STEP Briefing Note: Property holding by trustees

INTRODUCTION

This briefing note on property holding by trustees was originally published in ten weekly instalments.

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The briefing identifies some of those of which trustees (and a tenant for life under the Settled Land Act 1925) should be aware. It applies to property in England and Wales, regardless of the jurisdiction in which the landlord/trustee is located. Similar requirements might also apply to property in either Scotland or Northern Ireland, and specific advice would need to be obtained in relation to such properties.

The law in this briefing note is that applicable as at 30 June 2017.

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PART 1: THE RISKS OF HOLDING PROPERTY

WHAT ARE THE RISKS?

Land is often held in trust, whether it is bare land or land that has been built upon. Though even the holding of bare land poses risk to trustees, most (potential) risks arise in relation to any structure on the land and its occupancy/use.

Residential property is arguably where the greater risks lie, as, when dealing with non-residential property/land, the trustee owner will usually have in place carefully drafted legal agreements with the occupiers and the support of agents.

Residential property may often be occupied by a beneficiary. If let, the only professional involvement in the management may be the sourcing of new tenants and the drafting of any tenancy agreement – not the ongoing management.

In view of the above, in this series, we will consider the risks facing a trustee holding residential property. These risks may also attach to a tenant for life under the Settled Land Act 1925, if they have legal title to trust property vested in them.

The issues covered in this series apply primarily to property in England and Wales, regardless of the jurisdiction in which the landlord/trustee is located. Similar requirements might also apply to property in either Scotland or Northern Ireland, and specific advice would need to be obtained in relation to such properties.

The various risks arise due to the trustee’s ownership of land, and, in most cases, are imposed by statute. Though, in some instances, the responsibility and/or liability arising from a breach of a land holder’s obligations can be avoided if a competent agent has been retained to manage the particular risk in question, for the most part the trustee land owner and the agent will both be culpable. However, it is not unusual for a managing agent’s terms of business to exclude responsibility for monitoring compliance with the landlord’s statutory obligations, leaving the trustee solely responsible.

If, under pressure from the beneficiaries, a trustee appoints an agent who is less than competent, or whose terms of engagement exclude the monitoring of all, or any, of a landlord’s statutory obligations, the trustee may be personally liable not only for any financial penalties imposed, but also to remediate any damage to the trust property. Depending on the consequences of a breach of some of the statutory obligations, a custodial sentence can be imposed on the trustee landlord (especially if they are solely responsible for monitoring compliance with their obligations).

As an alternative to appointing a qualified agent to manage trust property, trustees might use s9 Trusts of Land and Appointment of Trustees Act 1996 to delegate by power of attorney to one or more beneficiaries their functions as trustee that relate to land held in the trust. Although subsection 9(8) purports to absolve trustees from liability for any act or default of a delegate beneficiary, such exoneration does not apply ‘if, and only if, the trustees did not exercise reasonable care in deciding to delegate the function to the beneficiary or beneficiaries’. Accordingly, the trustees might not escape responsibility for the breach of any statutory (or non-statutory) obligations unless the beneficiaries to whom their functions were delegated under s9 were considered sufficiently knowledgeable and competent to properly manage the land in question, or had agreed to engage competent agents to monitor compliance with the landlord’s obligations.

In this series, risks associated with the following will be considered:

- Agents’ terms of business
- Asbestos
• Contamination/environmental pollution
• Electrical safety
• Energy performance
• Fire safety
• Gas safety
• Health and safety
• Insurance
• Legionella
• Nuisance
• Repair and maintenance
• Right to rent
• Selective licensing
• Smoke and carbon monoxide alarms
• Smoking

Though, for the most part, the statutory obligations under each of the above headings are imposed where the person occupying the property does so under a tenancy, this is not always the case (as will be identified when discussing the individual matters).

As landlord, a trustee is under various statutory duties to any tenant, and others who occupy the premises from time to time as family and/or guests of the tenant – generally ‘strangers’ to the trust. These duties make the landlord responsible for the safety and wellbeing of all such people. However, the trustee has no such statutory duty towards any beneficiary of their trust in occupation as beneficiary (or family or guests of the beneficiary). In this series, consideration will also be given to whether or not a trustee might apply a similar standard to property occupied by a beneficiary, as they are required to apply regarding a stranger, and the circumstances that might inform such a decision.
PART 2: THE TRUSTEE’S OBLIGATIONS TO TENANTS AND BENEFICIARIES

BACKGROUND

Through both primary and secondary legislation, parliament has set out a strict code for the protection of tenants, with which landlords are required to comply. These requirements are primarily aimed at ensuring the safety and wellbeing of the rent-paying occupant, and those in occupation with them. A failure to comply with the statutory obligations may result in the landlord being subject to both civil and criminal penalties, the latter including a potential custodial sentence. Parliament has also recently widened the scope to include the policing of government policy through the ‘right to rent’ provisions of the *Immigration Act 2014* (which will be discussed later in this series).

Though there is a plethora of statutory obligations imposed on a property owner for the protection of rent-paying tenants, there is little similar protection afforded to non-rent paying occupants. In the case of beneficiaries, the terms of their occupation will most often be set out in the will or other trust instrument providing them with any right of occupation. Although this may address liability for insurance, repair and services, it does not always do so, and rarely touches on any wider issues. Trustees might consider putting in place a licence to occupy, covering terms not set out in the trust instrument.

CURRENT PRACTICE

Frequently, trustees allow beneficiaries to occupy trust property with minimal oversight, arguably on the basis that, as it is the beneficiary’s home, they will ensure it is a safe environment and will do nothing to put themselves, or their family, at risk. The trustees might also take the view that such an approach is supported by human rights legislation: that they should avoid intrusion into the beneficiary’s rights to home life and privacy. When a beneficiary occupies trust property, it is not unusual for them to object to what they might consider ‘interference’ by the trustee, such as the latter seeking to check on the upkeep of the property; or taking steps to ensure that there are no issues that could invalidate the property insurance, or cause the trustee to be personally liable to third parties.

