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Quarterly Housing Update

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Foreword

For the first time in a generation, the affordable housing sector can collectively say that money is no longer the limiting factor in delivering new supply.

As Tonia Secker and Jessica Arczynski explain elsewhere in this edition, there are billions of pounds available for unlocking sites and to promote new supply; for housing associations there remains (alongside the very healthy grant availability from Homes England and the GLA) a seemingly unwavering appetite for debt funding (and even for those associations whose balance sheets are constrained there are new opportunities to participate in joint ventures to overcome those constraints) and in a move that genuinely took everyone in the sector by surprise- the longstanding constraints on local authority development in the shape of the Housing Revenue Account debt cap are being removed.

So the ball is now firmly in the housing association and local authority's sector to deliver and surely the Government- of whatever complexion- will now look for these resources to be translated to new supply.

Whatever the storm clouds on the horizon- and there are plenty (Brexit, skills shortages and land supply to name but three) – this is a golden age for affordable housing, and it is incumbent on us all to seize the moment.

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Public funding for housing and infrastructure – a new golden age?

The Government's commitment to increased housing supply was driven home by the Prime Minister's attendance at the National Housing Federation Summit, the announcement of £2 billion in funding for long-term strategic partnerships and the commitment to remove the HRA debt cap for local authorities.

The availability of new or enhanced public funding streams is often critical to "unlocking" key sites, supporting housing led infrastructure and driving more challenging delivery targets. Surprisingly, however, market awareness of the available funding streams, how and where they can be used and the terms for their use is perhaps not as widespread as one would imagine.

What is available?

We set out below a "snapshot" of some of the primary public funding streams available for housing delivery.

- Housing Infrastructure funding – £2.3 billion is available to help "unlock" challenging sites.
- GLA Affordable Homes Programme 2016 - 21 - £3.4 billion investment through a wide variety of funding models to meet a range of London-specific delivery objectives.
- Homes England Shared Ownership Affordable Homes Programme 2016 – 21 – £4 billion is accessible to non-profit registered providers (including Strategic Partners), for-profit registered providers, local and combined authorities and private developers.
- Home Building Fund - £3 billion in debt finance for private sector development and infrastructure.

Of course public funding is not limited to Homes England or GLA - in particular, there are a wide variety of local authority funding sources already "in play" in the market to help stimulate housing delivery at a local level, such as:

- grant funding – in particular, many Councils are sitting on "war chests" of Right to Buy receipts which they are keen to see used by delivery partners within their areas before the three year deadline;
- on-lending – Council have the power to lend funds (either current reserves or Public Works Loan Board funds) for purposes which comply with their statutory duties; and
- alternative forms consideration – Council subsidiaries and/or delivery partners may benefit from innovative funding arrangements, such as where equity shares or land forms part of the "payment".

In addition, certain combined authorities have been established with a specific mandate to provide housing investment in their areas and they are in an ideal position to use Homes England, and/or local authority funding practices as a basis for developing their own innovative models which respond to local market needs.

Who are the recipients?

Public funding is relevant to all those engaged in housing delivery.

Whilst local authorities (including some combined authorities) and housing associations are the obvious recipients, private bodies may also "access" funding, either directly or indirectly through partnerships and consortium arrangements with registered providers. In any event public monies (and the conditions on which they are available) will inevitably be passed down contractually to private sector partners (e.g. contractors, developers).

Local authorities are under significant pressure to accelerate delivery in their areas and so are increasingly open to negotiating bespoke funding arrangements with housing associations or private developers as part of an overall delivery "package".

How to use public funding for housing and infrastructure?

Getting the right tenure balance can directly influence the rate of build out and scheme success. Grant funding has, in numerous cases, supported affordable housing provision to sufficient levels to persuade planners to allow consent to be given.

