

BRE TRUST

Charity Trustees' Indemnity Insurance - Scotland

Summary

- The Charity and Trustee Investment (Scotland) Act 2005 ('CTI(S) Act 2005') unintentionally placed a restriction on the provision of charity trustees' indemnity insurance ("TII").
- This restriction has been recognised as a problem by the Office of the Scottish Charity Regulator ('OSCR') and the Scottish Government.
- Section 127 of the Public Services Reform (Scotland) Act 2010 ('PSR(S) Act 2010') amends the provisions in the CTI(S) Act 2005 that place restrictions on TII. The amendments allow charities to provide their trustees with indemnity insurance from charity funds. There are, however, some restrictions on the provision of TII (for example, it must not include an indemnity for liability incurred by a trustee to pay a fine imposed in criminal proceedings).
- Section 127 PSR(S) Act 2010 will not come into force until 1 August, 2010. However, the OSCR has stated that in the intervening period it will not take action against charities which already have TII in place. The OSCR has also stated that new applications from bodies that have TII in place (or have power to put TII in place) will not be affected or refused because of it.

1. Restriction on Trustee Remuneration

The difficulty arose because the provision of trustee indemnity insurance ("TII") falls within the broad definition of "remuneration" in section 68 CTI(S) Act 2005.

Section 67 CTI Act 2005 sets out the circumstances under which trustees may receive remuneration. The conditions are:

- a) the maximum amount of the remuneration is reasonable and is set out in a written agreement;
- b) the charity trustees are satisfied that it is in the interests of the charity for the services to be provided for that amount;
- c) less than half of the total number of trustees are provided with the remuneration; and
- d) the charity's constitution does not prohibit the remuneration.

Therefore, the provision of TII will generally be contrary to the CTI(S) Act 2005.

2. Recognition that the Restriction on TII is a Problem

Since at least May 2006, OSCR has recognised that the restriction on TII is a problem because it may make it harder for charities to attract and retain trustees. OSCR has also noted that the restriction may cause problems in relation to cross-border charities which have already been approved and registered by the Charity Commission.

In November 2006, the Deputy Minister for Communities, Johann Lamont, stated that the restrictions placed on TII by the CTI(S) Act 2005 were an unintended consequence of that legislation. The Minister stated that the CTI(S) Act 2005 would be amended to remove the restriction on TII (see News Item dated 14 November 2006 on the OSCR website at <http://www.oscr.org.uk/NewsItem.aspx?ID=b7504bd6-063a-4cf3-b7c7-27a59e15036c>).

The Scottish Government (in its Policy Memorandum to the Bill for the PSR(S) Act 2010 which amends the CTI(S) Act 2005) stated that the restriction on TII was an unintended consequence of the CTI(S) Act 2005.

3. Amendment to CTI(S) Act 2005

The PSR(S) Act 2010 received Royal Assent on 28 April 2010.

Section 127 of the PSR(S) Act 2010 amends the CTI(S) Act 2005 by inserting a new section 68A, which specifically addresses charity TII. Section 127 is not yet in force, but it will take effect on 1 August, 2010.

The new section 68(A):

- allows charities to arrange the purchase, from the charity's funds, of insurance designed to indemnify the charity trustees against personal liability in their capacity as: (a) charity trustees or (b) directors or officers of any body corporate carrying on activities on behalf of the charity (section 68A(1));
- provides that the indemnity must exclude liability incurred by the charity trustee:
 - to pay a fine imposed in criminal proceedings;
 - to pay a sum payable to a regulatory authority by way of penalty in respect of non-compliance with a regulatory requirement;
 - in respect of representation in any criminal proceedings in which the charity trustee is convicted of an offence arising out of any fraud, dishonest, or wilful or reckless misconduct by the trustee (unless such conviction is quashed or set-aside); and
 - to the charity that arises out of any conduct which the charity trustee knew (or must reasonably be assumed to have known) was not in the interests of the charity

or in the case of which the charity trustee did not care whether it was in the interests of the charity or not (sections 68A(2) and (3));

- clarifies that the charity must not purchase TII if it is prohibited by the charity's constitution (section 68A(4)); and
- clarifies that TII may be purchased despite any provision prohibiting the charity trustees from receiving any personal benefit from charity funds (section 68A(4)).