However, is the above a satisfactory approach?

IS THE TRUSTEE A ‘FALL GUY’?

Though there is no specific duty imposed on a trustee to ensure the safety and wellbeing of a beneficiary in occupation, property owners have a general duty to third parties entering their property (which may also extend to those trespassing without permission). When renewing property insurance, trustees warrant that the property is in a safe condition. If the trustees have not taken any steps to verify the condition of the property (including, say, the gas and electricity installations), can they validly give such warranties? If, for example, the property is damaged by fire resulting from dangerous electrical wiring, the insurer might argue the policy to be void if the trustees had done nothing to satisfy themselves that they could reasonably warrant the condition of the property.

As noted above, beneficiaries may often view themselves as the property owners – hence their objections when trustees seek to assert their role as the legal owners. If any works are required, the beneficiary will often undertake them (provided they have the resources to do so). They might also make ‘improvements’ to the property (which may, or may not, add value). There will be some beneficiaries occupying trust property who do not get on with those who are entitled to do so once they cease occupation, and, accordingly, take a ‘devil may care’ attitude towards
general upkeep and maintenance. If anything goes wrong – say, chimney collapse, electrical fire or gas leak – on whom does the responsibility and liability fall for restoration of the property? Ultimately, it will be the trustee and, even if the insurer will pay to restore the property, the trustees may find themselves subject to civil or criminal sanctions should an individual be injured.

As property owners, trustees have the ultimate liability for ensuring the maintenance of property they own, and the safety of any person in or around the property. Although they might view such responsibility as falling on a beneficiary in occupation, not only is this rarely set out in writing. But, even when it is, is the trustee satisfied that the beneficiary properly understands the nature and extent of the responsibilities they are taking on? If not, can a trustee safely argue that they should be excused responsibility (and liability) for any mishap that might occur, or provide warranties on the condition of the property, etc.?

THE WAY FORWARD?

Trustees can reduce the potential for personal responsibility by viewing occupation by a beneficiary in the same light as where a paying tenant is in occupation, and by applying a similar level of oversight and standards to those applicable when the property is occupied by a rent-paying tenant.

A greater degree of care will be required of a professional trustee, as opposed to a family member acting as trustee. A corporate trustee may be expected to apply an even higher standard of care.

Where trust property is occupied by beneficiaries, trustees should carefully consider:

- the nature of the relationship between the beneficiary occupying the property and the other beneficiaries;
- the extent to which they (the trustees) exercise oversight;
- whether or not they should voluntarily apply the equivalent of any of the various statutory tests that would be applicable to a paying tenant and, if so, which; and
- putting in place an effective arrangement to monitor the condition of the property, and to enable them to provide the appropriate warranties when renewing the insurance.

It is not unusual for a trust to consist only of a property. In such situations, trustees might take the view that, as there is no money to fund anything, they cannot do anything. However, a lack of funds would not be a sufficient excuse if a calamity should occur. Should there be civil or criminal sanctions attaching to such a calamity, the authorities might not be willing to turn a blind eye to the consequences.

In conclusion, although trustees are not required to apply the statutory tests imposed in relation to paying tenants, they may be doing both themselves and the beneficiaries a disservice if they do not do so.
PART 3: GAS AND ELECTRICAL SAFETY

GAS SAFETY

The legislation regarding gas safety for Landlords is defined by The Gas Safety (Installation and Use) Regulations 1998, which relate to the installation, maintenance and use of gas appliances, fittings and flues in domestic, and some commercial, premises. The landlord is obliged to maintain the gas installation (which includes any gas appliance, fittings, pipework and flues in the premises) in a safe condition, and ensure that an annual safety check is carried out on each element of the installation, gas appliance and flue by a Gas Safe registered engineer. If an appliance, or indeed the gas supply to a property, has been capped, it should nonetheless be checked on an annual basis to ensure it is still capped. If it is uncapped, then the appliance or installation should still be checked. The standard homeowner gas boiler service is not sufficient to satisfy the requirements of the Gas Safety Regulations.

Less clear is with whom the responsibility lies when a property is owned by a trust and either no tenancy agreement is in place, or a license to occupy exists. The legislation does not cover this type of property occupancy, though the Health and Safety Executive (HSE) advises that both homeowners and landlords should have valid Gas Safety Reports in place that are completed annually. A beneficiary occupying a property that is held in trust has a relationship with the trustee that is more similar to a tenant/landlord – however, the beneficiary may view this as a homeowner relationship (them being the ‘homeowner’), not recognising the position of the trustee. Though the legislation may not state that homeowners should have a valid Gas Safety Record, it is advisable as directed by the HSE. Faulty gas appliances or gas leaks can cause serious health issues or, in the worst case, death, and landlords risk financial penalties, and even imprisonment, for non-compliance. As such, it is imperative that gas safety is taken seriously, regardless of how a property ownership is held.

ELECTRICAL SAFETY

The legislation concerning electrical safety is far less transparent than that for gas. It comprises mainly The Electrical Equipment (Safety) Regulations 1994 and The Plugs and Sockets etc. (Safety) Regulations 1994. Both sets of regulations are covered by the Consumer Protection Act 1987, which states that the electrics and any electrical appliances provided in a property should be safe. What is not defined is how this should be confirmed. There are industry-approved tests, including Portable Appliance Tests (PAT) and Electrical Installation Condition Reports (EICR), that can be performed, but the legislation does not prescribe that these tests must be completed as a requisite for compliance.

This lack of clarity leaves ambiguity in respect of compliance. Best practice would be to fall in line with guidance from the HSE and Electrical Safety First, which states that PAT tests should be completed on an annual basis, and EICRs completed at least every five years (depending on the installation, an electrician may specify a shorter time interval). The penalties for not complying with the legislation are financial fines and, potentially, imprisonment; property insurance may also be invalidated. For properties in Scotland, legislation requires that EICRs and PATs are in place before a tenancy commences and completed on or before their anniversary (annually for PATs, and every five years for EICRs).