In order to enhance supply, thought should be given to how to maximise the impact of available public subsidy by combining it with other potential sources of private and public investment. Layering funding streams will be driven by specific objectives and we have advised on a wide variety of options, including:

- an entity that is land "rich" but cash "poor" may wish to invest equity into a development vehicle in the form of land or shares;
- accelerated delivery can be driven by up-front grant funding arrangements which include a form of overage to share market uplift on a completed housing project;
- on-lending arrangements with local authorities will be welcomed where these can provide a revenue stream and create a crucial income to its general fund; and
- the establishment of development vehicles (companies or limited liability partnerships) to build capacity and maximise the use of funding streams (e.g. Right to Buy receipts, Community Infrastructure Levy funds);

Key issues

Although each development is unique, there are certain key legal principles which should be considered in any transaction which involves public funding, including:

- State Aid – in order to come within the State Aid rules, funding will need to be structured so that it is State Aid compliant or falls within one of the "exemptions" – this should be done at the scheme's conception to avoid "nasty surprises".
- Procurement – public bodies will need to satisfy themselves that the manner in which funding is provided as part of the overall development programme is compliant with (or outside of) public procurement law.
- Legal restrictions – local authorities and charitable housing associations (and their partners) will need to ensure they have sufficient powers (both constitutionally and under relevant statute) in order to undertake funding and investment activities.
- Security – if funds are being passed on consideration should be given to security measures (for loan) or recovery events (for grant) which may be necessary to safeguard public monies and incentivise delivery and on-going use. If an equity investment is contemplated, have sufficient protections been integrated into the constitutional / governance arrangements of the recipient?

Conclusion

There is of course no "one size fits all" funding model but what is clear is that public funding is now available at a significantly increased scale. Securing and effectively using such funds will be critical to unlocking development and maximising supply now and in the future.

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Retirement living

Recent attendance at the 2018 Association of Retirement Community Operators (ARCO) knowledge sharing day, hosted at our London office, demonstrated the growing interest in UK retirement living.

An ageing population, increased life expectancy and corresponding higher risk of developing dementia, alongside a woeful shortage of suitable accommodation makes the sector one of the most exciting and challenging areas in which to work. A far less saturated market than student living or multi-family, it provides a great opportunity to those willing to rise to the challenge.

But what do those thinking of entering the sector, be they developers, investors or operators need to consider, how can existing stakeholders fulfil the need for retirement living, and how do all of these parties ensure that their contributions result in viable business models?

The variety of models on the market, and their often confusing labels ("sheltered housing", "close care", "supported living"), don't need to be a barrier. From traditional care homes to innovative retirement villages, the market is open to new and creative solutions. A fundamental and decisive factor is the extent to which care provision will factor in your offering. For over-55s, downsizing and moving somewhere new may have nothing to do with physical or mental health needs, and everything to do with enjoying community. For others, often a little later in life, those same physical and mental health needs can be the sole reason for leaving the family home. And there are those in-between, who want to prepare a place that they feel secure and comfortable, with the hope that this will be their last move.

Whilst there is a lot we can learn from the more mature markets in the USA, Australia and New Zealand, the very underdeveloped nature of the UK market leaves it open to innovation. It turns out that an Englishman (or woman)'s

home may not be their castle. For those seeking a low maintenance, flexible solution a rented offering may be far more appropriate than home ownership (and saves on SDLT).

The same "blank canvas" is part of the challenge for investors, who need to know that the sector is supported by robust legislation and self-regulation in order to boost confidence. The topic of event fees has seen some clarification from the Law Commission but yet more is needed. We need to find an alternative legal model which allows the flexibility for a landlord and a community to deal with those whose health means they are unable to continue in their existing community but without taking away from the security to feel supported and stable in later years.

Underpinning it all is real estate, meeting the fundamental need to have a roof over one's head. Still, a successful scheme should acknowledge the links between health and housing, and community and health. Both the design and the location need careful consideration, as does the service offering. Particularly for residents who are less able to travel, an urban location may be more accessible than a more isolated rural setting, although that must be balanced against land values and availability. Local infrastructure (dropped kerbs, accessible transport) must support the residents as well. This highlights just one of the roles that government (local and national) has to play.

That role is no more obvious than in the planning regime. Planners need to be ambitiously forward-thinking regarding accommodation for older people, ensuring there is adequate provision and clear guidelines. We welcome the draft London plan beginning to acknowledge the specific role of affordable accommodation for older person's housing but that is an initial step to be developed into more detailed approaches focusing on this kind of housing in London but also across regions and at a national level.

