# QUARTERLY HOUSING UPDATE

**Spring 2021**

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# Foreword

Welcome to our Spring 2021 edition of Quarterly Housing Update (although the current weather did make me double check that this is not, in fact, our Autumn edition!). As we look forward to a brighter Summer (both in terms of weather and hopefully a return to some degree of "normality" as society opens up again) the diverse range of topics covered in this edition remind us that time has not stood still during the pandemic and there is much for the housing sector to reflect on.

In particular the recent high profile failings of some local authority landlords has highlighted a renewed vigour on the part of the Regulator of Social Housing to take a tough line on matters of health and safety and to remind the local authority sector of the regulatory framework with which it must comply. Henna Malik and Ian Doolittle explore these themes in their article. Elsewhere in this edition, Emma Burrows reflects on the long awaited decision made by the Supreme Court in the Mencap case, which concluded that so called sleep in employees were not entitled to the national minimum wage, whilst William Bethune and David Zong give their initial thoughts to the draft Leasehold Reform (Ground Rent) Bill published earlier this month, which seeks to implement the long awaited "ban" on ground rents on leasehold dwellings.

Finally some good news to share about our nomination for four awards at the People in Law Awards, including for the best organisational response to Covid-19. We are often told that it is our people and our culture that sets us apart, and these nominations are testament to the hard work that goes on "behind the scenes" to build our people first strategy.

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# Going green – Why the social housing finance sector has embraced green and sustainable finance

**Over the past 18 months, green and sustainable finance has become a major source of funding to housing providers. Whilst there have been isolated examples of green financing being used in the sector previously (such as Cross Keys green bond and The Housing Finance Corporation Limited's £400 million green loan way back in 2006), it is only recently that housing associations have embraced green and sustainable finance as key to achieving their development goals.**

Green and sustainable finance is, after all, a natural fit for the social housing finance sector. For years, housing associations have been excellent corporate citizens, focusing on areas which can easily be badged as ESG (environmental, social and governance). Housing associations provide affordable housing to those who need it they help support tenants into employment, improve the energy efficiency of their homes and help their tenants with fuel poverty. Housing associations are involved in placemaking, building communities people truly want to live in and they understand the value of designing developments with biodiversity and green spaces in mind. However, the message from funders is that it is time for housing associations to start articulating their story better when it comes to their ESG credentials.

ESG considerations have leapt to the top of the list of investors' priorities. There is a huge drive towards green and sustainable finance, which has been spearheaded by pressure from European investors. The introduction of the Stewardship Code which was launched in October 2019 requires pension trustees and asset managers to consider ESG factors across all asset classes when making investor decisions. Funders have realised, rather belatedly, that they should be asking their borrowers about their ESG credentials.

This combination of factors has lead to a huge influx of green and sustainable finance products being offered in the social housing finance sector.

*"There is huge investor interest in green, social and sustainable finance with a number of funds having a mandate to invest in green/impact investment products."*

A recent survey of fund managers carried out by US private bank Brown Brothers Harriman revealed that 74% of global investors plan to increase their allocation of ESG assets over the next year.

We've been delighted to act on some innovative green and sustainable financing transactions in the sector over the past year.

Cartrefi Conwy entered into an innovative refinancing transaction where margin reductions were included in their loan facilities where they meet a range of environmental and social KPIs; a first in Wales. These KPIs are linked to criteria taken from the Sustainability Reporting Standard for Social Housing which was launched in November 2020. The Standard (the development of which Trowers was involved in) consists of a set of criteria (split into standard and enhanced criteria) on which all housing associations, from the largest member of the G15 to the smallest association, will be able to report on an annual basis. The idea behind the Standard is to provide funders to the sector with transparent, comparable data that they can use to measure an housing association's ESG performance. Cartrefi Conwy were the first to enshrine the Standard in a loan facility.

Aster Group established a £1 billion medium term note programme in accordance with the Framework for Sustainable Finance (drafted in accordance with Social Bond Principles and Sustainability Bond Guidelines) which allows them to issue sustainability notes. The deal marked only the third ever sustainability bond issued by a housing association.

We have put in place a number of sustainability linked loans for housing associations (where the proceeds can be used for any purpose but the margin is linked to ESG metrics set by the housing association). Example ESG metrics include improving the median gender pay gap and improving the EPC rating of homes.

