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Publications —— Spring 2018

Quarterly Housing Update

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Foreword

One of the defining features of the sector last year was the continued rise of housing up the political agenda, and the first quarter of 2018 shows no sign of that abating, with perhaps for the first time, housing becoming a defining factor in the forthcoming local elections.

Against this backdrop it was somewhat puzzling to see the appointment of yet another housing minister just after we went to press on our last edition and I sincerely hope that the solid work done by the previous minister, particularly in relation to fire safety and tenant engagement, is continued.

Of course the appointment of a new minister has not stopped the flurry of policy announcements that will impact on the sector, and of particular importance is the new draft National Planning Policy Framework. We are digesting the framework and will report on the issues in the next edition, but in the meantime I would encourage the entirety of the sector to review the draft and respond to the consultation.

Also worthy of mention is the Letwin review. Originally announced at Autumn Budget, the review, led by Sir Oliver Letwin will look to explain the gap between the number of planning permissions being granted against those implemented in areas of high demand. The brief of the review is wide ranging, but let's hope one of the observations of the interim report – linking slow build out rates to the requirement for developers to provide on site affordable housing – isn't code for an end to cross tenure housing development.

And, of course, we await the outcome of many of the proposals floated in last year's Housing White Paper, as well as the Social Housing Green paper promised by Sajid Javid last year.

Against this policy uncertainty, there is a clear trend of the housing sector "just getting on with it" and much of the work that our team are doing here reflects that. Indeed two of our articles in this edition exemplify just that – witness the rise of housing associations embarking on strategic land deals, and – particularly in an urban context – looking to add supply by building extra storeys on existing blocks.

Elsewhere in this edition we have a topical mix of new legislation that providers need to grapple with, and a salutary reminder of the need for providers to protect themselves against contractor insolvency.

Finally, we've got an exciting range of seminars and training sessions coming up, all of which remain free to attend, so I would encourage you to look to our website to see what we have to offer.

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Insolvency-proofing your contracts

Contractor insolvency has plagued the public sector since the global financial crisis of 2007. Carillion, the latest company to go into administration, were reported to have over 450 public sector contracts, many of them outsourced to smaller companies. Here's how social landlords protect themselves from the damaging effects of contractor insolvency.

Most public sector contracts will need to be advertised in accordance with the Public Contracts Regulations 2015. Contracting authorities can use the Regulations to interrogate the financial standing of bidders, and can require bidders to demonstrate a minimum financial turnover to be able to tender. The Crown Commercial Service has advised that bidders should not be disqualified solely for a failure to achieve minimum thresholds, and that a number of factors should be considered when assessing bidders' financial status. However, contracting authorities should be able to use minimum thresholds to exclude bidders, provided that they have valid reasons for doing so.

Where companies are bidding as consortia or relying on the resources of other companies, contracting authorities can request and assess the financial status of those third parties. Bidders can be required to agree to enter into parent company guarantees, performance bonds or other securities as a condition of being awarded the contract. Any forms of guarantee and bonds should be provided to bidders at tender stage, to avoid having to negotiate separate terms with each bidder. Social landlords should also seek collateral warranties from key supply chain members, with step-in rights to allow direct instruction of the supply chain in the event of contractor insolvency.

Contract documents can be drafted to require contractors to demonstrate financial security at regular points, and/or to allow employers to undertake their own financial checks on contractors. Social landlords should also require contractors to pay their sub-contractors within 30 days of an undisputed invoice (in compliance with Regulation 113) and report on their success rate. Continued vigilance of a contractor's financial health should help prevent surprise insolvencies, or at least give social landlords sufficient time to mitigate any risks.

Most standard-form construction contracts allow employers to terminate the contractor's appointment in the event of contractor insolvency. These terms vary depending on the contract being used: the JCT and NEC suites require employers to give contractors notice of termination, whereas the PPC and FAC-1 contracts provide for automatic termination of the contractor's appointment. Social landlords should pay careful attention to termination and notice provisions and follow these to the letter, to avoid any claims of wrongful termination.

Many contracts only allow termination at the point of actual insolvency. Social landlords can consider amendments to allow termination at an earlier stage (eg, when the contractor takes steps to appoint a liquidator/administrator). Contracts should provide for the employer to re-take possession of building sites and materials, and allow remaining work to be awarded to third parties to prevent delays. Ideally, the contract should allow employers to stop payments after termination, and set-off their own costs against any sums still owed to the contractor.

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The Homes (Fitness for Habitation and Liability for Housing Standards) Bill

This Private Member's Bill, introduced by labour MP Karen Buck, passed its second reading in the Commons on 19 January 2018 with a unanimous vote, and will now go to Committee.

