in draft. These regulations (SI 2016/1027) came into effect on 31 October 2016.

Also in effect from 31 October 2016 are the Self-build and Custom Housebuilding Regulations 2016 (SI 2016/950), which revoke and replace the Self-build and Custom Housebuilding (Register) Regulations 2016. The new regulations widen the definition of "a serviced plot of land"; give relevant authorities the discretion to set local eligibility criteria for entry in the register; and, in certain circumstances, allow a relevant authority to apply for exemption from the duty to grant suitable development permission in respect of sufficient serviced plots to match the demand shown by its self-build register ("the Section 2A duty"). An authority concerned that it may not be able to comply with the Section 2A duty, can also apply for an exemption if, for any base period, the demand for self-build and custom housebuilding is greater than 20% of the land identified by it as available for future housing.

We anticipate that relevant authorities will want to set local eligibility criteria, since details of individuals who meet such criteria will be placed in part 2 of the register, which will be used to show the demand for self-build in an area. Authorities can set two types of criteria:

- criteria designed to demonstrate that an individual has sufficient connection with the authority's area;
- criteria designed to demonstrate that an individual will have sufficient resources to purchase land for their own self-build and custom housebuilding.

The Department for Communities and Local Government has announced that it will be updating its Planning Practice Guidance to refer to the recent changes, but this is not yet available.

Training

For details of all the training that nplaw can offer, please contact Fiona Anthony *at* fiona.anthony@norfolk.gov.uk or on 01603 222943.

Next newsletter

We hope that you found this newsletter useful. If you are a new reader and wish to subscribe to future newsletters, just enter your email address in the box on the news & events page of our website at http://www.nplaw.co.uk/news-events/.

Happy Christmas to all our readers!

The next edition of our newsletter is due out in January 2017. It seems far too early, but since this is our last opportunity to do so, we wish all our readers a Merry Christmas and a very Happy New Year.

If you have any queries relating to this newsletter or wish to seek advice, please contact:

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