Although, Clause 8 of BRE Trust's Memorandum of Association makes it legally unnecessary to modify the Memorandum of Association on account of the above exclusions, we think that it would be desirable, when a convenient opportunity presents itself, for BRE Trust to modify the proviso to paragraph (u) of Clause 3(2) of its Memorandum of Association so that it extends to such of the above exclusions as are not already included. We suggest too that the proviso is extended to include an additional restriction introduced by the Companies Act, 2006. In that way, paragraph (u) will set out a full list of the exclusions of cover required by both Scottish and English law and will serve as an up to date reference point when obtaining cover. We attach wording that we suggest is substituted for the existing paragraph (u).

4. The OSCR's Current Position

The OSCR published a "position statement" in May 2006 recognising that the restriction on the provision of TII is problematic. In the position statement it noted that, as the regulator, OSCR cannot ignore the legislation. However, the position statement says that "...OSCR will not intervene and take enforcement action simply because a charity has trustee indemnity insurance".

The position statement was updated in May 2010. The OSCR noted that the amendment made by the PSR(S) Act 2010 addresses the difficulty caused by the restriction on TII. The OSCR noted that the amending provision was not yet in force and confirmed that, in the meantime, "...[OSCR] will not take action against charities because trustee indemnity insurance is in place. New applications of organisations that have such insurance in place or have the power to put such insurance in place will not be affected by this and will not be turned down because of it".

The 2006 statement, as updated in May 2010, is available on the OSCR website at: <http://www.oscr.org.uk/trusteeindemnityinsurance.stm#>

5. Legislation

Section 67 CTI(S) Act 2005: Remuneration for services

- (1) A charity trustee may not be remunerated for services provided to the charity (including services provided in the capacity as a charity trustee or under a contract of employment) unless subsection (2) entitles the trustee to be so remunerated.

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- (2) Where a charity trustee of a charity –
- (a) provides services to or on behalf of the charity, or
 - (b) might benefit from any remuneration for the provision of such services by a person with whom the trustee is connected,
- the person providing the services (the “service provider”) is entitled to be remunerated from the charity’s funds for doing so only if the conditions set out in subsection (3) are met.
- (3) Those conditions are –
- (a) that the maximum amount of the remuneration -
 - (i) is set out in a written agreement between the service provider and the charity (or, as the case may be, its charity trustees) under which the service provider is to provide the services in question, and
 - (ii) is reasonable in the circumstances,
 - (b) that, before entering into the agreement, the charity trustees were satisfied that it would be in the interests of the charity for those services to be provided by the service provider for that maximum amount,
 - (c) that, immediately after entering into the agreement, less than half of the total number of charity trustees of the charity fall within subsection (4), and
 - (d) that the charity’s constitution does not contain any provision which expressly prohibits the service provider from receiving the remuneration.
- (4) A charity trustee falls within this subsection if the trustee is –
- (a) party (in the capacity of a service provider) to a written agreement of the type described in subsection (3)(a)(i) under which any obligation is still to be fully discharged,
 - (b) entitled to receive remuneration from the charity’s funds otherwise than by virtue of such an agreement, or
 - (c) connected with any other charity trustee who falls within sub-paragraph (a) or (b).

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- (5) Nothing in subsections (1) or (2) prevents a charity trustee or other service provider from receiving any remuneration from a charity's funds which that service provider is entitled to receive by virtue of –
- (a) any authorising provision of the charity's constitution which was in force on 15 November 2004,
 - (b) an order made by the Court of Session, or
 - (c) any enactment.
- (6) For the purposes of subsection (5)(a), an “authorising provision” is a provision which refers specifically to the payment of remuneration—
- (a) to the service provider concerned,
 - (b) where that service provider is a charity trustee, to a charity trustee, or
 - (c) where that service provider is connected to a charity trustee, to any person so connected.
- (7) Where a charity trustee or other service provider is remunerated in contravention of this section, the charity may recover the amount of remuneration; and proceedings for its recovery must be taken if OSCR so directs.