The purpose of the Bill is to give tenants new powers to hold landlords to account for housing standards by inserting additional provisions into the Landlord and Tenant Act 1985. Section 11 sets out the current implied repairing obligations and this would remain unchanged. As drafted, the Bill would replace Section 8 to provide a further implied covenant that the dwelling is fit for habitation at the time of grant and will thereafter be kept fit for human habitation throughout the term. As with Section 11, it would apply to any lease of a dwelling for a term of less than seven years.

On deciding 'fitness for habitation', the amended Section 10 would list matters which need to be considered: repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences, facilities for preparation and cooking of food and for the disposal of waste water, and any 'prescribed hazard', meaning anything prescribed in regulations made by the Secretary of State under Section 2 of the Housing Act 2004. This would comprise the list of hazards in Schedule 1 of The Housing Health and Safety Rating System (England) Regulations 2005 (HHSRS). The dwelling will be regarded as unfit if it is so defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

The implied term would apply to all new tenancies, and also to existing periodic tenancies (whether secure, assured or statutory periodic) with effect one year after the commencement date.

Section 11 puts a statutory obligation on most landlords to keep in repair the structure and exterior of their properties, and to repair installations for the supply of water, heating and sanitation. However, as Section 11 applies only to repair it this requires there to have been some damage or deterioration, and does not cover all situations where conditions pose a risk to health and safety. Provisions requiring landlords to ensure that their properties are fit for human habitation (the current Section 10) have ceased to have affect as a result of annual rent limits. The proposed 'fitness standards' can already be enforced by the local authority through the HHSRS, but there is inconsistent application and enforcement by local authorities. The system falls short in the case of council tenants since local authorities cannot take enforcement action against themselves. The new Section 8 is intended to bridge the gap and provide a direct statutory remedy for tenants where property standards or fitness fall short.

The Bill does not add new responsibilities as such, but instead imports the HHSRS standard into statute, allowing a tenant to apply to the court for an order for specific performance and damages (as opposed to asking the local authority to inspect and serve a notice obligating the landlord to take action). It will be interesting to see the extent, if at all, to which this might replace complaints to a local authority's Environmental Health Department and notices being served under the HHSRS.

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Gender pay reporting trends in the housing sector

The deadline for housing associations with over 250 employees to report their gender pay gaps has now passed and the figures which are available on the government's portal make for interesting reading. Not only larger housing associations have reported, some with fewer than 250 employees who were not required to report as a matter of law, have nevertheless chosen to do so.

What needs to be done?

The Equality Act (Gender Pay Information) Regulations 2017 came into force on 6 April 2017 and private or voluntary sector employers with at least 250 employees must report their gender pay gap data by 4 April 2018.

As a quick reminder employers are required to report the following on an annual basis:

- The overall gender pay figures calculated using both the mean and the median based on the snapshot date of 5 April;
- The number of men and women in each of four salary quartiles, based on the employer's overall pay range. This will show how the gender pay gap differs across the organisation, at different levels of seniority; and
- Separate information on the mean and median gender pay gap relating to bonuses.

The report must be signed by the CEO and will appear on the Government's dedicated website and the employer's own website for at least three years. The employer can also include a narrative explaining their figures and any plans to address the gender pay gap.

Emerging trends in the housing sector

Although there are no two housing associations alike, some trends have started to emerge.

Generally the median pay gap is not too high, with a significant number of housing associations reporting a gap of less than 5% and some even reporting a "reverse gap" (i.e. a gap in favour of women). That said, there are some housing associations reporting gaps well above the national average, including gaps going over 30%. Although the gender pay gap in this sector is not a glaring one, it is still an issue which providers will have to tackle.

Although in some instances there are women in Chief Executive and other senior roles, it is not uncommon for them to be under-represented in more senior levels of the organisation. Another common theme is the prevalence of women in part-time roles, which may have a particular impact on the bonus gap, which is reported as a comparison of total value, and not a pro rated hourly rate.

The gender imbalance in repairs and maintenance roles has been highlighted in some of the reports. Historically these have been more male dominated as they typically attract male employees. These types of roles offer additional payments for overtime, standby and callouts and therefore more men tend to be eligible for them than women.

What about housing associations care businesses?

The social care sector is notable for reports of a zero or even negative gender pay gap for employers with standalone care businesses. However, the picture is somewhat different for housing associations with care businesses. Comparisons may not always be consistent because sometimes there isn't a single employer for the two functions. However, there are examples of employers with both housing and care businesses having a higher gender pay gap because of the historically better terms of men in repairs and maintenance and asset management, and poorer terms for women in social care.