Similar to the advice for gas safety, the HSE recommends that homeowners have EICRs completed to confirm electrical safety, and this is normally recommended on home buyer reports. As such, it recommended for properties held in trust that enquiries are made regarding the latest electrical reports.
RESPONSIBILITY AND RECORD-KEEPING

A trustee must be aware of the legislation discussed above and, when an agent is instructed to manage the property, ensure that the agent’s terms of business set out who is responsible for compliance. For ‘absent’ landlords (which will often include trustees), many agents’ terms of business require statements of facts to be given concerning the history of the property, something that may be unknown to the trustee. The trustee should ensure that the agent is aware of this and manages responsibility for compliance on behalf of the trust.

When using a managing agent, the trustee should fully reviews terms and conditions and any documentation provided, as some agents may request that waivers are signed stating that they have advised the trustee of the legislation. By signing such a waiver, the trustee has confirmed they understand the legislation, but have opted against providing the relevant safety checks. These waivers absolve the agent of any responsibility in respect of complying with the legislation.

It is important to be aware of changes in legislation and, if an agent is instructed, ensure that that agent keeps abreast of them. There have been several changes to gas legislation over recent years (made by the Gas Safe Register) that can catch out both gas engineers and landlords. There are also potential changes due in respect of both EICRs and PATs that both trustees and agents should monitor. It is important that the agent is responsible for compliance, keeps up to date with any changes, and can identify non-compliance on any certificates received. Of course, if there is no managing agent in place, then these responsibilities fall to the trustee.

It is also important to take heed of the smaller elements of the legislation, such as record-keeping. In respect of the Gas Safety Regulations, it is stipulated that the landlord or agent is also required to keep a copy of the record for two years, and ensure that a copy is provided to each tenant prior to a new tenancy commencing, and within 28 days of a renewal. Agents and landlords are also required to keep copies of completed certificates for six years.

A FINAL WORD

It is important to remember that the above legislation, though originally aimed at giving greater protection to tenants, is rooted in reducing risk to individuals. Both gas and electricity can be dangerous when left untested, and electrical installations deteriorate over time. It is, therefore, important that, where properties are held in trust, the trustees consider this and take appropriate steps to ensure the safety of the occupants.
PART 4: SMOKE AND CARBON MONOXIDE ALARMS

BACKGROUND

Though the dangers of smoke inhalation and carbon monoxide (CO) poisoning have been recognised for many years, it was not until 2015 that government regulations were issued. Coming into force on 1 October 2015, the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 apply to let residential property only in England. The Regulations apply to private sector landlords; they do not apply to social housing landlords.

For any new letting after 1 October 2015, the required alarms (see below) must be in place before the tenancy commences, and tested on the day that the tenant moves in.

For existing tenancies, landlords are required to ensure that alarms are fitted in compliance with the Regulations as soon as practicably possible.

Though there appear to be no similar requirements for let residential property in any other parts of the UK, trustee landlords of such properties might adopt similar arrangements in order to ensure the safety of occupants, and to help protect their own reputation.

The Regulations specify the installation of ‘alarms’, not merely ‘detectors’.

SMOKE ALARMS

At least one smoke alarm must be installed on every storey of rented property on which a room is used, wholly or partly, as living accommodation.

CARBON MONOXIDE ALARMS

A CO alarm must be fitted in every room of rented accommodation used, wholly or partly, as living accommodation and that contains a ‘solid fuel burning combustion appliance’. The alarm must be installed within a specified distance of the appliance. If there is more than one such appliance in a room, it may be necessary to have more than one alarm in that room in order to comply with the Regulations.

Though the Regulations specify ‘solid fuel’ appliances, many incidents of CO poisoning have involved gas appliances. Accordingly, in its guidance, the Department for Communities and Local Government states: ‘we would expect and encourage reputable landlords to ensure that working carbon monoxide alarms are installed in rooms with [gas appliances]’. A similar view could also apply to oil burning appliances.

WHAT IS A ‘ROOM’?

For the avoidance of doubt, the Regulations specify that a ‘room’ includes:

- a bathroom or lavatory; and
- a hall or landing.

So, if there is a bathroom (or shower room) in the roof space (and no other accommodation on that floor) a smoke alarm must be installed on that floor and, if there is also a gas water heater in the bathroom, a CO alarm must be fitted.
ENFORCEMENT

Local authorities are responsible for enforcement.

If an enforcement notice has not been complied with within 28 days, the local authority may levy penalties of up to GBP5,000 for each default (i.e. for each alarm).

If non-compliance becomes apparent following an incident in which life had been put at risk, the possibility of criminal sanctions may arise. If this involves a corporate landlord, it may include personal culpability for the directors and members of staff.

MIXED-USE PROPERTIES

Responsibility for compliance with the Regulations for mixed-use properties will depend on the nature of the letting:

- **Residential element and commercial element let as a single unit:** the commercial tenant will usually be the responsible party.
- **Residential element separately let:** the residential landlord is the responsible party.

BENEFICIARY-OCCUPIED PROPERTIES

Where a beneficiary is entitled to occupy trust property, or a trustee has allowed a beneficiary or other third party to occupy trust property, can a trustee ignore the Regulations?

Though the Regulations do not apply to such arrangements, trustees may nonetheless feel it appropriate to adopt the measures, in order to help ensure the wellbeing of the beneficiaries and anyone else that occupies, or otherwise has access to, the property. If any such persons suffer injury that can be traced back to the fact there were no (or no sufficient) alarms, the trustee could suffer reputational damage, or something more severe.

If a beneficiary ‘in possession’ of trust property has let/sub-let the property (or any part of it) – unless within the first category of excluded tenancies (shared accommodation), below – they will be that tenant’s landlord and responsible for compliance with the Regulations. Although, strictly, the trustee will have no responsibility to the tenant, consideration should be given to ensuring the beneficiary is aware of their various obligations as landlord, including compliance with the Regulations, mindful that – if the beneficiary’s interest terminates (e.g. on the death of the beneficiary) – the trustee will become the landlord and assume the responsibilities.

