

Charities Conference 2021

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New Lanark Trust

- Decision of the Inner House of the Court of Session.
- New Lanark Trust (NLT) set up 2 trading companies New Lanark Hotels Limited (“NL Hotels Limited”) and New Lanark Trading Limited (“NL Trading Limited”).
- Some of the trading activities carried out in each subsidiary are as follows:-
- **NL Trading Limited**- operates the visitor attraction in New Lanark, the café, the retail shop, produces spun woollen yarn, the hydro electric power station and makes and sells ice cream on the site.
- **NL Hotels Limited**- operates the hotel, hostel, self-catering accommodation, a conference centre, bar, restaurant, wedding venue, leisure club, pool and beauty treatment facilities.
- Both subsidiaries operate within original mill buildings on the site.

New Lanark Trust – Continued

- OSCR had rejected NLT's application to register the subsidiaries as charities.
- OSCR had accepted that some of the activities provided public benefit and were charitable, but not enough to meet the charity test. Some of the activities were seen as being purely commercial activities.
- Inner House of the Court of Session held that the activities of both subsidiaries were entirely primary purpose linked with the advancement of education and heritage, so were charitable.
- Inner House directed OSCR to recognise the subsidiaries as charities and enter them on to the Scottish Charity Register.
- NLT is a unique case -judgement held that NL is a living and working community. The commercial facilities on site for visitors were essential to experience being part of this.
- OSCR are now updating their guidance on "Meeting the Charity Test".

The Kids Company Case

- Recent High Court case against the former trustees of Kids Company and the CEO Camilla Batmanghelidjh.
- Brought by the official receiver seeking to disqualify the former trustees from being future company directors and charity trustees.
- Official receiver also claimed that the CEO was a de facto trustee who should also be disqualified.
- This case contains a number of important lessons for every charity.
 - **Delegation** - trustees can rely on competent key staff such as a CEO/senior management team to a reasonable degree to carry out the charity's strategy.
 - Emphasises the importance of having a robust governance structure in place.
 - Delegated roles must have a clear work remit- must be accountability and oversight.
 - Trustees will always remain accountable, they can never delegate their overall responsibility.

Charity Reserves

- Part of the good financial governance of every charity to have reserves and a reserves policy.
- Official receiver claimed that the trustees financial mishandling led to the charity's insolvency and meant they were unfit to act.
- Kids Company had a demand led financial model - would never turn away a child in need.
- Court held that the trustees decision to prioritise spending on the charitable objects rather than to build up substantial reserves was reasonable.

The Standard of Care expected of Trustees

- Judge took a “benevolent approach” to trustees.
- Standard to apply for showing that a trustee is unfit to act is a very high one.

Updating the Charities and Trustee Investment (Scotland) Act 2005

- Draft bill expected in 2022 for the new Act.
- We expect it to increase OSCR inquiry and enforcement powers as well as increase transparency and openness.

Thank you

For more information on anything covered in today's session, please contact:



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Contracts

Charities Conference

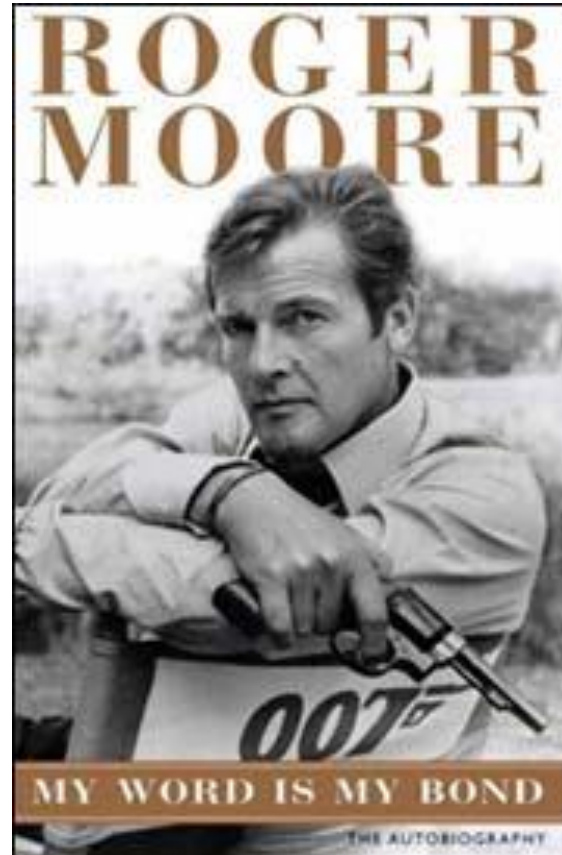
7th October 2021

Scott Fyfe Associate

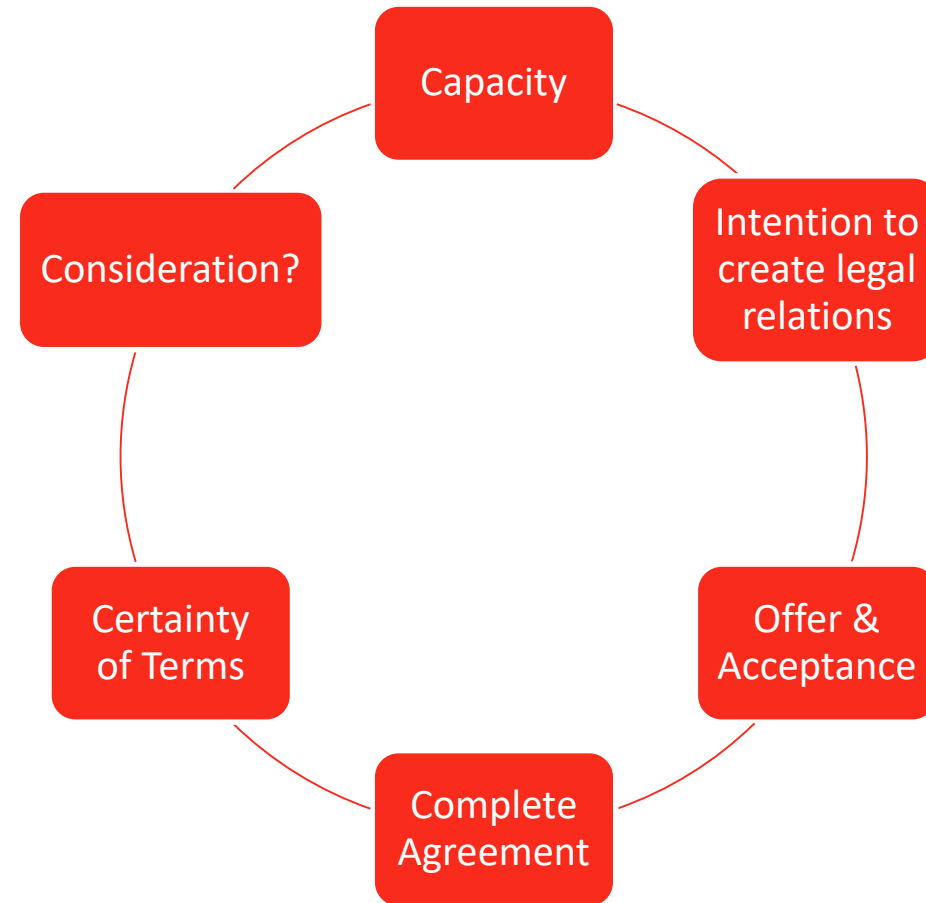
Today's session

- Contracting Principles
- Key clauses
- Force Majeure in a Coronavirus Context
- Contracting in a Post-COVID World
- Top Tips
- Q&A

Contracts



Contracting Principles



Key Clauses

- Obligations
- Consideration
- Indemnities
- Limitation of Liability
- Termination
- Boilerplate terms

Key Clauses

- Obligations:
 - Should be as clear and exhaustive as possible
 - Failure to meet obligations will constitute breach
- Consideration
 - Simple v Structured
- Indemnities
 - Express promise to pay money on the happening of a specified event

Key Clauses

- Limitation of Liability
 - Reduces risk
 - What liabilities cannot be limited?
- Termination
 - Ensure that you have an exit from the contract
- Boilerplate terms
 - Often overlooked
 - Examples: notices; severance, third party rights, entire agreement, jurisdiction, force majeure

Effect of the Coronavirus Pandemic on Charities

- OSCR Survey conducted in May and November 2020.
- 2,548 Scottish charities participated.
- November 2020: 92% of Scottish charities reported some form of negative impact from COVID-19 (98% in May 2020).
- The most common impact (90% of charities) was upon the charities' ability to deliver their services.
- 79% had seen an impact on their finances.

Force Majeure

- What is a Force Majeure clause?
- Performance must be rendered impossible
- What is the effect of invoking a Force Majeure clause:
 - Suspension
 - Non-liability
 - Obligation to mitigate
 - Right to terminate

Contracting in a Post-COVID World

- Termination clause – ensure that you have an exit from the contract without incurring further liability.
- Force Majeure clause – ensure that your force majeure clause covers as much as possible.
- Dispute Resolution clause – try to avoid going to court at all costs.
- Consideration clause – build in a structured payment arrangement in order manage cash flow.

Top Tips

1. Always have a written contract where possible
2. Every sentence in a contract means something
3. Always have an exit
4. Plan for the worst; hope for the best
5. Don't be afraid to negotiate



Charities Conference

Employment Law Update

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Employment Law Round Up

- Hybrid Working
- Consultation on proposed changes to Flexible Working Regime
- Vaccinations
- Mandatory Duty to prevent harassment at work

Hybrid working

- CIPD research suggests as many as 40% of employers expect more than half of their work force to regularly work from home after the pandemic has ended
- Policy / framework of expectation recommended
- Considerations
 - Eligibility
 - Expectations for hybrid working
 - Office working
 - Working elsewhere
 - Sits alongside other forms of flexible working
 - Insurance
 - Health & Safety and risk assessments
 - Contractual issues

Flexible Working

UK Gov't consultation published 23 Sept 2021

Proposals for reform include

- Making the right to request flexible working a “day 1” right
- Making changes if necessary to the current 8 permissible business reasons for refusing a FW request
- Requiring the employer to propose alternative arrangements than those suggested by the employee.
- Requiring employers to raise awareness of FW rights with staff

Consultation closes on 1 December 2021.

Hybrid working

- Implementing the policy
 - Consultation
 - Communication
 - Supporting managers and training

Vaccination

- Mandatory Vaccination
 - Currently only in the regulated care home in England from 11 November 2021
 - ACAS advise employers to encourage and support staff without making vaccination a requirement
 - Equality and Human Rights Commission warn that a blanket mandatory vaccination policy applied inflexibly is “likely to be unlawful” due to vaccination not being suitable for all as well as risk of unlawful discrimination
 - Alternatives, seek to encourage voluntary uptake of vaccination.

Proposed Mandatory Duty to Prevent Harassment

UK Gov't intends to introduce legislation which will require employers to take positive proactive steps to prevent sexual harassment at work

Possibly enforced by Equality and Human Rights Commission

Statutory Code of Practice to be developed

Unclear currently if this will apply to all forms of unlawful harassment under the Equality Act 2010.