Possible solutions

Some fairly detailed plans for improvement have been produced to accompany the gender pay reports. One of the key issues earmarked is that of female career progression and the need to identify those who have the potential to grow into more senior roles. Proposed solutions include putting extra support in place, such as mentoring programmes and coaching to encourage women to develop the skills and knowledge required to obtain more senior positions.

The implementation of a "Women in Leadership" programme aimed at improving skills and opportunities is another solution. Some organisations also plan to put in place cross-organisational working groups of men and women to discuss the challenges, barriers, opportunities and support required to close the gender pay gap.

Some organisations have committed to reviewing their recruitment and selection processes to prevent any unintentional gender bias, and to ensuring that, wherever possible, there is a mix of genders on interview panels. Encouraging women taking maternity leave to return to work by enhancing their maternity provision is another measure which is considered.

A conscious effort is being made on the part of some organisations to attract women to construction and maintenance roles which have traditionally been held by men. Other things which employers state that they have found useful include mandatory diversity training, and having a wide range of flexible working options to enable employees to manage their work/life balance.

The importance of having a narrative

The provision of contextual information about the findings of a gender pay gap is entirely voluntary, however providing a narrative is a useful way of explaining any particular circumstances or anomalies that have led to any gender pay gap that is discovered. A narrative can explain discrepancies in pay across the organisation, the existence of skills shortages for any roles which may lead to a salary premium, the extent to which overtime is routinely worked and the proportion of men and women regularly working overtime. It can also contain details of bonus schemes, as well as details of any action being taken by the employer to narrow the gender pay gap.

Once an employer has committed to an action plan it is important to follow it through. As gender pay information has to remain on the employer's website for three years it will be obvious if the action plan has not been implemented, or has had little impact. One point worth noting is that the snapshot date for next year's report has also just past, so these improvement plans will not necessarily have any impact until the reports in 2020.

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Overriding easement and restrictive covenants

Easements and restrictive covenants on land can complicate the design of schemes and cause delay in their implementation, or even in some cases sterilise a potential development site altogether. To ensure that there are no impediments to proposed development, it may be necessary to deal with third party rights. Those third party interests could be rights of light, rights of way, covenants restricting land to certain uses or rights allowing underground services to pass beneath neighbouring properties.

Local authorities have long had the power to override easements and restrictions for both the construction and use of development. That power previously under the Town and Country Planning Act 1990 was replaced on 13 July 2016 by section 203 of the Housing and Planning Act 2016 (Section 203). The power under Section 203 is broadly similar to the previous provisions but extended the power to all bodies with compulsory purchase powers. That said, local authorities remain the key bodies for driving regeneration.

This has gained even more prominence in recent years due to increased focus on large scale redevelopment and regeneration projects for housing on brownfield sites. Regeneration and redevelopment projects will, almost always, take place on previously developed land, therefore are likely to be affected by third party rights or restrictions.

When Section 203 applies

The Section 203 power applies where:

- there is planning consent for the building or use of the land;
- the land on which the building work has taken place has at any time on or after 13 July 2016 either:
  - become vested in or acquired by an authority; or
  - been appropriated for planning purposes
- the authority could acquire the land compulsorily for the building or use in question; and
- the building work/use is for purposes related to the purposes for which the land was vested, acquired or appropriated.

Importantly successors in title to the local authority such as housing associations or private developers will also benefit from the power once they interfere with a third party right in the course of development for which Section 203 has been engaged.

The power applies to land which has been purchased or compulsorily acquired by local authorities since Section 203 came into force. A local authority may also agree to appropriate land they have held historically, such as a housing estate or sports field, in advance of a sale to a third party in order to engage Section 203.

The provision can also be used in conjunction with major development proposals even where land is already owned by a private developer, by temporarily transferring or leasing to a local authority in order to utilise the Section 203 power. This is with the intention of ensuring that third party rights do not prevent the taking forward of a development or create a 'ransom' situation that to overcome on commercial terms may make a development unviable. A high profile example of this occurred recently where the London Borough of Hammersmith and Fulham resolved to engage Section 203 to

prevent a right of light dispute blocking Chelsea FC's stadium redevelopment. They did this by acquiring a leasehold interest in small amount of airspace above the ground from Chelsea, which will be later leased back to the club.