There is a further need to be forward thinking in the buildings themselves, to future proof them both in terms of technological advances and to build in adaptability for those whose needs are likely to evolve. Technology can play a role in end of life care as well as in making existing care models more efficient, and helping to ease the health problems that we know are associated with loneliness in old age. Technology can be incorporated alongside design to anticipate the challenges of dementia and facilitate an on-going quality of life. That is not to say it should not be handled with caution, particularly where it is used in conjunction with sensitive personal data.

At the heart of it all is people. Not just residents but staff as well. High turnover of staff is a turn off for consumers who value stability. This comes with a cost in terms of recruiting, training and retaining staff. Add to this the constantly changing requirements (see our note on the recent Mencap sleep-in case and its impact on the wider social care sector on page 9) and staffing is arguably one of the greatest challenges.

Even so, we see a role for all kinds of players, whether for investors who want to partner with operators, remain in the operation themselves, or develop and move onto the next project. From housing associations to pension funds, there are structures and financing options that can be made to work for all. Retirement living is not without its challenges, but ultimately, it is of benefit to us all to build up the provision in the UK. If we've piqued you're interest, we'd love to talk to you.

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Encouraging prompt payment of the supply chain

While the Government considers new ways to encourage prompt payment practices in the public sector, a recent survey shows that clients and contractors aren't meeting current requirements.

It's been five years since amendments to the Late Payment of Commercial Debts (Interest) Act 1998 imposed requirements on public sector clients to pay their contractors within 30 days of receipt of an undisputed invoice. This was followed two years later by Lord Young's reforms to the Public Contracts Regulations 2015, requiring contracting authorities to pay their contractors within 30 days and ensure that equivalent terms were included in contractors' and suppliers' contracts, and also to publish annual statistics reporting on the percentage of their invoices paid on time.

Based on current evidence, the construction industry is struggling to meet these requirements. In July 2018, Build UK published information on the payment performance of 24 of its contractor members. 13 companies reported having payment terms to suppliers of 45 days or more, and over half of the contractors reported paying at least one-third of their invoices late, in breach of the prompt payment legislation.

Public sector clients aren't faring much better. A recent Freedom of Information Request revealed that 89% of local authorities are not monitoring whether their supply chain is being paid within 30 days, as required by the procurement regulations. 49% of authorities were reported as either not having or not knowing whether they had compliant payment terms in their standard contracts, while 18% stated that they had no intention of implementing a 30-day payment period.

As part of the Government's ongoing attempt to promote prompt payment practices, the Crown Commercial Service (CCS) recently ran a public consultation on prompt payment by suppliers to central government, executive agencies and non-departmental public bodies for contracts over £5 million per annum. The CCS's consultation report proposes that these public bodies should use tender processes to ensure prompt payments are being made, and make compliance with the rules a condition of submitting a tender.

The consultation document considers two options for how prompt payment practices can be assessed in practice. Option 1 is a qualitative approach, in which contracting authorities would be required to ask bidders about their payment systems and whether they were "effective". Option 2 proposes a Pass/Fail assessment, in which contracting authorities would be able exclude bidders who do not meet prompt payment requirements. The CCS has promised formal guidance as to how contracting authorities could assess prompt payment, but this has yet to be issued.

Pending the issue of the guidance, it's unclear whether pushing the monitoring of payment processes into tender exercises will be sufficient to ensure compliance. Moreover many public sector clients operate non-compliant payment practises themselves so it may be difficult for them to insist on compliance with rules they themselves don't follow.

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Utilising commercial portfolios to promote the healthy eating concept

Many housing associations own a small but very useful amount of non residential property. The scale varies from housing association to housing association with some having a commercial portfolio of anything up to 10% of overall holdings and some hardly having any commercial property at all.

A number of associations are now looking to proactively manage their commercial portfolios in order to influence a range of outcomes, not just necessarily about maximising rental income.

Whilst for a few housing associations their commercial portfolio is an asset which they actively manage, for a large number it is at best an inconvenience and at worst something which they completely ignore. There might be very good reasons why this is the case. The rules about commercial property are entirely different from the rules about residential property and it is almost certainly not the core activity of any housing association to provide commercial property. However, where a housing association does have commercial property, it should look at this not as an inconvenience, but as an opportunity to promote its own objectives free from much government or external interference.