Recently we have assisted with Believe Housing's private placement from L&G which was the sector's first sustainability linked private placement with metrics linked to energy transition. We also acted on a green private placement for a housing association which allows for them to use the proceeds of the placement for "green spend" – a first for the sector.

It is hotly debated whether housing associations should enter into one of these finance products rather than going down the route of securing debt from traditional lenders or look to standard bonds in the capital markets which can result in a pricing benefit. We are often asked whether it's "worth" housing associations considering entering into, for example, a sustainability linked loan or a social bond given the extra consideration that will need to be given to setting the relevant ESG metrics. It is important that the metrics set are both meaningful and aspirational to the housing association to avoid suggestions of green washing. Housing associations need to consider whether they have the data to hand that will allow them to record their performance against the chosen metrics or whether new systems need to be put into place.

Our view is that there is no question that the huge investor appetite for green and sustainable finance products is creating pricing tension in the sector resulting in a cost benefit to housing associations. But more importantly given how much emphasis funders are placing on ESG considerations, it is likely that in two years time we won't be talking about "green finance", we will simply be talking about "finance" as ESG metrics will become part and parcel of any finance product. Housing associations who are ahead of the curve and place ESG considerations at the heart of their business are likely to be much more attractive to investors.

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# Group companies – getting it right

**These days, it is very common place for providers in the residential housing market (private companies, housing associations and local authorities), whether delivering market and/or affordable housing, to use corporate group structures with multiple entities.**

There are a number of sensible and legitimate reasons that multiple subsidiaries can deliver an optimal solution and for some bigger players, using group structures has become second nature and the norm.

To deliver the benefits of development in a group structure effectively, various teams need to be joined up to ensure that the additional administrative hurdles don't become risks and liabilities. This article will pick up some (but by no means all) themes and risk areas, including some common pitfalls that arise as a result of operating a group structure.

## Group structure advantages

**Grant availability** – often with affordable housing schemes, there will be an entity within the group structure that is registered with the Regulator for Social Housing (RSH) either as a for-profit or not-for-profit registered provider (RP). RP status has the primary benefit of having more readily available access to affordable housing grant. It also comes with significant additional administration in order to satisfy the RSH in relation to the various standards which the RSH administers and which the entity must report on.

**Tax advantages** – with numerous tax advantages that can be used in real estate transactions, through onshore and offshore solutions, this will be a key economic consideration for many group structures. For example, VAT efficient structures for real estate, and particularly affordable housing, to keep certain development activities within a separate vehicle are becoming more common place.

**Ringfence of risk** – establishing a project specific vehicle enables the risk associated with that project to be contained within that entity, subject to any security or parent company guarantees that may be given. This also can provide a more straightforward financing position where the intra-group loans are more visible than funding development within a single entity.

**Collaboration** – having separate corporate entities enables a corporate joint venture to be formed, which will usually focus the partners on their specified inputs and outputs. A good tried and tested method for partnerships also brings these entities into the partners' groups (although may be subject to separate rules on accounting).

## Some (non-exhaustive) tips to consider

**Changing to a group governance mind-set** – when setting out on establishing a group structure, an important shift in mind-set is raising awareness throughout the legal, governance and company secretarial teams (if they will be the same teams serving all entities) and developing processes to ensure the right entity and the right officers/ directors are; signing documents, holding board meetings, keeping minutes and making resolutions.

Without clear communications and relevant training for staff members, it is easy for mistakes to be made which can have serious consequences, especially in the context of funding/security and landlord and tenants.

**Process change** – more broadly than just governance, there may be changes in how things are done in the new group company. These may be because of;

- **regulatory issues** – for example, local authorities and housing associations having more flexibility on tenancies;
- **financial** – directors may need to consider the financial restraints the group company has as opposed to the parent company when acting for both and whether intra-group finance be required;
- **public procurement** – a subsidiary of a contracting authority may not be subject to public procurement rules; and
- **conflicts** – there could be a higher risk of the potential for conflicts of interest given the shared personnel between the group companies.