Stricter test

Whilst the prominence of Section 203 has increased in recent years, local authorities are also becoming more stringent in their requirements before they agree to use their powers. Using Section 203 overrides a property interest of a third party, a draconian action by a public body, so should only be engaged where there is a strong case for doing so in the public interest. It is understandable that a local authority or developer may wish to unlock stalled developments, but they will need to consider carefully whether using their power is appropriate in the circumstances of each case, given the risk of judicial review if it is not used properly.

A new requirement of Section 203 is that the power is available only where the authority also would be able to acquire the land compulsorily. At present, it is unclear what the intention is behind this requirement and it is likely that further guidance from Government or the courts will be required to clarify the point. However it is clear that some consideration of compulsory purchase principles should be undertaken before engaging Section 203 to override private rights. This may include evidencing that use of Section 203 would benefit the economic, social or environmental wellbeing of the surrounding area. Individual decisions will turn on the facts of each particular development but some of the overarching issues that will need to be considered include:

- Whether the scheme is a proper use of planning powers;
- Whether there is a compelling case in the public interest for the use of its powers; and
- Whether the public interest in the development proceeding outweighs any impact on the human rights of any third party likely to be affected.

In every case, it is important for the local authority and/or developer to show that the use of the power is a last resort. A local authority/developer must first genuinely endeavour either to avoid interfering with the rights or to negotiate a deal for the right to be released by agreement.

Compensation

Third parties, like under CPO, will be protected in such case by the entitlement to compensation if their rights are overridden.

Whilst using Section 203 to override easements such as rights to light, allows the construction or maintenance work to be carried out even if it interferes with such a right, compensation will need to be paid. This is calculated on a diminution in value basis which is normally much lower than what would be negotiated on a ransom basis. Therefore use of Section 203 has financial benefits, as well as giving certainty on dealing with the rights in question.

Conclusion

Section 203 is often perceived to be a 'magic wand' waved by local authorities at the request of developers to make a site deliverable. It is a very important power, one that does and will continue to feature heavily in unlocking underused brownfield sites for development, vital to meeting local and national housing development targets. However developers and local authorities should ensure that processes followed when using Section 203 are robust. Legal challenges on use of this power are expected in the coming years and the legal requirements will no doubt be developed. The cost of exercising these powers incorrectly could be extremely high.

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Strategic land

Last year, the market became aware that housing association, L&Q, had purchased Gallagher, a private land business, thereby gaining access to land for the development of over 40,000 homes. Whilst L&Q's acquisition is the most high profile, it is part of a growing interest from the sector in the concept of strategic land and its potential opportunities. The Daily Telegraph has been quoted as saying that strategic land is the "murky underbelly" of development. Is this an unfair tag and indeed what do we mean by strategic land?

Strategic land is the current "buzz" term given to the process of land assembly and planning promotion. In broad terms, it is the process of seeing land into a developable asset. So through site assembly, promotion and planning policy, CPO, infrastructure, procurement and collaboration, as land values continue to soar, control of land is a way to secure long term development. So what are the opportunities for housing associations? These broadly fall into two categories:

- A place on a framework or long term collaboration with a promoter. Essentially, this is the association securing a long term relationship with a promoter to be a "first choice" affordable housing partner. The idea would be that key commercial principle terms are agreed as part of the frameworks allowing individual sites to be easily called off. Promoters will then be able to market sites in the knowledge that there is an affordable housing partner on board to deliver any planning obligation. For associations this does not give direct land control, but can open up long term opportunities and access to units or affordable housing sites, largely on a package basis, which, for some, can be very appealing.
- Perhaps the bigger prize is becoming involved in the acquisition and promotion of strategic land itself; either alone or as part of a partnership, for example, buying into an existing strategic land company, providing an injection of cash to that vehicle and for the association, giving access to sites and opportunities. There are undeniably risks associated with strategic land, which need to be managed as part of an association's resources, but the potential rewards are significant and mean that association's are increasingly looking at this as part of their business activity.

What kind of structures are involved?

We advise clients on a range of transaction structures including:

- Conditional contracts and options – tailoring disposal or acquisition contracts so that they appropriately engage with project contingencies prior to land transfer. These typically include planning and promotion, site assembly, infrastructure/access land, abnormal ground conditions/contamination and drainage strategies.
- Payment structures and overage – devising or agreeing the appropriate valuation mechanisms where, as is often the case, the price will not be settled at the outset of the transaction. This involves navigating issues relating to deferred payment (and security) together with appropriate overage/claw back.
- Promotion agreement/land owner JVs – advising on transactions where the end developer of some or all of the land has not yet been identified and putting in place an appropriate agreement covering the planning, promotion and disposal phase. Transactions of this nature can be structured with the initial development partner responsible for promotion also being the developer by way of hybrid promotion or master framework agreement.
- Collaboration and consortium agreements – for projects of a more strategic nature, for example, urban extensions, where there is a mix of stakeholders,

there is often a need for agreements covering project collaboration. This typically includes cost, risk and profit sharing mechanisms and may include equalisation of land values across sites where there are complex ownership issues/structures.