One of the areas that could enormously benefit from this and which is being actively pursued by clients, is the healthy eating concept. Any of a housing associations non-residential portfolio can be put to uses which promote the healthy eating concept. For example, preference can be given by an housing association to retail shops which promote healthy eating. High street chains selling unhealthy food, or perhaps fast food outlets, can be discouraged in favour of healthier equivalents. In many cases, such healthier fast food outlets enhance the local communities and reflect their communities far better than a national or international chain. Diversity in the food market would therefore be encouraged, and the nature of any such outlet can be tailored to, and arise from, any specific community that it serves.

Other associations have taken a proactive role in not letting (or not renewing) leases to other commercial tenants where activities may be perceived detrimental to a community (e.g. bookmakers or a high cost credit brokers).

The key point to remember here is that housing associations commercial properties are not regulated to the same degree as their residential properties. Each housing association is free to do with that property anything that it wants to do subject only to the broad parameters of its general objects and of planning law. Therefore, fast food outlets can be local fast food healthy outlets. Food retailers can be retailers of fresh organic produce rather than processed food. Information centres can be set up promoting the healthy eating concept in any of these premises.

The lesson to be drawn from this is clear. Housing associations are free to do it, they own the property, and they have the ability to put their non-residential property to any use which in their opinion promotes the wellbeing at their communities.

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Affordable private rent and the build to rent sector - new tenure, new opportunity?

Housing associations and local authorities have watched the emergence of the build to rent (BTR) sector with interest, with some of the earliest housing association and local authority led schemes now starting to come to market.

Although the buoyancy of the outright sale market has limited the speed at which the sector has developed, it is clear that the BTR sector is now starting to form a key part of the market and this was recognised by the Government in the new National Planning Policy Framework (NPPF) published in May. It is also no longer just a London based 'product' as figures issued in August showed that for the first time ever, BTR homes either completed, under construction or being planned across the UK regions are equal to those under way in London.

The NPPF included for the first time a specific definition of BTR establishing it more firmly as a separate asset class. Following on from the proposals in last year's Housing White Paper and the accompanying BTR consultation, the NPPF also confirmed the creation of a new affordable tenure, specific to the BTR sector, badged 'affordable private rent' (APR). The rationale behind APR is to create a new type of affordable housing which streamlines delivery and encourages more development of Build to Rent schemes.

APR units will be available to rent at a 20% discount to open market rent and the default position is that APR will comprise 20% of the overall development. BTR developments are exempted from the new expectation that all new build schemes will provide a minimum of 10% affordable home ownership. The key difference between APR and more established affordable tenures however is that there will be no requirement to involve a third party housing association to take ownership of the affordable units. Single ownership and management of a scheme is a fundamental feature of BTR as an asset class and the resultant flexibility and efficiencies this provides is the driving force behind this change in approach. This is a distinct shift in policy which will require a step change in the way local authority planning teams approach affordable housing for developments of this type.

Housing associations, particularly, are likely to be concerned about the potential reduction in available Section 106 stock as a result of the change. The new tenure should however also provide opportunity for the sector. In looking to diversify their portfolios, many housing associations are looking at expanding into the BTR sector and by promoting APR as part of a wider BTR scheme, an housing associations affordable housing expertise may well provide an edge when progressing through the planning system.

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The Mencap decision and its implications

The Court of Appeal's decision in Royal Mencap Society v Tomlinson-Blake and Shannon v Rampersad (t/a Clifton House Residential Home) (the Mencap case) comes as a great relief to care providers who have been faced with an ever-increasing pressure on budgets. However, it also raises a number of challenges.

The Court held that employees are not entitled to the national minimum wage (NMW) for the full duration of their sleep-in shift because the work they are carrying out is "time work", and they are therefore only entitled to the NMW when they are awake and carrying out duties.

The Court looked first at the National Minimum Wage Regulations and concluded that their effect is that a worker who is required to be available for the purpose of working, at or near his or her place of work, is entitled to have this time counted as time work for NMW purposes. The two exceptions to this are where the worker is at home, or where the arrangement is that they will sleep (and be given facilities for doing so). In the latter scenario only the hours where they are, and are required to be, "awake for the purpose of working" will qualify for the NMW.