**Oversight** – whatever the governance arrangements and control that is exercised over the group entities, the parent company will need sufficient oversight of the group in order to manage the overall risk effectively. This may be done through delegation, effective communication and reporting. Where subsidiaries are envisaged to be independent of the group, the parent should be cautious and have in place safeguards and advice to ensure that the subsidiary does not create liabilities and risks which the group as a whole cannot withstand (depending on the funding and other arrangements in place).

**Tax, accounting and audit** – in establishing subsidiary companies, it is crucial that attention is given to key statutory duties which may require specialist input on a periodic basis and which may require bespoke processes and advice, especially if a subsidiary may have different treatment to its parent. These issues are governed by statute and directors of the companies can take on personal liabilities if these duties are not adequately discharged, for example:

- What is the tax status of the subsidiary and meeting its HMRC registration obligations and deadlines? Consider VAT grouping, SDLT reliefs, corporation tax liability, charitable status, intra-group transfer pricing, PAYE and NICs (if it employs staff).
- How will the accounts of the group be published? Are group accounts required under the Companies Act 2006? Do the accounts need to be published with a different registry (e.g. Companies House, the FCA or Charity Commission)?
- Does the company require an independent audit of its accounts? There are thresholds in place that may exempt certain companies from audit requirements, and similarly some entities are required to undertak audit due to its regulatory status.

**Resourcing** – When establishing a group company, it is important to consider the resourcing of the group company and ensure that it has the human and external resources to discharge its function.

In addition to the governance function outlined above, it is common place for some personnel to work across the group but this can raise employment considerations as to whether they are able to undertake that work under their existing employment contract.

Depending on the nature of the work that the group company is undertaking it may also need specialist advice or resources which its parent has not needed. For example, a subsidiary which is branching out into a new sector may require additional skills on its board or through consultants.

Establishing and operating a group structure can be daunting at first, but it is a tried and tested method which with careful planning and implementation need not keep you up at night. Working with group structures in the private, public and third sectors we understand the unique challenges that can arise and have experience in advising on optimum structures to meet the objectives of organisations as well as what to do when things go wrong.

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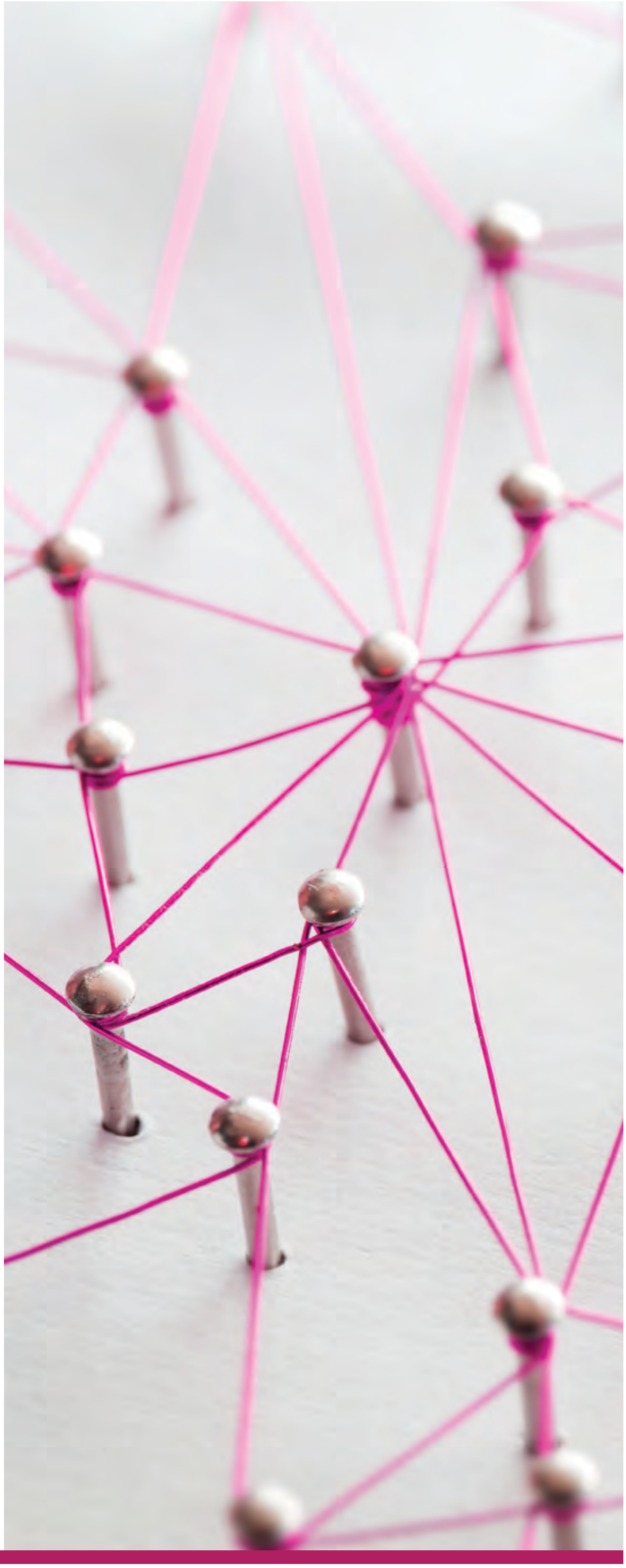