EXCLUDED TENANCIES

There are a number of forms of tenancy excluded from the Regulations. Other than the first category below, this is due to the fact that they are already subject to a stricter management code:

- **Shared accommodation with the landlord, or the landlord’s family** – i.e. where there is a ‘live in’ landlord.
- **Long leases**, if the right of occupation is for a term of at least seven years and there is no break provision during the initial seven-year period.
- **Licensed houses in multiple occupancy (HMOs).** (An unlicensed HMO is not excluded from the Regulations.)
- **Hostels and refuges.**
- **Care homes.**
• Hospitals and hospices.
• Other accommodation relating to healthcare provision.
PART 5: FIRE SAFETY AND SMOKING

FIRE SAFETY
The relevant fire safety legislation covers two distinct areas:

- furniture and furnishings; and
- premises.

A failure to comply with the statutory requirements is a criminal offence.

FURNITURE AND FURNISHINGS
Where property is let and furniture or furnishings are provided by the landlord, they must comply with the Fire Safety (Furniture and Fittings) Regulations 1988 (as amended in 1989, 1993 and 2010). To comply with the regulations, each item must meet certain fire retardant standards; not contain certain substances; and have a label attached, in the statutory form, confirming that it meets the requisite fire safety test. Items of furniture made before 1950 are exempt.

If any item does not comply with the relevant regulation, it must be removed and, where appropriate, replaced with a compliant item. Similarly, if an item does not have a fire safety label attached, the item must be removed, unless it has both been made in the UK and either the landlord has the original purchase receipt, or is able to obtain proof of purchase from the original supplier. If the landlord is unable to comply with this, it is not sufficient simply to attach a new label without the item first being retested (the cost of which is likely to be greater than that of replacing the item).

Any item supplied by the landlord, whether included in the letting arrangement or otherwise, must comply with the fire safety regulations.

In addition to being satisfied at the start of any letting that the furniture and furnishings comply with the regulations, the landlord is required to undertake regular inspections to ensure continued compliance.

Though property occupied by a beneficiary under the terms of a will or trust may not be 'let', the trustees should consider the extent they might be culpable for damage or injury arising in connection with any furniture or furnishings they have provided for use by the occupier, if such items do not comply with the fire safety regulations.

Where an agent is instructed to manage let property, a failure by that agent to ensure compliance does not necessarily absolve the landlord from responsibility (or prevent damage to their reputation).

PREMISES
Although the Regulatory Reform (Fire Safety) Order 2005 (the Order) is primarily directed at non-domestic premises, it extends to the common parts of properties in multiple occupancy (even if residential).

In all cases covered by the Order, a fire risk assessment must be made at least annually and, if there are more than five persons working in (or otherwise occupying) the premises, the assessment must be in writing.

The assessment must be provided by the ‘responsible person’, who is the person designated to ensure compliance with the Order. In addition to arranging the fire risk assessment, they have
duties to prevent a fire arising, and to ensure the safety of persons in the premises in the event of a fire.

If the premises are occupied by a single tenant, the tenant is the responsible person.

Where properties are in multiple occupancy, or the tenant does not occupy the entire premises, the tenant will normally be the responsible person for the part they occupy; the landlord/owner will be the responsible person for the common parts, and any parts which are unoccupied. The Order includes an expectation that, where premises are in multiple occupation, the responsible persons will coordinate their arrangements.

A failure by a tenant to comply with their statutory obligations may be a breach of the terms of their tenancy/lease, and may endanger the safety of other persons/property for whom/which the trustee landlord is responsible. A tenant’s breach may also result in the landlord being in breach of the Order and subject to sanction.

SMOKING

Under the relevant smoke-free legislation, the smoking of any form of tobacco, or other substance, in a public place is prohibited. In general, a public place includes:

- a workplace (e.g. shops, bars, churches and auditoria); and
- the common part of any building or other premises to which the public has access, and is wholly enclosed (except for windows and doors).

‘Workplace’ can also include a motor vehicle (e.g. a delivery van, or company car), or a maritime vessel.

Smoking in cars in which there is someone under 18 is illegal, unless:

- the driver is the person who is smoking and they are the only person under 18 in the vehicle; or
- the vehicle is a convertible with the roof fully opened; merely having a window open, or the fan turned up full to dispel the smoke, is not sufficient for this exception.

Smoking, or failing to prevent someone from smoking, in a smoke-free area is subject to a civil fine.

Non-smoking signs are required to be displayed in all non-smoking areas. A failure to do so can is penalised by a civil fine. The responsibility for the correct display of non-smoking signs falls on:

- the employer, for workplaces; and
- for other areas, the person with control of that place. For common parts of a building, this will generally be the landlord or owner.

Smoking is permitted:

- Outside buildings (although some building owners have declared smoke-free zones near to the building entrances).
- In designated smoking areas.
- In the ‘open’ countryside.
- In an individual’s home. Where the individual is a tenant, the terms of their tenancy can prohibit smoking. In that case, though smoking in the property would be a breach of the tenancy agreement/lease, which could give rise to an attempt to evict the tenant, it would not give rise to civil penalties.
Notwithstanding the above, a trustee may not wish to allow smoking in trust property, given the increased cost of maintenance and fire risk. Where the property is furnished, it could be necessary to remove all contents, if subsequently occupied by non-smokers or a family with young children. Without a restriction in the occupation agreement, the occupiers and any guests will be able to smoke. If any head lease (or other superior lease) includes a smoking restriction, or prohibition, a failure to reflect this in the terms of any occupation would be a breach of the terms of that senior lease.
PART 6: SELECTIVE LICENSING, THE ‘RIGHT TO RENT’ RULES, AND ENERGY PERFORMANCE CERTIFICATES

SELECTIVE LICENSING

With effect from April 2006, local authorities have been able to designate specific areas (zones) as subject to selective licensing. If a private landlord lets property within a zone, they must have an appropriate licence. Local authorities have prosecuted private landlords who have not obtained a licence, or have failed to comply with the terms of their licence or another requirement of the local authority. Without a licence from the relevant local authority, private landlords cannot legally let property in a zone. There appears to be no national register of zones, so enquiries need to be made of local authorities on a property by property basis.