The Court also took into account the recommendations of the Low Pay Commission reports that those carrying out sleep-ins should be entitled to the NMW for all the times when they are awake and required to be available for work.

The outcome of the appeals

In Mencap the claimant slept by arrangement at her place of work whilst on her sleep-in shift and was expected to deal with emergencies. She was treated as being available for those hours, rather than actually working. The sleep-in exception applied, with the result that only those hours during which she was required to be awake for the purpose of working counted for NMW purposes.

Meanwhile, in Shannon a night care assistant was again only available for work and not actually working.

Impact on the care sector

What do providers who are currently paying the NMW for sleep-ins do? If they stop, they will have to manage repercussions from disgruntled staff.

How about HMRC's Social Care Compliance Scheme which is now, effectively, redundant? HMRC will be issuing guidance.

And what about providers who have made backpay payments to staff to cover historic NMW shortfall for sleep-ins? Can these be recovered? Provided the payments have not been made under COT3s or settlement agreements there may be scope.

Finally, there's the issue of commissioners to consider and whether they will continue to contribute to the cost of contracts. We already have anecdotal evidence that some commissioners are reconsidering their decisions to pay top ups to cover the NMW.

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Squaring development deals with the procurement rules

Construction projects connected to a transfer of land may in some cases be subject to the public procurement rules. Here's an overview of issues that housing associations and local authorities should consider when structuring their development deals.

Up until a decade ago, it was generally assumed that public sector bodies could agree development deals involving a transfer of land without having to worry about the public procurement rules. In 2007, the pendulum swung the other way: the European Court of Justice concluded in the Roanne case that some development deals, or works carried out in accordance with those deals, could amount to public contracts, regardless of whether there was a land transfer. Accordingly, any relevant works undertaken that exceeded the public works contract threshold would need to be advertised in accordance with the procurement rules.

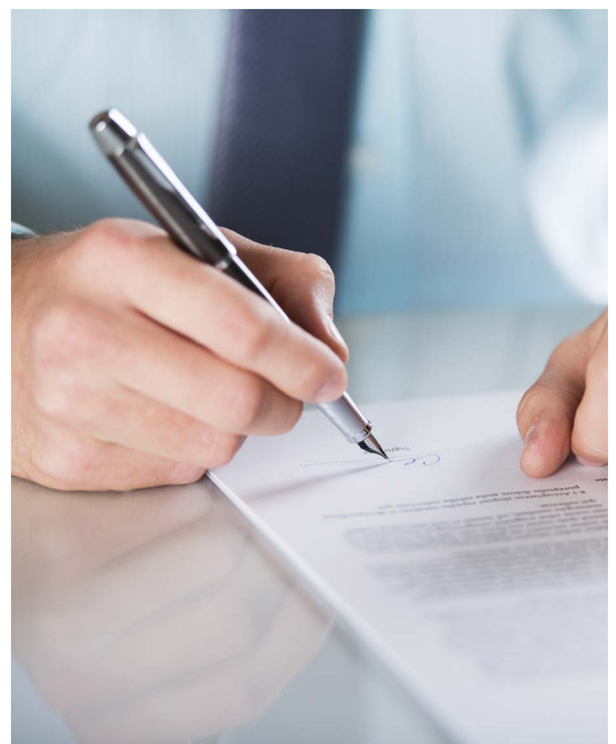
The judgment was a shock for the UK property market, and led to social landlords taking a more cautious approach to procuring development deals, though many development deal structures continued to fall outside of the procurement regime.

Since Roanne, the rules around when development deals are subject to procurement rules have been refined and clarified in the Helmut Müller and subsequent cases. In the 2016 West Berkshire case, the High Court of England and Wales upheld the European rulings and provided some useful guidance for UK public bodies as to when the procurement rules would apply, and identified some flexibility for authorities to structure development deals outside the procurement regime.

So when is a development deal a "public works contract"?

Most development deals are highly bespoke, and so it's difficult to apply a one-size-fits-all approach. Both judicial and government guidance agree that each deal needs to be assessed on a case-by-case basis, and that public bodies should avoid "off-the-shelf" solutions being applied to every deal.