# Land Registry measures during the pandemic

**The Land Registry has a crucial part to play in transactional work, dealing with the registration of the ownership of land and property in both England and Wales.**

The Land Registry is currently experiencing a high volume of applications based on an existing backlog which has been heightened by the pandemic, working remotely and the SDLT holiday. This has created a significant level of demand.

To give you an idea of current timeframes, its worth noting that Register queries, such as obtaining official copies and official search applications are operating as usual. Index map searches can take up to 3 days. But more complex applications for registration, such as applications for a transfer of part, are currently taking in excess of nine months to complete.

The Land Registry is doing what it can to help, and you may be interested to know:

- The Land Registry has implemented tools and procedures to assist with managing expectations and enabling transactions to progress, such as replacing the requirement for wet ink signatures which would have otherwise created logistical issues on transactional matters over the course of the pandemic.
- The "Estimated Completion Date" tool has been launched to assist in providing an estimated completion timeframe. This is updated monthly to help manage expectations.
- Applications can be made to expedite both residential and commercial applications where the delay is causing hardship, or there is another transaction that cannot proceed because of the delayed application. Full details will need to be lodged with the Land Registry with supporting evidence. If the request to expedite is successful, the Land Registry will review the application within 10 working days. It is important to note that any deadlines reliant on the application being processed should be raised in advance to enable an application to expedite to be processed within sufficient time.
- The Digital Registration Service has been launched to simplify the submission of applications by checking the information as it is uploaded to deal with avoiding common errors and ultimately speed up turnaround times by reducing requisitions pending registration and delays. This facility will also be extended to multi-title applications this summer.
- The Land Registry will, until further notice, accept Mercury and electronic signatures provided the criteria set out in the Land Registry Practice Guide 8 has strictly been followed. This process is continuing to evolve and the Land Registry is looking at developing the use of qualified signatures as a more secure and convenient option for conveyancing long term. This process would not require a witness as there is an embedded identity check and the output is encrypted securely to a regulated standard to protect against fraud.

Looking ahead, the Land Registry is looking to publish a new government web page in the coming weeks with the purpose of centralising information and updates surrounding current backlogs and current service standards with a move towards using AI in the sector.

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# Proposed changes to charity law

**The Queen's Speech announced that a new Charities Bill is to be introduced with the intention of reducing bureaucracy for charities. This follows on from the Government publishing its response to the Law Commission's recommendations regarding technical issues in charity law in March.**

The Law Commission's recommendations were published in 2017 and came out of the review that Lord Hodgson carried out of the Charities Act 2006 (as it then was) back in 2011. These changes have therefore been under consideration for quite some time.

The original Lord Hodgson report ran to 160 pages, and the Law Commission made a total of 43 recommendations for approval. Of these the Government has accepted 36 recommendations.

