STEP Guidance Note: Property holding by trustees – Part 2

INTRODUCTION
This weekly series on property holding by trustees will comprise ten parts, written, on behalf of the STEP UK Practice Committee, by:

- Paul Saunders FCIB TEP, Independent Trust Consultant, STEP UK Practice Committee
- Katherine Rose (MARLA), LSL Corporate Client Department
- Sian Pinheiro-Torres (MARLA), LSL Corporate Client Department

Land is often held in trust, whether it is bare land, or land that has been built on. The law places various responsibilities on land owners, with both civil and criminal sanctions for breaches, depending on the issue. Though these obligations are mainly targeted towards let property, a trustee cannot assume they do not apply to property occupied by beneficiaries merely because they pay no rent.

This series on property risks identifies some of those of which trustees (and a tenant for life under the Settled Land Act 1925) should be aware. This second part considers the trustee’s obligations to tenants and beneficiaries.

This note 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.

1 – 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.

2 – 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?

3 – 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.?

4 – 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.