The Public Contracts Regulations 2015 currently define a "public works contract" as "the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence over on the type or design of the work." The greater the control a client exercises over the works, the more likely it is to be a public works contract. For example, projects where the client requires the developer to construct a specific type of building or number of units, or to construct the works to the client's specification, are more likely to be covered by the procurement rules. Likewise, where the client has rights to inspect or certify the works as being complete, or to require the development to rectify defects, these are also likely to be public works contracts.



When considering whether a development deal is or isn't covered, the Courts will also look at the overall purpose of the development. If the land transaction is contingent on the developer constructing or procuring the construction of the works, or if the works are for the overall "benefit" of the contracting authority (whether financial or non-financial), then the works are more likely to be viewed as a public works contract. By contrast, works that are incidental to the development, or where the client doesn't exercise control over the works, are less likely to be covered.

With this in mind, it is possible for social landlords and developers to structure development deals which do not qualify as public works contracts. This usually involves the client reducing its influence over the type or design of the works, or agreeing that the land transaction is not accompanied by obligations to develop the site. The High Court has held that development deals where the developer has a contractual option to enter into the deal, and where any construction obligations are subject to the developer taking up that option, will not qualify as public works contracts.

Given the complexities involved, social landlords looking to enter into development deals should seek advice on the impact of the procurement rules as early as possible in the procurement process. A clear understanding of where procurement rules start and end (and the flexibilities that currently exist under UK case law) can be useful in helping structure development deals, ensuring that social landlords achieve their development objectives while remaining compliant with their legal obligations.

Likewise, developers who are tendering for public sector developments or looking for public sector partners to develop sites they own or control, should also take advice about the application of the procurement rules, in order to avoid having to implement risk-mitigation strategies with their public sector partners further down the line.

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Bank ring-fencing – why a move towards safer banking could have cost implications for housing associations

In the wake of the banking crisis in 2008, which saw the government bailing out major banks at immense cost to the taxpayer an independent commission headed up by Sir John Vickers recommended that UK banking activities be ring-fenced in order to protect the deposits of individuals customers, small and medium enterprises (SMEs) and homeowners.

That recommendation will finally become a reality from 1 January 2019 when new regulations will come into effect requiring banks that hold over £25 billion in deposits to separate their retail banking activities from their investment banking activities. The objective behind the new legislation is to re-build public confidence in the banking system, minimise the impact of any future banking failure and reduce the possibility of public funds being used for a bail out should a bank fail in the future. The notion is a simple one - retail investment, including lending to SMEs and vanilla hedging arrangements will be within the ring-fence and riskier investment banking and more complex hedging arrangements will sit outside the ring-fence.

So why should housing associations be concerned? Well, firstly lenders to the sector are taking an inconsistent approach as to whether social housing loans fall within the ring-fence or not. Some banks have indicated that they are of the firm view that social housing loans will sit squarely within the ring-fence, whilst others will be running new social housing finance lending through their investment arm from now on. This means that housing associations could find their loan arrangements being treated rather differently depending on who they have borrowed from. A lack of consistency of approach is not helpful and would have inherent cost implications.

The notion that social housing loans will sit within the ring-fence also assumes that housing associations will be considered SMEs. In the current era of mega mergers between housing associations the resulting entities may simply be too large to really be classified as such. Even setting merger activity aside, it may be a stretch to consider some of the larger housing associations as "medium enterprises".

Equally, things become trickier where a more complex financing structure has been used. Loans featuring financing treasury vehicle structures (which are a common feature of registered provider loans) may sit outside the ring-fence depending on the banking institution's interpretation of the legislation. Anything outside the ring-fence may need to be re-negotiated as post January 2019 the costs of any product outside the ring-fence will be considerably higher for the bank.

More of an issue is the unintended negative effect the new legislation may have on hedging arrangements. Embedded hedging arrangements or stand-alone swaps which reference RPI are not allowed to sit within the ring-fence and must be part of the bank's investment activities. This means that housing associations with RPI linked swaps (on an embedded or stand-alone basis) face having to re-negotiate these with their banks. The costs of unwinding hedging arrangements can be extremely costly (especially if the swaps are out of the money) and the banks are likely to pass any costs straight on to the borrower.