Although a lot of the recommendations do deal with technical matters, such as inconsistencies between legislation, there are some important points which will impact the sector going forward. Some of the most notable recommendations that are made are:

- Changes to the requirements relating to disposals by charities which would allow more people (not just those that meet the strict definition of Qualified Surveyor) to provide the necessary advice and for the format of that advice to be more streamlined and less prescriptive.
- Changes to the rules on disposals to connected persons, so that short term leases to employees are not caught and would not require Charity Commission consent. However, disposals by charities to their subsidiaries would still be considered a disposal to a connected person.
- Further relaxation of the rules around permanent endowment, allowing corporate charities to make use of a statutory power to release funds from the restriction, and for that power to be freely available for all permanent endowment funds up to a value of £25,000.
- Trustees to be given a statutory power to borrow funds from permanent endowment and to allow them to make social investments which may see a negative financial return.
- The statutory power for charities to remunerate trustees for the supply of services provided to the charity should be extended to also cover goods provided to the charity.
- The Charity Commission to be given a statutory power to require a charity to remunerate a trustee for equitable reasons.
- A new statutory power to allow trustees to make ex-gratia payments without requiring Charity Commission approval up to a specific level (set as a sliding scale on the basis of charity size). That power would be able to be delegated rather than the decision having to be made by trustees themselves.
- A lease with an absolute prohibition on assignment would be excluded from a statutory vesting of assets by way of a vesting declaration.
- Amendment of the rules around the register of mergers which should remove the need for charities to maintain a shell entity to receive ongoing legacies.
- Trust corporation status to be automatically conferred on corporate trustees however they are appointed. Trust corporation status is important for corporate trustees to be able to deal with land and at the moment can only realistically be obtained by appointment by Charity Commission scheme.

The Government now intends to "bring forward legislation to implement these recommendations when parliamentary time allows". Given everything going on in the world right now time for parliament to meet is quite limited, so it may still be some time before we see these recommendations come into force. Nevertheless they will be welcomed when they do.

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# Local Authority Registered Providers – the health and safety challenge

**The Social Housing White Paper issued last year set out the Government's intention to introduce a significantly different, and in particular a much more proactive, regulatory regime. The chief executive of the Regulator of Social Housing (RSH), Fiona MacGregor, has been engaging with local authority registered providers (LARPs) about the changes to consumer regulation. These include the overall aim of putting safety at the heart of social housing regulation.**

We now await the implementation of those changes, including legislation; but for some time the RSH has shown itself ready to take a tough line, especially on health and safety.

## The standards

The regulatory standards include wide-ranging obligations. The Home Standard requires that landlords "meet all applicable statutory requirements that provide for the health and safety of occupants in their homes."

Those statutory requirements are many and various, but LARPs can expect their compliance to be judged especially by the following legislation:

- Fire safety – Regulatory Reform (Fire Safety) Order 2005 – as recently amended
- Gas safety – Gas Safety (Installation and Use) Regulations 1998
- Electrical safety – Landlord and Tenant Act 1985 – fitness for human habitation
- Asbestos – Control of Asbestos Regulations 2012
- Water safety – Control of Substances Hazardous to Health Regulations 2002 – legionella
- Generally – Health and Safety at Work etc. Act 1974

## Regulatory notices so far

The RSH has served 'breach' notices against the following local authorities:

- Arun (August 2018) – for health and safety (i.e. fire and water) breaches
- Gateshead (April 2019) – for a range of health and safety breaches [by its ALMO]
- Canterbury, Dover, Folkestone & Hythe and Thanet (September 2019) – for a range of health and safety breaches [by their jointly owned ALMO]
- Runnymede (October 2019) – for health and safety (i.e. fire and electrical) breaches
- Lambeth (November 2019) – for health and safety (i.e. fire, gas and asbestos) breaches
- South Kesteven (February 2021) – for (inter alia) health and safety breaches

## How is the Home Standard regulated?

The RSH is essentially concerned with corporate failings i.e. where assurance mechanisms and decision-making have failed.

It is important to appreciate how the RSH gains or gathers information. In the case of health and safety matters, it currently depends on self-referrals or on 'external' sources, including resident or councillor complaints, whistle-blowers or the national or local media.

> *"The White Paper commitments, however, included the introduction of routine inspections for landlords with over 1,000 homes – which will cover almost all LARPs."*

The RSH then has to decide whether and how to investigate.

In relation to the consumer standards, it is currently constrained by the legislation that prevents it taking action unless satisfied that there is actual or potential "serious detriment" to residents. (The RSH currently interprets this to mean "serious actual harm or serious potential harm to tenants".)