RIGHT TO RENT

The ‘right to rent’ scheme was initially rolled out, on 1 December 2014, as a trial in the West Midlands. It was extended throughout England on 1 February 2016. (Note that the scheme has not yet been introduced in Wales.) The scheme requires that landlords or agents check applicants’ and tenants’ ID to ensure that they have a right to stay in the UK.

The above may sound simple enough, but there are restrictions in the relevant legislation that can cause issues for both landlords and agents:

- checks must take place no earlier than 28 days before the start of a tenancy;
- landlords and agents are required to check that documents are valid, and that they are not being deceived; and
- documents must be checked in person, and copies of valid documents must be retained as evidence that the check has been completed.

Though the checking of documents in person may sound simple, it can pose issues for overseas applicants, particularly students moving to the UK for the first time. To comply with the letter of the legislation, the applicant would be required to send their ID documents to the landlord or agent to check, and this would then need to be verified via a video conference. In practical terms, applicants are unlikely to want to post such valuable documents, and so agents and landlords are likely to need to make acceptance of proposed tenancies subject to the verification of ID documents after applicants arrive in the UK. This can cause uncertainty for all parties involved and, if there are issues with these documents, can leave landlords in the lurch in respect of proposed tenancies.

For trustees, the reality of the situation is that the responsibility of verifying any right to rent information should fall on the managing agent, should one be in place. However, many terms of business will pre-date the legislation, and if they have not been updated to account for the right to rent checks, the default position for compliance sits with the landlord (i.e. the trustee), not the agent. Even if the agent is proactively and voluntarily completing the checks, should those be carried out incorrectly, responsibility for compliance remains with the trustee. Of course, if there is no managing agent in place, then the responsibility sits solely with the trustee.

Trustees should be aware that further legislation came into force, in December 2016, as part of the Immigration Act 2016, introducing civil penalties for both landlords and agents for failing to check the status of a tenant or occupier, as well as making it easier for landlords to remove illegal migrants from their properties. As such, there are now heavy financial penalties in place, as well as potential criminal sanctions, for failure to complete the necessary checks and maintain appropriate records.
Finally, trustees may also need to consider the right to rent rules for beneficiary-occupied properties. The legislation simply states that all tenants and occupiers must be checked, even if they are not named on the tenancy agreement; if there is no agreement; or if the tenancy agreement is not written. This would include licence to occupy documents, where the occupier will be using the property as their main residence, and the licence has the provision for payment for service charges. It will also include any licence to occupy that is not written, but implied or verbally agreed, where service charges are also dispensed by the trustee. The legislation is not retrospective, so should be considered only for new licences to occupy issued after the legislation was introduced.

**ENERGY PERFORMANCE CERTIFICATES**

The legislation for Energy Performance Certificates (EPCs) has been in place since 2008, and provides that an EPC is required if a property is marketed for rent (as well as sale). Trustees should, however, be aware of upcoming changes to the legislation, which may make it harder to rent out a property. The *Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015* will bring phased minimum energy efficiency standards (MEES) into force.

MEES will apply only to assured, assured shorthold, and rent act tenancies, and not, therefore, to properties rented to companies or non-housing act tenancies. The first phase of MEES came into force in April 2016, and provided that tenants can request landlord consent (which cannot be unreasonably withheld) for improvements listed on the EPC to be completed. From 1 April 2018, it will be unlawful to grant new, or renew, leases with an EPC rating of less than ‘E’, and from 1 April 2020, that provision will apply to all let properties. Landlords with properties that have an EPC rating of less than an ‘E’ will need to carry out works to improve the energy performance of the building to a rating of ‘E’ or higher, or they will face civil penalties.

Fortunately, there are exemptions to the regulations, namely:

- if there is no Green Deal (or equivalent) available for the improvements recommended by an independent installer of energy efficiency improvements, and/or it has been assessed that the recommended improvements would not pay for themselves over seven years, based on energy savings in the energy bill (the ‘golden rule’);
- if a third party who has the right to prevent works from being carried out without their consent, such as a lender, freeholder or sitting tenant, refuses to grant consent or will grant consent only subject to a condition that a landlord could not reasonably satisfy; and
- where a report obtained from an independent surveyor states that the energy efficiency improvements will decrease the market value of the property (or the building of which it forms part) by more than 5 per cent.

Where a trustee is renting out a property that has not been on the market before, they should be aware that an EPC is required, and that they should take account of the grade noted on the EPC.

The completion of an EPC is something an agent will normally deal with on a managed service, but trustees should be aware that if the grade is lower than an ‘E’, provision will need to be made for improvements, so that the property may continue to be rented over the coming years.

Trustees must also be aware that, under the *Deregulation Act 2015*, landlords must provide a copy of the EPC for the property prior to a tenant taking occupancy. An agent may argue that the EPC is noted on the property’s particulars, but proving that the tenant has seen this can cause issues. It is, therefore, recommended that agents have signed copies of the EPC. Again, the trustee must be aware of what the managing agent is doing, and be able to evidence it; failure to provide the EPC can invalidate service of notice to remove the tenant from the property.
PART 7: REPAIR AND MAINTENANCE, AND NUISANCE

REPAIR AND MAINTENANCE OVERVIEW
A landlord’s obligations in respect of repairs are defined under s.11 of the Landlord and Tenant Act 1985 (the 1985 Act), which states that the landlord is responsible for maintaining:

- the structure and exterior of the property; and
- fixtures and fittings along with pipes, wiring and appliances that have been supplied.

These responsibilities are applicable whether or not they are stated in a tenancy agreement. There is some protection for landlords, as a tenant must report the repairs in the first instance. However, if the landlord does not act on this, they are in breach of the tenancy agreement. This can lead to a tenant withholding rent or reporting the landlord’s failures to a local authority under the housing health and safety rating system (HHSRS), as well as breaches of other legislation noted below.