- Planning environment and infrastructure – it is possible to promote sites through emerging development plans as well as negotiating or appealing planning decisions and settling Section 106 Agreements to ensure that they are future-proofed for complex multideveloper sites. It would be important here to take advice on potential environmental liabilities, remediation strategies and warranty packages. Parties will need to think about infrastructure contracts, whether relating to shared site services, for example, roads and drainage, or community facilities such as schools and health care centres
- Project finance – Funders, whether third party or government agencies, need to be considered from the outset. Looking at the "funder's view" early means that the transactions are fundable and do not need to be unpicked at a later date.

So is this the "murky underbelly"?

Strategic land is not for everyone and is only suitable for those in it for the long haul, as projects can take many years to come to fruition. But for parties who can wait the duration (including the affordable housing sector) they will have direct involvement in shaping the built landscape for the future. A strategic land deal allows house builders to get on and do what they do best, i.e. build, and gives HAs a direct say in their long-term programme.

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Peters v Haringey – expanding the art of the possible

At a time when pressure to deliver housing continues to increase, the ruling in *Peters v London Borough of Haringey* will be welcomed by a wide range of housing stakeholders. The judgement represents the first substantive analysis of how the term "commercial purpose" should be interpreted when a local authority is exercising the general power of competence pursuant to the Localism Act 2011 (the Act) – in this case concerning the decision to enter a joint venture with Lendlease in the form of a Limited Liability Partnership (LLP) as part of a major housing-led regeneration initiative.

LLPs – analysis of local authority powers

Partnerships are increasingly used by the private and public sector to escalate housing delivery – usually because of a clear symbiosis of interests. Many public authorities (e.g. local authorities, combined authorities, Homes England, NHS trusts) have robust housing objectives and access to land or funding but lack development resource. Housing associations and private developers are well placed to fill this resource and the potential for capital and/or revenue generation (in the form of private sales or rental income) is welcomed by both partners.

When considering a partnership vehicle, an LLP can be attractive as it provides governance flexibility and tax transparency – the latter is particularly appealing to charitable housing associations and local authorities (who do not pay corporation tax). Until this judgement, however, there was considerable uncertainty as to how to interpret the prohibition in Section 4(2) of the Act on using LLPs where the authority (i) is relying on its general power of competence under Section 1 of the Act; and (ii) is doing so for a "commercial purpose".

Mr Justice Ouseley determined that Haringey's purpose in entering into the LLP was non-commercial and the authority was therefore not in breach of Section 4(2) of the Act. His analysis focused on the following principles:

- It was necessary to identify the authority's dominant purpose – in Haringey's case this was to regenerate deprived areas, develop new and improved housing and deliver other social and economic benefits in the borough, all of which were non-commercial objectives.
- Although it was hoped that the LLP would make a profit, this was ancillary to the dominant purpose and, in any event, such profits would be used to further the Council's wider function-related objectives. Justice Ouseley contrasted Haringey's purposes with those of Lendlease, the LLP itself or a property development company – three clearly profit-driven entities.
- The Council could act on a commercial basis when entering into the LLP but this would not necessarily mean that it had a commercial purpose – i.e. the fact that a commercial return may be achieved did not automatically mean that the Council was acting for a commercial purpose.

Who is impacted by the Haringey case?

This decision is clearly significant to local authorities – those who so far eschewed joint venture arrangements may wish to consider direct participation in an LLP structure, either with the private sector or with another public authority, on the basis of purposes which are predominantly non-commercial.

Certain combined authorities have the same powers as those set out in Section 1 and 4 of the Act, therefore the Haringey analysis of "commercial purpose" will be relevant – particularly where these are in the early phases of housing development, the opportunity to partner with an established developer or housing association through an LLP could accelerate delivery.

Whilst there has been an increased appetite for joint venture arrangements in the sector generally, private sector developers and housing associations may wish to use the judgement as a catalyst for discussions with public authorities about new housing delivery partnerships.