But the White Paper promises to remove this test – though we anticipate that it will still be required to act proportionately.

The RSH expects LARPs to be open and transparent with it. If the RSH hears of a breach directly from the LARP, that helps reassure the RSH that the LARP has the capacity and willingness to sort out problems. If the RSH only discovers the breach some time later, this undermines the RSH's confidence that the LARP can be trusted to resolve this and other problems.

The RSH publishes summaries of cases dealing with the consumer standards. They indicate how the RSH assesses "serious detriment". As the list above shows, all LARP regulatory notices have involved or included health and safety matters, where the serious detriment issue is usually clear-cut.

## ALMOs

It will be noted that some notices served on LARPs have involved ALMOs. The RSH holds LARPs responsible for their ALMOs or other contractors. It is important to bear in mind that the Grenfell Tower was managed by Kensington & Chelsea's ALMO. Some ALMOs are RPs. The RSH will resist the suggestion that a local authority is entitled to rely on its ALMO's RP status as providing assurance that the ALMO was complying with the Home Standard. In the White Paper the Government promises to render void provisions in ALMO (or TMO) contracts which hinder the exercise of the RSH's powers.

## How should a LARP react to problems?

The initial questions are obvious. What are the regulatory standard requirements applicable to the situation? Have they been breached – and if this is not clear, what do any advisers say? Is the breach 'material' (given its impact, breadth and longevity) and/or systemic in nature? The answers will determine how to investigate it – either internally or with external support.

LARPs can inadvertently create liability for themselves. Reports can exacerbate risks. It is important to take account of the rules on disclosure and the duties owed to any insurers who may be involved. If experts are instructed through lawyers then the LARP may be able to argue that the report is subject to legal professional privilege – a directly commissioned report is not.

There is a tendency to acknowledge fault and create future legal and regulatory difficulties. A carefully drafted brief and a disciplined process can avoid those difficulties, without preventing the facts from emerging and solutions being found.

When and how the RSH is informed and engaged depends on the type and seriousness of the breach. Openness and transparency are obviously important, but the RSH will also expect the LARP to get to grips with the situation and identify the extent of the problem itself. The LARP must exercise judgement in deciding when it has sufficient information to alert the RSH and have a sensible discussion with it; but delay should be avoided. The RSH always prefers to be informed and kept informed.

## What should LARPs be doing now?

LARPs have all been focussing closely on health and safety and may well believe they are compliant; but is that in fact true and, even if it is, can it be evidenced? Can the current procedures and systems cope with future pressures? What assurance regime is in place? Can it be strengthened, for current and future requirements?

LARPs will be conscious that formal standards are not everything. Tenants will judge them by other 'standards' too. This is not easy and will be burdensome – but avoiding or mitigating the impact of a regulatory intervention saves a great deal of time and effort – as well as all the other benefits.

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# Mencap – the Supreme Court decision: a hollow victory?

**The Supreme Court has held in *Royal Mencap Society v Tomlinson-Blake* that employees are not entitled to the national minimum wage (NMW) for the full duration of their sleep-in shift. It agreed with the Court of Appeal's previous decision in *Mencap* that they are only entitled to the NMW when they are awake and carrying out duties, rather than being available for work.**

The decision will come as a relief to care providers and provides welcome clarity in the sector which has been in a state of uncertainty on this issue for several years. The threat of extensive back-pay claims has now disappeared. In a 2018 survey undertaken by VODG, Trowers & Hamlins and Agenda Consulting, 68% of care providers responding said that paying the back pay due would threaten the viability of their organisations. This threat has now gone.

## A bit of background

In *Mencap* the claimant slept by arrangement at her place of work whilst on her sleep-in shift. She was expected to respond to the needs of the people she supported and, to respond to and deal with emergencies that might arise.

The case was heard by the employment tribunal and the Employment Appeal Tribunal (EAT) before going to the Court of Appeal in 2018.

> *"While previous courts had taken the view that sleep-ins could be time work, bearing in mind various circumstances, including the requirement to be present for particular hours, the Court of Appeal disagreed."*

As the claimant slept by arrangement at her place of work, and was provided with suitable facilities for doing so, the Court of Appeal held that she was to be treated as being available for work during those hours and not actually working. As a result the sleep-in exception applied; only those hours during which she was required to be awake should be paid at the NMW.