Landlords are at risk of negligence or personal injury claims if a tenant notifies them of a maintenance issue and it is not rectified. This risk is extended further under the Defective Premises Act 1972 (the 1972 Act), which expands the liability to include visitors to the property. Further, the legislation confirms that penalties will apply where the landlord ought to have known about the fault – another crucial difference between the 1972 and 1985 Acts. Landlords and trustees can avoid these risks by completing regular property inspections that detail the condition of the property, and maintaining an open line of communication with tenants, either directly or via a managing agent.

Although persons occupying trust property ‘as a beneficiary’ are not tenants, the 1972 Act applies ‘to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy’. Accordingly, regardless of the terms of the trust instrument, or any licence to occupy, trustees cannot ignore defects that could lead to injury or damage to persons or property.

RETTALIATORY EVICTION
Under more recent legislation (the Deregulation Act 2015), if a tenant makes a complaint to a landlord or managing agent concerning a repair, the landlord does not reply or fix the issue, and the tenant progresses the complaint to the local authority, which then issues a warning notice, the landlord cannot serve a s.21 notice under the Housing Act 1988 (to terminate the tenancy) for six months. This is in addition to being required to complete the works listed on the notice from the local authority. Failure of the landlord to complete the works will result in the local authority doing so at a cost to the landlord. Should a local authority intervene, the list of work is likely to grow – the HHSRS that councils use to rate hazards has 29 categories that can fall in to either the category 1 (serious) or category 2 (other) brackets. It is likely that the council will identify other works required that were not originally noted by the tenant – a further cost to the landlord.

TRUSTEE’S OBLIGATIONS
The legislation concerning repairs poses a problem for trustees where a property is not managed by an agent, but by a non-property professional, or directly by the trustees themselves. It can prove problematic in not only arranging for works to be completed – and completed at a reasonable cost and to a good quality – but also maintaining accurate records of what has and has not been completed. It is common for larger jobs and appliance replacements to come with
warranties, and failure to keep records or keep documents could result in unnecessary cost outlays.

The legislation for a normal landlord and tenant relationship is clear. However, it is less clear what, if any, statutory responsibility a trustee has with regards to maintaining a property. Other than the 1972 Act, the above-mentioned legislation does not cover a property occupied under a licence to occupy, and, as such, there is no direct requirement for a trustee to maintain a property. However, where there is no written agreement, this requirement could be implied.

It is also worth noting that many properties are held in trust as an investment, even if acquired for occupation by a beneficiary. If a trustee allowed a property to fall into disrepair, resulting in a loss of capital value, it could be subject to criticism from the beneficiaries of the trust. A lack of awareness of the condition of a property could allow it to fall into such condition that it poses a real risk to the health of any occupants. In such circumstances, if an occupant were to be injured, or their health otherwise adversely affected, the trustee may be open to criticism on the basis that it ought to have known of the condition of the property and made appropriate repairs. Further, if the trustees are ignorant of the condition of the property, this could void the warranties given on the renewal of the property insurance, enabling the insurer to avoid paying out on any claim, thereby compounding the trustees’ misery.

Finally, as noted above, the 1972 Act applies to properties held in trust and, should someone be injured due to a defect that has not been identified or repaired, the trustee would be liable for the cost of repair, as well as any damages. Though some of the liability might be covered by the property insurance, the trustees might not – depending on the circumstances – be entitled to recover any shortfall from the trust fund.

**NUISANCE**

In terms of nuisances that relate to repairs, a landlord can cause either a:

- private nuisance (when something in a part of the property the landlord owns causes damage or otherwise interferes with the property rights of third parties, affecting their use and/or enjoyment of their own property); or
- statutory nuisance (where a landlord permits disrepair that presents a risk to, or damages, an individual’s health).

Both are breaches of the 1985 Act. Though the former may result in claims for monetary compensation from the affected parties, a failure to remedy any statutory nuisance may be subject to criminal sanctions.

There are other types of nuisance of which trustees, as property owners and not merely as landlords, need to be aware, which most frequently apply to properties that are leasehold and are applicable to both tenants and beneficiaries. In many leases, it will be stated that any occupant of the building must not cause a nuisance to other residents, and any breaches are effectively a breach of the head lease. Continued breaches can result in the threat of legal action, which can, in turn, result in the forfeiture of the lease by the freeholder.

In terms of freehold properties, continued complaints of nuisance can result in police intervention, or local authorities becoming involved to re-house individuals, and can also result in damage to the property itself. In areas where the local authority operates a landlord licensing system, the existence of a ‘nuisance’ could result in the revocation of the trustees’ licence, especially if antisocial behaviour is present.
PART 8: CONTAMINATION AND ENVIRONMENTAL / HEALTH RISKS

BACKGROUND
Property owners and landlords have responsibility for ensuring that various environmental and health issues that might affect their property are identified and managed in an appropriate manner. This note covers a number of the more common issues. Property owners and landlords should consult with their own agents to ascertain if there are any other relevant issues that might affect their property.

CONTAMINATION / ENVIRONMENTAL ISSUES
The spillage or otherwise placing of noxious substances on land or directly or indirectly into any waterway etc., whether or not accidental, can result in significant liabilities, which will usually fall on:

- the culprit (if identified);
- the person using the land when the contamination is identified; or
- the current, or previous, owner of the legal title to the land; previous owners may be liable despite parting with the legal title many years before the contamination occurred.

The liability includes not only cleaning-up costs, but also compensation to the parties adversely affected by the contamination. Depending on the nature of the issue, the resulting costs can be substantial, and may even exceed the value of the property in question.

- **Example 1:** Trust holds land used as a waste tip. There is no record of what has been dumped, but it is believed to be too hazardous to clear. What was originally a substantial trust fund was fully used to maintain the land in a safe condition, and the trustees are now personally liable for the ongoing costs.

- **Example 2:** A farmer parked his disused tractors and other equipment in a field. Contaminants from the equipment (mainly diesel oil and chemical residue) leached into the ground as the rust set in, and were found in local ground water samples. The cost of remediation exceeded GBP1 million.