Unhelpfully banks are adopting an inconsistent approach to the categorisation of derivatives and whether they fall in or outside the ring-fence which does not provide housing associations with the certainty they require. We have also seen one major lender to the sector moving away from offering so called "two way" break costs provisions, where credit is given on termination for transactions where the bank would realise a gain.

The costs to the banks of complying with the new legislation will be vast and there are concerns that the banks may seek to pass those costs on to their borrowers, for example through the pricing of new deals or possibly even through the increased costs provisions in their loan arrangements. While no bank has attempted to do so yet, it is certainly possible that the costs of ring-fencing will have a negative impact on both the future pricing of social housing finance loans and on banks' appetite to lend generally.

It is important that housing associations are aware that ring-fencing is coming and that the new legislation, while aimed at producing a safer banking system, may actually have the unintended effect of increasing their costs and exposure to risk. It may also make management of their loan portfolios more complicated, for example, we have already seen one lender requiring an existing housing association customer to put in place a new take out facility from a different group entity to that housing association in connection with the original facility with each such facility having separate security pools.

Housing associations should be pro-active in contacting their lenders now to discuss ring-fencing so that they can work together to re-negotiate any arrangements which may be outside the scope of the ring-fence and minimise any additional costs being passed on to them.

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The Homes (Fitness for Human Habitation) Bill

After several false starts, Karen Buck MP's Homes (Fitness for Human Habitation) Bill 2017-19 (the Bill) now has government support, and the bill is, at the time of going to press, awaiting its second reading in the House of Lords, which will be held on 23 November 2018.

The effect of the bill, if enacted, will be to amend sections 8 - 10 of the Landlord and Tenant Act 1985 to modernise the definition and the requirements for 'fitness for human habitation'.

If enacted, landlords of all residential housing, both in the private rented and the social housing sectors, would be under an obligation to ensure that residential properties are fit for human habitation at the commencement and for the duration of the tenancy.

The Bill would give tenants and the local housing authority the ability to take court action to enforce these standards and seek remedies such as specific performance against a landlord.

Current law: s8 Landlord & Tenant Act 1985

Section 8 is an implied term that obliges all landlords of residential housing that the property must be in a condition fit for human habitation at the commencement, and for the duration of the tenancy. However, the section is limited to homes with annual rents of less than £80 in London and £52 elsewhere- figures that haven't been revised since the 1950s.

Purpose of the bill

The purpose of the bill is to modernise the definition and requirements for 'fitness for human habitation' and to provide tenants with a means to enforce these requirements themselves. Despite failed attempts in the past, the Bill reached its first reading in the House of Lords on 29 October 2018 and awaits its second reading on 23 November 2018.

The Bill's jurisdiction covers England and Wales but the content of the Bill only covers tenancies in England. Wales have already enacted similar provisions in the Renting Homes (Wales) Act 2016.

Currently a landlord's predominant obligation in relation to property standards is section 11 Landlord and Tenant Act 1985 which relates to the structure of the property and ensuring that there is adequate heating and hot water facilities. The Bill goes beyond structural issues and inserts the addition of hazards and potential hazards into the new definition of 'fit for human habitation' which would become section 10 of the amended Landlord and Tenant Act 1985.

Currently, the main recourse for a privately renting tenant is to have the property inspected using the Housing Health and Safety Rating System (HHSRS) under the Housing Act 2004. However, an inspection will only take place where the council exercises its powers to do so following a complaint. Often before this inspection takes place, tenants are served with a notice to quit from the landlord to terminate the tenancy.

Council tenants cannot currently do anything as a local authority cannot take enforcement action against itself.

Homes (Fitness for Human Habitation) Bill 2017-19

The Bill creates Section 9A which imposes an obligation on the landlord to ensure that the residential dwelling is fit for human habitation at the commencement and for the duration of the tenancy.

Leases the Bill would apply to:

- Tenancies of less than 7 years that are granted after the Bill comes into force

(including leases of more than 7 years where there is a break that can be exercised prior to the 7th year of the term);

- new secured, assured or introductory tenancies for a fixed term of 7 years of more granted after the Bill comes into force;
- periodic tenancies have 12 months from the Bill coming into force to become fit for human habitation before the obligation is effective and continues for the tenancy; and
- renewal of fixed term tenancies after the enforcement of the Bill will be treated as a grant of a new tenancy.