Future considerations

We set out below additional principles that follow on from the Haringey judgement – these should be considered by both public authorities and their partners when establishing an LLP:

- Where authorities are relying on the analysis of commercial purpose set out in the Haringey case they must be careful to document their decision-making process consistently and at an early stage – the audit trail should reflect the primary / ancillary purpose in a way which demonstrates the dominant non-commercial nature of the Council's purposes.
- If the authority's purpose is primarily commercial, e.g. establishing a vehicle for revenue generation or trading activities, it must act through a company. This would not preclude a local authority participating in an LLP indirectly, i.e. through a wholly-owned subsidiary company.
- A commercial purpose should be distinguished from the "commercial character" referred to in the definition of a "body governed by public law" in the Public Contract Regulations 2015 (the Regulations) – the fact that an authority does not have a commercial purpose in entering into the LLP, will not be determinative of whether that joint venture (whether an LLP or otherwise) is subject to the Regulations.

What's next?

For the time being, the judgement in Haringey has provided much needed clarity to the question of when a public authority has the power to directly participate in an LLP. However, residents opposed to the Haringey LLP have expressed an intention to appeal the decision therefore, provided they are given leave, this may not be the final word in the matter. In the meantime, if public or private partners have been considering the use of an LLP, now is the time to take action.

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Criminal Finances Act

New corporate criminal offences relating to a failure to prevent facilitation of tax evasion (in the UK or abroad) were introduced on 30 September 2017 by the Criminal Finances Act 2017 (the Act). These offences involve strict liability (meaning that an organisation can be liable even if there is no fault or negligence) but the Act offers a defence where "reasonable prevention procedures" were in place. HMRC has published guidance which will help housing providers consider how to put in place appropriate procedures.

What are the offences?

The new offences are:

- failure to prevent facilitation of UK tax evasion; and
- failure to prevent facilitation of foreign tax evasion.

Any corporate body or partnership (wherever incorporated or formed) can commit either offence. This therefore includes Community Benefit Societies.

For an offence to be committed there needs to be:

- fraudulent tax evasion by a taxpayer (either an individual or an entity);
- criminal facilitation of that tax evasion by someone who is "associated" with the organisation; and
- failure by the organisation to prevent its associate from committing the criminal facilitation of tax evasion.

Who is "associated" with the organisation?

The Act defines a person who is associated with the relevant body as:

- an employee;
- an agent (other than an employee); or
- any other person who performs services for or on behalf of the relevant body including, for example, a sub-contractor.

The above parties must be acting in their role within the organisation. Assessing whether they are doing so will involve consideration of the organisation's proximity to, control over, and/or benefit from the associated person. HMRC's guidance looks at subsidiaries and joint venture companies. It concludes that subsidiaries are not automatically "associated"; it will depend on the facts in each case. Joint venture companies will also not be automatically "associated" but it will depend on whether or not they are acting for and behalf of the participants.

What are "reasonable prevention procedures"?

If the organisation has put in place "reasonable prevention procedures" (or it was not reasonable to have in place any such procedures), there is a defence to both offences. The approach is similar to that in the Bribery Act 2010.

The measures put in place should take account of the size, nature and complexity of the organisation. HMRC's guidance sets out six guiding principles (similar to the Ministry of Justice's principles for defending Bribery Act offences) for consideration when creating procedures.

These are:

- Risk assessment: You will need to carry out an organisation wide assessment of the risks that the organisation could facilitate tax evasion, whether in the UK or abroad.
- Proportionality of risk-based prevention procedures: With regard to the levels and types of risk identified in your assessment put procedures in place.
- Top level commitment: The top level management should show commitment to the prevention of facilitating tax evasion and the processes necessary to do so.

- Due diligence: This should be undertaken in relation to staff and customers to the extent necessary with regard to the identified risks.
- Communication (including training): Staff should be trained to ensure they understand the relevant obligations.
- Monitoring and review: This should be undertaken to ensure that policies and procedures in place respond to the changing risks.

In the housing sector, higher risk areas are likely to include:

- Cash rent and rental arrears payments: Accepting these may facilitate tenants avoiding tax on earnings;
- Sub-letting of flats: Failing to enforce restrictions on sub-lettings may facilitate tenants avoiding tax on their own rental income; and
- Property transactions: Real estate is a higher risk area generally and it will be important to ensure that prices are properly set so as not to facilitate avoidance of stamp duty land tax and to check the source of funds with which purchasers pay for properties.

It is important for housing providers to reduce the risk of prosecution by putting procedures in place and monitoring compliance regularly as part of ongoing governance activities. Failures to do so could result in criminal conviction, unlimited fines, regulatory penalties and reputational damage.

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Up, up and enter...