- **Example 3:** Pristine land, ripe for development, is occupied by an endangered species (animal or plant), or is found to encompass an archaeological site. Though there may be no need for remediation, development could be blocked or no longer economically viable.

Where land in a trust might be the subject of contamination, the transfer of the legal title to a third party will not absolve the trustee of potential liability. If there is any concern, trustees should consider insuring the risk before distributing the land.

ASBESTOS
Asbestos exists in a number of forms and is a known cause of fatal diseases, including asbestosis, mesothelioma and lung cancer. Though some forms of asbestos are ‘safe’, even those may be hazardous if damaged.

From 1 January 2000, the use of asbestos in building construction was banned, so that buildings constructed after that date should be asbestos-free, though there might be issues where the development was on a Brownfield site (existing contamination) or existing equipment was reused (soundproofing, insulation, fire blankets).
For non-domestic property, and common parts of property in multiple occupancy (including residential property), the property owner/landlord is required to have in place an asbestos risk plan, unless it is certain there is no asbestos in the premises.

Where asbestos has been identified, the plan will identify any remedial action required, or other safeguards, that must be complied with. Failure to comply may result in criminal sanctions.

Contractors working at the property may require sight of a copy of any plan, even if that work does not directly involve the asbestos.

Any work involving (or potentially involving) asbestos should be carried out by appropriately licensed contractors, who will apply the correct procedures for the management and disposal of asbestos.

**LEGIONELLA**

Though legionella is generally seen as a problem for owners of office blocks and the like, the definition of ‘foreseeable risk’, below, captures water in the domestic shower and the kitchen sink. Further, with the wider use of air conditioning in properties, the incidence of properties with a foreseeable risk is increasing, both for commercial and residential property.

Persons in control of premises that might present a foreseeable risk of exposure to legionella bacteria must have in place a scheme to:

- prevent or control the risk;
- implement, manage and monitor precautions;
- keep records of those precautions; and
- appoint a person with managerial responsibility for compliance.

A foreseeable risk is considered to exist in:

- water systems incorporating a cooling tower, or an evaporation condenser;
- hot and cold water systems; and
- other plant and systems containing water that is likely to exceed 20°C and that may release spray or clouds of droplets during operation or when being maintained.

There is a statutory requirement to notify the local authority of cooling towers and certain types of evaporative condensers.

The Health and Safety Executive has published a [Code of Practice on Legionnaires’ disease](https://www.gov.uk) (PDF) and, where it applies, a failure to comply may constitute a criminal offence.

Even where property is let on a full repairing lease, so that the primary responsibility falls to the tenant, the landlord may have joint responsibility if they retain a right of access under the terms of the lease.

**HEALTH AND SAFETY**

Failure to comply with the relevant health and safety legislation, in whatever arena, may result in criminal sanctions. Health and safety covers not only the matters identified above, but also the general duty of employers and others to third parties.

Although primarily seen as applying to the workplace, health and safety legislation applies to the common parts of buildings in multiple occupancy, including purely residential buildings.
In the workplace, the responsible person is the employer, with a secondary responsibility on the property owner if they are responsible for the maintenance of items the employer has informed the owner compromise the health and safety of employees.

For the common parts of buildings, the person with control of the common parts is responsible for compliance. This will often be the owner or person with a lease over the entire building.
PART 9: INSURANCE

BACKGROUND

Section 34(1) of the Trustee Act 2000 inserted a new s.19 into the Trustee Act 1925, providing that:

‘A trustee may - (a) insure any property which is subject to the trust against risks of loss or damage due to any event, and (b) pay the premiums out of trust funds.’

Though this imposes on trustees only a power – not a duty – to insure, most trustees will want to ensure that effective insurance is in place, appropriate to the nature of the asset in question.

Where the beneficiaries of the trust are all ‘of full age and capacity and … (taken together) are absolutely entitled to the property subject to the trust’, they can direct that trust property is not to be insured, or insured only under certain conditions (s.19(2) of the Trustee Act 1925). Where there is more than one beneficiary, such a direction must be from all of them – ideally, in writing, signed by them all.

Where property is held in trust, if specifically held for occupation by a beneficiary, the trust instrument may refer to responsibility for various outgoings, including insurance. Although, often, the reference is to responsibility for paying the premiums, at times it will direct that the beneficiary arranges insurance in compliance with the trustees’ directions. Where there are no specific directions in a trust instrument, the trustees and beneficiary in occupation will often agree this through an exchange of letters or, perhaps, set out the terms of occupation in a licence to occupy.

If the trust property is to be let out, the tenancy agreement will usually identify who is responsible for paying the insurance premiums. It is only in long leases, or under the terms of a will or other trust instrument, that the burden of arranging the insurance might be shifted to the occupier. The desirability of such an arrangement is considered below.

WHO SHOULD INSURE?

In general, the trustees should be the insured party, although, where settled land is involved, the Settled Land Act tenant for life would be the appropriate person. Though it might be seen as convenient for the policyholder to be the beneficiary in occupation, if a claim arises and the proceeds thereof are not applied appropriately (e.g. the insurer pays out GBP5,000 on a claim, and the beneficiary policyholder spends GBP2,000 making rudimentary repairs, keeping the remaining GBP3,000), the trustee may be liable to ‘restore’ the trust fund.

It is not unknown for a beneficiary in occupation to ‘profit’ from an insurance claim, especially where they and those entitled on their death are not on ‘good terms’. In such cases, the beneficiaries with the perceived loss may turn to the trustees to make good such ‘loss’.

In order for there to be a valid policy of insurance, by law the policyholder must have an insurable interest, whether the subject of the insurance is the policyholder’s wife, home, car, or some other chattel. That an individual lives in a particular property does not necessarily mean that they have an insurable interest in it. When considering insurance arrangements for trust property, trustees must be mindful to avoid the potential for a policy to be declared void (‘vitiated’, in insurance jargon) if the insured does not have an insurable interest. Mere responsibility for paying the insurance premiums does not create an insurable interest.