The Bill will not apply to fixed term tenancies until they are renewed, nor does it apply to tenancies that were agreed prior to the commencement date but occupation occurs after.

There are limitations to the landlord's obligation under 9A(2) and (3) as a landlord is not obliged to reinstate the property in the event of destruction or if the tenant's own breach has caused the unfitness for habitation. The landlord will not be able contract out of this obligation, and cannot impose penalties on the tenant for attempting to enforce this obligation.

The Bill will provide tenants and the local housing authority with the ability to take court action against the landlord to fulfil their obligation under Section 9A. The Bill gives courts the express power to use specific performance as a remedy regardless of any equitable rule restricting its scope.

The landlord and his appointed agents are given the power to enter the dwelling to inspect the condition and state of repair provided at least 24 hours' notice is given and they attend at reasonable times.

What constitutes fit for Human Habitation?

Section 10 of the current Landlord and Tenant Act 1985 contains a list of matters that constitute human habitation such as 'ventilation' and 'repair'. The Bill amends

Section 10 to include 'any prescribed hazard' and this definition is taken from Section 2 of the Housing Act 2004 which is the basis for the HHSRS. Hazards can include anything that interferes with, or puts at risk, the health and safety of the tenants such as the absence of a smoke detector or a badly maintained ceiling. The impact is that rather than having to ask councils to come to the property to review the hazards, tenants can go to the courts directly.

Conclusion

The effect of this Bill is to give tenants a much stronger method of enforcing the landlord's obligations to keep properties fit for human habitation. It will also greatly increase the number of tenants who will benefit from protection.

Competent landlords should have nothing to fear.

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Do housing associations need to review their intragroup arrangements?

Earlier this year the Charity Commission opened a consultation and issued draft guidance for charities that have connections with non-charitable organisations. The intention of the guidance was to highlight that there may be risks to working with non-charitable organisations and charities need to be particularly careful to maintain their separation and independence. The guidance applies to all charities, including those housing associations which are exempt charities.

A non-charitable organisation could include a charity's wholly owned trading subsidiary (for example a development company), and having a connection with a non-charitable organisation could include sharing the same board members, staff or other resources, sharing a name or branding or either organisation providing regular funding to the other. Clearly therefore the guidance will be directly relevant to charitable housing associations that have trading subsidiaries.

The guidance states that the legal framework and principles set out are not new and are simply consolidating points raised in other publications. In the main that is true, and points like making sure the charity is carrying out its own purpose and acting in its own interest, should not be new to board members. However, our view is that the guidance does in part also extend the expectations on charities.

One example of this is that the guidance expressly states that the Commission's expectation is that there should be a quorum of independent trustees on the board – which will generally mean there should be at least two independent board members on the charity. The guidance does not expressly recognise that, since a trading subsidiary is ultimately setup to benefit a charity, it may reasonably be concluded that there is no conflict of interest between the organisations or that the conflict may be managed by the trading subsidiary agreeing to subordinate its own commercial interest to that of the parent charity.

Some charitable housing associations do (successfully) manage intragroup conflicts on this basis. We made this point to the Commission on behalf of clients in our consultation response.

A similar example is where the guidance states that senior employees who advise the board may themselves have a conflict and that may undermine the independence of the board's decision making process.

Another important point is that the guidance refers to charities needing to obtain "best value" from the commercial organisation. This is a high threshold and where a charity is contracting with its own trading subsidiary, taking into account the wider benefits of dealing on an intragroup basis, it should be sufficient for a charity to obtain "value for money".

The guidance also emphasises the importance of ensuring that there are written agreements in place to cover matters like the sharing of data, staff and resources and also responsibilities in terms of communication. We wait to see whether our comments are taken into account in the final guidance which is planned to be published late 2018. However, if the final guidance follows the draft guidance, and does not take our comments into account, then charities will need to review their governance arrangements. Charities will also need to bear in mind that the Regulator of Social Housing will consider the guidance when assessing intragroup governance.

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