Section 68 CTI(S) Act 2010: Remuneration: supplementary

- (1) In section 67 –

“benefit” means any direct or indirect,

“maximum amount”, in relation to remuneration, means the maximum amount of the remuneration whether specified in or ascertainable under the terms of the agreement in questions,

“remuneration” includes any benefit in kind (and “remunerated” is to be construed accordingly),

“services” includes goods that are supplied in connection with the provision of services...

Section 127 PSR(S) Act 2010: Charity trustees' indemnity insurance

- (1) In section 67(5)(c) of the 2005 Act (remuneration for services), for “any” substitute “this Act or any other”.
- (2) After section 68 of that Act insert—

“68A Charity trustees' indemnity insurance

- (1) The charity trustees of a charity may arrange for the purchase, from the charity's funds, of insurance designed to indemnify the charity trustees against personal liability in respect of any negligence, default or breach of duty committed by them in their capacity as—
 - (a) charity trustees, or
 - (b) directors or officers of any body corporate carrying on any activities on behalf of the charity.
- (2) The terms of such insurance must, however, be framed to exclude the provision of any indemnity for a charity trustee in respect of any liability incurred by the charity trustee—
 - (a) to pay—
 - (i) a fine imposed in criminal proceedings,
 - (ii) a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature,
 - (b) in respect of representation in any criminal proceedings in which the charity trustee is convicted of an offence arising out of any fraud or dishonesty, or wilful or reckless misconduct, by the charity trustee,
 - (c) to the charity that arises out of any conduct which the charity trustee knew (or must reasonably be assumed to have known) was not in the interests of the charity or in the case of which the charity trustee did not care whether it was in the interests of the charity or not.
- (3) For the purposes of subsection (2)(b) the reference to conviction does not include a conviction—

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- (a) quashed by an order under section 118(1)(b) or 183(1)(c) of the Criminal Procedure (Scotland) Act 1995 (c. 46),
 - (b) quashed by an order under section 118(1)(c) of that Act and which order has the effect of an acquittal by virtue of section 119(9) of that Act or otherwise,
 - (c) in relation to which the verdict is set aside by an order under section 183(1)(d) of that Act and which order has the effect of an acquittal by virtue of section 185(9) of that Act or otherwise.
- (4) This section—
- (a) does not authorise the purchase of any insurance whose purchase is expressly prohibited by the charity’s constitution,
 - (b) has effect despite any provision prohibiting the charity trustees receiving any personal benefit from the charity’s funds.”

Section 128 PSR(S) Act 2010: Interpretation of Part 9

For the purposes of this Part, the “2005 Act” is the Charities and Trustee Investment (Scotland) Act 2005 (asp 10).

26 July, 2010

Bristows

Ref JDL/JF

THE COMPANIES ACTS 1985 to 1989

**COMPANY LIMITED BY GUARANTEE
AND NOT HAVING A SHARE CAPITAL**

MEMORANDUM OF ASSOCIATION

OF

BRE TRUST

(as amended by Special Resolutions passed on 15 March 2002¹, 4 August, 2004² and 4 December, 2007)

1. The Company's name is "BRE TRUST".
2. The Company's registered office is to be situated in England and Wales.
3. (1) The Company's objects are, for the public benefit:
 - (a) To undertake, commission and support research in areas of science, engineering, information technology, management and economics associated with the built environment, including its processes and artefacts;
 - (b) to advance knowledge, innovation, and communication, and to promote education and excellence, in all such matters, and to collect, collate and publish useful information, ideas, and data relating thereto; and
 - (c) to undertake, commission, facilitate and support carbon emission reduction projects and such other activities and services as are beneficial to the built environment and charitable in law.
- (2) In furtherance of such objects, but not otherwise, the Company shall have the following powers:
 - (a) To provide opportunities by all suitable means for the discussion, publication, and inter-change of knowledge, ideas, techniques and experience on all matters of interest in relation to or connected with the built environment;
 - (b) Either alone or with others to organise and conduct conferences, seminars, workshops and courses;