Other than when the Settled Land Act 1925 applies, the trustees have an insurable interest in trust property, and would usually be the appropriate policyholder – although, if there is a contractual duty on another party to effect the insurance (e.g. a leaseholder), that other party
may well be the appropriate policyholder. However, for the reasons identified above, is it appropriate for the insurance to be held other than by the trustees?

HYBRID SITUATIONS

Most homeowner’s insurance policies are ‘comprehensive’, covering buildings and contents, both of which are the property of the homeowner. Where a beneficiary occupies trust property, the contents are usually theirs and do not form any part of the trust. However, it is often the case that insurance still covers both the buildings and contents, as the premiums are lower for a combined policy, despite the fact that the policyholder might have no insurable interest in either the buildings or the contents.

In these situations, trustees find it more convenient for the policy to be held by the beneficiary, as the trustee does not need to be involved in dealing with claims for damaged or stolen chattels that have nothing to do with the trust. However, does that merely set them up for difficulties if a claim for damage to the trust property is made, and either the insurer questions whether the policyholder has an insurable interest (and could void the policy), or the beneficiary misappropriates all, or part, of the proceeds of claim?

WARRANTIES

When renewing insurance, as when taking out a new policy, the policyholder warrants to the insurer the condition of the insured property. Among the matters warranted is usually that the property is being maintained as required by the insurer, and that there are no known defects. As identified in part seven of this series (repair, maintenance and nuisance), trustees should undertake regular inspections of trust property that detail the condition of the property. If properly completed, the inspection reports will support the warranties given on renewal, avoiding the potential vitiation of the insurance.
PART 10: AGENTS’ TERMS OF BUSINESS

OVERVIEW

Terms of business are an essential element of a relationship between an agent and a landlord and, therefore, important for any properties held in trust. The agent’s terms of business should not only identify fees chargeable for the management of the property, but also specify parameters regarding what the agent will and won’t do during their management. Below, we consider some of the key areas.

FEES

The Consumer Protection Act 2015 states that all agents should clearly display fees on their websites for consumers to view – so, in theory, trustees should be able to find this information before getting to the point of signing an agent’s terms of business. In practice, this may not be the case, and fees may be presented only at the signing of the contract. If so, these should be clearly stated and not buried within the terms of the contract or ‘hidden’. Trustees must look out for hidden fees throughout the contract as this can, unfortunately, be a common practice among agents.

Another point to look out for in respect of fees concerns ongoing charges; this practice is more commonplace among Central London agents. Under this practice, renewal fees that are normally payable on the introduction of a tenant tend to be payable for the lifetime of the tenancy; if a landlord or trustee terminates management of the property, the renewal fee will remain payable and will continue to be invoiced against them until the tenant vacates. Some agents may even include clauses to confirm that renewal fees are payable if the property is sold, so the contract should be read carefully.

TERMINATION

Most agents’ terms of business will stipulate how a contract can be terminated; normally, it must be done in writing, and provide a notice period of between one and three months. Slightly more unusual are clauses that stipulate that management cannot be terminated until the current tenancy ends (with fees remaining payable), or contracts that simply lack a termination clause altogether. It is also commonplace for there to be a ‘severance’ fee for termination, to allow the agent to prepare a handover to the next party. It is important to consider whether fees, such as those for renewal, continue to be payable under these clauses.

STATUTORY OBLIGATIONS

The agreement should outline the statutory obligations with which the landlord must comply, to help ensure that they understand their obligations. The agreement should stipulate who is responsible for compliance; one might think that, by employing an ‘expert’ in this area, they would take on responsibility for compliance, but this is not always the case. If an agent is instructed on an introduction service, it is common for all arrangements to be passed to the landlord, unless the agent agrees otherwise. Agents may also use waivers to ‘notify’ landlords of their obligations; within these, however, the landlord confirms that they are aware of the legislation and confirms compliance. It can be difficult for offshore trustees reasonably to provide such a warranty.
Under a managed service, a trustee should expect that an agent will arrange the necessary statutory checks; however, they must still look out for the agent ‘indemnifying’ themselves from complying with the legislation on the landlord’s behalf. Consideration might be given to inserting a clause requiring the agent to notify the landlord in a timely manner of any new, or changes to existing, statutory obligations that might apply to the property in question.

ONGOING LEGISLATIVE REQUIREMENTS

Many landlords and trustees will have likely used the same managing agent for many years, during which time many new legislative requirements may have been imposed on landlords. If the agent has not updated their terms of business or provided a change control notice to advise the landlord that they will take on compliance with/management of the legislation, then the landlord has no fall back for saying the agent has been negligent if they do not manage this area correctly.

PROFESSIONAL INDEMNITY INSURANCE

An area that may well be missing from many agents’ terms of business relates to the level of insurance the agent carries (which should be available through enquiries made), and is certainly something of which to take account: if the value of the property the agent is managing exceeds the insurance value, then there is not sufficient cover in place should something go wrong. In particular, is the limit of cover applied per individual claim, or per claim year?

DATA PROTECTION

Another area that may be omitted from terms relates to data protection and client confidentiality; ideally, the terms of business should provide for non-disclosure of data the agent holds and encounters when managing the property. This is particularly important for properties held in trust for notable individuals.

SERVICE AGREEMENT

It is also important to look out for defined services in the agent’s agreement that dictate how they will manage the property, in particular:

- how it will be marketed, and in what timescales;
- what type of references will be undertaken;
- how maintenance is managed for the property (it is important to check if the agent pre-authorises works up to a specific level);
- how many visits are required for the property; and
- how the deposit will be held.

Further, the terms should identify the agent’s credit control process for the recovery of rent, specify that it receives the rents ‘as trustee’ for the landlord, and set out timescales for the remittance of rents received to the landlord.

Do the agent’s standard terms of business require them to obtain specific authority to initiate court action to recover rent arrears, or to evict tenants? Such actions would normally be done in the landlord’s name. Can a trustee satisfactorily agree to an agent taking action without specific prior authority? Leaving aside the lack of control of costs, it may have no control over either the
circumstances in which proceedings are initiated, or the content of statements made in court papers that are attributable to them.