Not surprisingly, given land values, there's an increasing trend to development which maximises the use of existing assets: whether by infill development, building on garage sites or rooftop extensions. If you are considering this type of development you should review, at an early stage, whether you can obtain the necessary access from existing residents to enable you to carry out the works. The same issues can apply on regeneration schemes if you intend to carry out remodelling works as part of a refurbishment scheme.

The rights of the parties will largely be set out in the tenancies and leases which residents occupy under. A sensible starting point would be to check the extent of the property demised to the tenant. Is this restricted only to the flat or house which the resident occupies, or does it include any other areas, such as gardens, parking spaces or stores which might otherwise be earmarked for development?

The lease may also contain definitions of the 'Building', 'Estate' and 'Common Parts' and any express or implied easements which residents have over those areas will need to be considered.

Tenants may also have a right to light to their premises. The erection of scaffolding or similar structures to facilitate works may interfere with this right.

A covenant for the tenant's quiet enjoyment will ordinarily be express (and where it is not, it will be implied). Essentially, this means that the landlord must ensure that there is no interference with the tenant's possession and enjoyment of the property. An express covenant may be dependent on the tenant paying rent and complying with the other tenant covenants in the lease and may also be restricted to the landlord only, so that the tenant will have no claim against the landlord if the tenant's possession of the property is interfered with or interrupted by anyone who derives title under the landlord.

Reservations in favour of the landlord are usually set out in a schedule to the lease, although in the case of secure/assured/assured shorthold tenancies a review of the tenant's covenants may be necessary, in order to ascertain access rights.

These reservations will ordinarily include access to the tenant's home for the purpose of carrying out repairs and maintenance, but check whether this right to access also includes access for the purposes of making alterations or improvements to the wider building, estate or any adjoining premises. Any rights reserved will be subject to a requirement to give notice and are likely to be subject to an obligation to make good. Many leases, particularly those granted under the Right to Buy legislation, are widely drafted with a view to giving landlords the right to carry out development, but these do vary from scheme to scheme so the drafting should always be checked.

Even where a lease or tenancy contains reservations which are adequate to enable a landlord to develop, works should not interfere with the tenant's right of quiet enjoyment. A tenant who feels that his right has been interfered with may seek damages for the breach of the covenant for quiet enjoyment and an injunction to halt works or prevent future works. A Court will look to balance the rights of the parties and will expect a landlord to take reasonable steps to minimise the disturbance to the tenant.

In addition to rights held by any residents, landlords also need consider the terms of any other interest at the site – including rooftop telecommunication leases, substation leases, or third party rights of access over the site.

A further point to consider is whether the drafting of existing leases is likely to give rise to problems with service charge recovery, after the development is completed. You will need to review service charge mechanisms to ascertain how future maintenance costs will be apportioned between existing and future leaseholders and whether these allow you to recover the cost of new services (such as lifts). This is a complex area, but again is something which should be considered at an early stage.

Practical steps which a landlord might consider include:

- Checking the terms of any lease or tenancy agreement to ascertain whether development is permitted, what limitations apply and what costs can be recovered.
- Ensuring that tenants are forewarned of any redevelopment plans at the earliest possible opportunity.
- Taking into account the current use of occupied premises which will be affected by your redevelopment plans.
- Before works begin, consulting tenants as to how disruption can be minimised – can specific dates and times be agreed for particularly noisy or disruptive works? For London regeneration schemes, also bear in mind the Mayor's best practice guide.
- Considering whether any compensation should be offered – this might assist in demonstrating reasonableness.
- Where vacant possession of units is required, entering into an agreement to decant leaseholders (and providing alternative residence for the duration).

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Section 9 needs assessments: a box-ticking exercise?

As part of the de-institutionalisation of care and accommodation for vulnerable adults, local authorities increasingly engage external housing and care providers to deliver statutory care and accommodation. However, the commissioning local authority remains responsible for the assessment of individual needs for care and support under the Care Act 2014 (CA 2014).

The case *R (JF through his mother and litigation friend)-v- Merton London Borough Council (2017) EWHC 1519 (Admin)* highlights the importance of carrying out a proper assessment of the individual's needs before a local authority can lawfully change the arrangements for their care and/or accommodation provided under the CA 2014.

JF was a 24 year old man with complex needs. He ordinarily required one-to-one and on occasion, two-to-one support. JF had been residing at a residential college (the College), funded by the Merton LBC (the Council).

The Council prepared a needs assessment under Section 9 CA 2014, which it sent to JF's parents in March 2016. It stated that JF's placement at the College would terminate at the end of March 2016 and that a potential alternative 52-week residential placement at a lodge had been identified.