¹ Taking effect from 1 April 2002

² Change of name effective from 11 August, 2004

- (c) To award research grants and studentships, and to give other assistance by any and all means;
- (d) To publish and distribute journals, periodicals, pamphlets, papers, reports, books and other documents or films or recorded tapes (whether audio or visual or both);
- (e) To monitor and advise upon existing and prospective legislation;
- (f) To subscribe to any library, laboratory, or other institution;
- (g) To buy or by any other means acquire and take options and any other rights or privileges of any kind over any property whatever and to improve, manage, construct, repair, develop, exchange, let on lease or otherwise mortgage, charge, sell, dispose of, turn to account, grant licences, options, rights and privileges in respect of, or otherwise deal with all or any part of the property and rights of the Company;
- (h) To apply for, register, purchase, or by other means acquire and protect, prolong and renew, whether in the United Kingdom or elsewhere any patents, patent rights, brevets d'invention, licences, secret processes, trade marks, designs, protections and concessions and to disclaim, alter, modify, use and turn to account and to manufacture under or grant licences or privileges in respect of the same, and to expend money in experimenting upon, testing and improving any patents, inventions or rights which the Company may acquire or propose to acquire;
- (i) To employ all technical, professional and other staff, servants and agents as may be required by the Company and to pay salaries, wages or rewards to any such persons and to make all reasonable and necessary provision for the payment of pensions and superannuation to or on behalf of such persons and their dependants;
- (j) To invest and deal with the moneys of the Company not immediately required for its purposes in or upon such investments securities or property as the Company may think fit;
- (k) To borrow and raise money in any manner and to secure the repayment of any money borrowed, raised or owing by mortgage, charge, lien or other security upon the whole or any part of the Company's property or assets (whether present or future) and also by a similar mortgage, charge, standard security, lien or security to secure and guarantee the performance by the Company of any obligation or liability it may undertake or which may become binding on it;

- (l) To accept gifts and raise funds and invite and receive contributions from any person whatsoever by way of subscription or otherwise;
- (m) To draw, make, accept, endorse, discount, negotiate, execute and issue cheques, bills of exchange, promissory notes, bills of lading, warrants, debentures, and other negotiable or transferable instruments;
- (n) To subscribe for, take, purchase, or otherwise acquire, hold, sell, deal with and dispose of, place and underwrite shares, stocks, debenture stocks, bonds, obligations or securities issued or guaranteed by any other company constituted or carrying on business in any part of the world, and debentures, debenture stocks, bonds, obligations or securities issued or guaranteed by any government or authority, municipal, local or otherwise, in any part of the world;
- (o) to undertake and execute any charitable trusts which may lawfully be formed by the Company and which may be related to its objects;
- (p) to make loans (with or without security or interest) or gifts of money to persons, companies or other organisations for purposes in furtherance of the Company's objects, and to guarantee the performance of the obligations of any person or company undertaken in connection with such purposes;
- (q) to effect insurances over the Company's property;
- (r) to establish or subscribe to the support of any charity;
- (s) to subscribe to, affiliate, become a member of, arrange, amalgamate, or co-operate with any other charitable organisations, companies, institutions, societies, clubs or associations having objects similar to those of the Company and which shall prohibit the payment of any dividend or profit to and the distribution of any of their assets amongst their members at least to the same extent as such payments or distributions are prohibited in the case of the Company by this Memorandum;
- (t) to purchase or otherwise acquire and undertake all or such part of the property, assets, liabilities or engagements as may lawfully be acquired or undertaken by the Company of any one or more of the charitable organisations, companies, institutions, societies or bodies having objects altogether or in part similar to those of the Company;
- (u) to provide indemnity insurance to cover the liability of the members of the Company's Council which by virtue of any rule of law would otherwise attach to them in respect of any negligence, default, breach of trust or breach of duty of which

they may be guilty in relation to the Company; provided that any such insurance shall not extend to:

- (i) any claim arising from any act or omission which the members of the Council knew to be a breach of trust or breach of duty or *not to be in the interests of the charity* or which was committed by the members of Council in reckless disregard to whether it was a breach of trust or breach of duty or *in the interests of the charity* or not; ~~and provided also that any such insurance shall not extend to~~
 - (ii) the costs of any unsuccessful defence *to civil proceedings brought by the Company* or to a criminal prosecution *(including any fine imposed)* brought against the members of the Council in their capacity as directors/trustees of the Company; *and*
 - (iii) *any liability incurred by the members of the Council to pay a sum to a regulatory authority in respect of non-compliance with a requirement of a regulatory nature;*
- (v) To do all such other things as may be deemed incidental or conducive to the attainment of the Company's objects or any of them.

4. The liability of the Members is limited.
5. Every Member of the Company undertakes to contribute such amount as may be required (not exceeding £1) to the Company's assets if it should be wound up while he is a Member or within one year after he ceases to be a Member, for payment of the Company's debts and liabilities contracted before he ceases to be a Member, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.
6. The income and property of the Company shall be applied solely towards the promotion of its objects as set forth in this Memorandum of Association and no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend, gift, division, bonus or otherwise howsoever by way of profit, to Members of the Company and no member of the Council shall be appointed to any office of the Company paid by salary or fees or receive any remuneration or other benefit in money or money's worth from the Company.

Provided that nothing herein shall prevent any payment in good faith by the Company:-

- (a) of reasonable and proper remuneration for any services rendered to the Company by any member, officer or servant of the Company who is not a member of the Council;
- (b) of interest on money lent by any Member of the Company or member of the Council at a reasonable and proper rate of interest per annum;

- (c) of reasonable and proper rent for premises demised or let by any Member of the Company;
 - (d) to any member of its Council of out-of-pocket expenses;
 - (e) of fees, remuneration or other benefit in money or money's worth to any company of which a member of the Council may also be a member holding not more than 1/100th part of the issued capital of that company;
 - (f) of the usual professional charges for business done by any member of the Council who is a solicitor, accountant or other person engaged in a profession or by any partner of his or hers, when instructed by the Company to act in a professional capacity on its behalf provided that at no time shall a majority of the members of the Council benefit under this provision and that a member of the Council shall withdraw from any meeting at which his or her appointment or remuneration or that of his or her partner is under discussion;
 - (g) of any premium in respect of any indemnity insurance to cover the liability of the members of the Council which by virtue of any rule of law would otherwise attach to them in respect of any negligence, default, breach of trust or breach of duty of which they may be guilty in relation to the Company; provided that any such insurance shall not extend to any claim arising from any act or omission which the members of the Council knew to be a breach of trust or breach of duty or which was committed by the members of the Council in disregard to whether it was a breach of trust or breach of duty or not and provided also that any such insurance shall not extend to the costs of an unsuccessful defence to a criminal prosecution brought against the members of the Council in their capacity as directors/trustees of the Company
7. If upon the winding-up or dissolution of the Company there remains, after the satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the Members of the Company, but shall be given or transferred to some other charity or charities having objects similar to the objects of the Company, and which shall prohibit the distribution of its or their income and property to an extent at least as great as is imposed on the Company under or by virtue of Clause 6 hereof, such charity or charities to be determined by the Members of the Company at or before the time of dissolution, and if and so far as effect cannot be given to such provision, then to some other charitable object.
8. Nothing in this Memorandum of Association or the Company's Articles of Association shall authorise an application of the Company's property for purposes which are not charitable in accordance with section 7 of the Charities and Trustee Investment (Scotland) Act 2005.