The Council argued (amongst other things) that JF could be provided with less expensive accommodation because he did not need the on-site multidisciplinary team support currently provided at the College. The Council confirmed that the Lodge had undertaken a pre-admission assessment of JF and was equipped to meet his needs. JF's parents had visited the lodge, but did not consider it to be suitable.

JF applied for Judicial Review of the Council's decision to move him from the College to the lodge on the basis that it had failed to undertake a lawful assessment of JF's needs, in breach of its statutory duties under CA 2014.

In reaching its decision, the Court set out the legislative framework applicable to the assessment of JF's needs and the Council's duty to promote JF's wellbeing under Section 1 CA 2014, which included the suitability of his living accommodation. The Court highlighted the importance of ensuring that the needs assessment undertaken under Section 9 CA 2014 took into account JF's wishes and feelings, the outcomes he wished to achieve in day-to-day life and the extent to which the care and support provided could contribute to achieving those outcomes.

The Court concluded that the Council had failed to properly assess JF's needs, prior to taking the decision to change his placement. The decision to move JF to the lodge was therefore quashed and the Council was ordered to undertake another assessment under Section 9 CA 2014.

This serves as a reminder that although local authorities may favour a placement because it is more cost-effective, or there are limited options available, they have an overarching duty to promote the individual's wellbeing and are not excused from carrying out a proper assessment of their needs.

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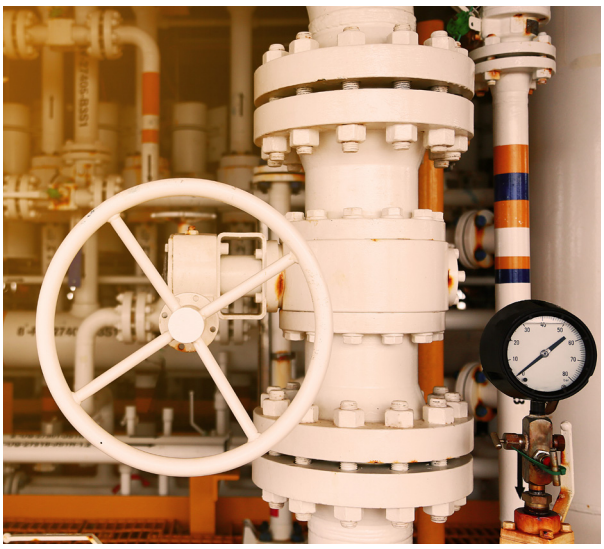
Water rates collection – where are we now?

Two High Court decisions on water rates collection arrangements have reached the opposite outcome as to whether a landlord is entitled to retain the commission and voids allowance that is standard practice in such arrangements. So what are the key considerations for landlords?

Readers may recall that in *Jones v Southwark LBC [2016] EWHC* 457 the High Court set the cat amongst the pigeons by ruling that Southwark LBC, who recovered water rates from their tenants as part of the rent and paid Thames Water direct, was a re-seller and therefore prohibited by the Water Resale Order 2006 from retaining the commission and voids allowance. The decision led to LB Southwark refunding water charges back to 2001 to its tenants at an estimated cost of £26.8m.

In the subsequent decision of *Rochdale Boroughwide Housing v Izevbigie [2017] EWHC 790*, the High Court found that a water rates collection agreement between Rochdale Boroughwide Housing and United Utilities did not make the landlord a re-seller, therefore the landlord was entitled to retain the voids and commission allowances and to charge the water rates to its tenants without deductions.



Although some of the reasons for the outcome in the Rochdale case were specific to the particular landlord, others set a useful list of criteria for future agreements to meet in order to avoid being found to be re-selling arrangements. These are:

- The recitals to the agreement provided that the landlord was collecting charges "on behalf of" the water company and providing "collection services" for the water company;
- Internal reports before the relevant agreements were entered into made it clear that the landlord intended to enter into the agreement to collect charges "on behalf of" the water company; and
- The agreement provided for the landlord's right to collect money owed by tenants to the water company and there was no assumption of responsibility to pay the charges to the water company.

Landlords entering into new water collection agreements or considering historic arrangements (in may cases 'inherited' on a stock transfer) will need to carefully consider the nature and content of those arrangements in light of the above cases.

It remains to be seen whether a challenge will be made to the principle of the Jones v Southwark decision. It has been reported that some London boroughs are supporting such a challenge. However, given that any challenge would most likely need to be made in the Court of Appeal, it could be up to 18 months before the Court of Appeal rules on the matter. In the meantime, landlords should consider their status under the Water Resale Order 2006 in respect of their current and historic arrangements.

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