In the other NMW and sleep-in case which formed the appeal to the Supreme Court *(Shannon v Rampersad (t/a Clifton House Residential Home)* the EAT (agreeing with the Employment Tribunal) found that a night care assistant in a residential care home was not "working" for the purpose of calculating the NMW simply by being "on-call" in his flat on the premises. He was required to be in a staff flat known as the studio from 10pm until 7am and to respond to any request for assistance by the night care worker on duty at the home, but could sleep if he was not required. In practice, he was very rarely asked to assist. The EAT held that only those hours when he was "awake for the purpose of working" counted towards the NMW.

## The Court's decision

The decision from the Supreme Court is very clear. It sets out that it is necessary to draw a clear distinction between whether an individual is actually working or is only available for work. If the latter, it will only be the time that the individual is actually working which counts towards the calculation of the NMW.

In coming to its decision, the Supreme Court, like the Court of Appeal before it, referred to the recommendations of the Low Pay Commission (LPC) in its first report published in June 1998, which the government largely accepted. It concluded that the report was an important aid to the interpretation of the NMW Regulations, which deal with the calculation of the NMW. The report, which refers to those required to be on-call who sleep on their employer's premises, states:

*"For hours when workers are paid to sleep on the premises, we recommend that workers and employers should agree their allowance, as they do now. But workers should be entitled to the National Minimum Wage for all times when they are awake and required to be available for work."*

The Court concluded that the objectives of the provisions of the NMW Regulations designed to deal with the calculation of hours for sleep-in work are those identified by the LPC. This meant that work should normally include time for which a worker was required to be available for work at the place of work. However, in the Court's view "(by implication) that would not apply if the worker was not at the place of work but at home (the home exception). It would also expressly not apply to workers who were required to be on call and to sleep at their employers' premises".

The Supreme Court clearly states in its decision that, "To be available for work a person must be both awake for the purposes of working and not simply awake for his own purposes. This meant that the hours that he is permitted to sleep do not form part of the calculation of his hours for NMW purposes (unless he is woken for work reasons)."

In the course of its judgment, the Court undertook an analysis of previous sleep-in case law in which it has been held that workers on night shifts, are performing work (as opposed to being available to work) throughout their shifts. In considering these decisions it considered that the basic distinction between whether an employee was working or merely available for work had not been properly addressed.


## What to consider now

While the legal certainty surrounding sleep-in payments will be welcomed by care providers, it may leave those who have been paying the NMW for sleep-ins facing tough choices.

> *"Choosing to stop paying staff for sleep-ins now may mean acting in breach of what has become a contractual entitlement and so the tricky issue of getting staff consent to cease making these payments will have to be tackled."*

How does a care provider tell staff that it will no longer pay the same for sleep-ins, by top-ups or separately?

There's also the important issue of staff morale. In a sector already facing chronic recruitment and retention problems, anything which reduces the pay of social care workers will make it difficult for providers to find motivated staff who feel valued for the work they do. What remains clear is the need for public dialogue to help resolve the funding of care services in the future, and to ensure that recruitment does not suffer. So while the legal position is now very clear, this knotty issue is still contentious.

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# Latent defects insurance – buyer beware?

**Latent defects insurance (LDI) has become a mainstream product in the new build housing and commercial property market, with all major residential mortgage providers and some commercial funders requiring an approved form of LDI to be put in place by the developer or the builder for security against latent defects. It is also becoming increasingly common for LDI to be pushed by developers in placeof more traditional forms of security, such as 12 year contractual liability for latent defects and a full suite of collateral warranties from the supply chain.**

The potential issue with LDI is that it is a separate 'product' in the form of a contract for insurance, subject to its own policy terms and conditions, that sits outside the contract a purchaser may have with its developer or builder.

> *"Therefore any potential claim under the LDI policy is subject to the standard terms of the specific insurer, including any limitations of cover."*

This has been raised in a recent case where homeowners brought a claim against the insurer in relation to latent defects at their home under the terms of an LABC new home warranty.

In *Sehayek* and another v *Amtrust Europe Ltd*, the homeowners purchased the property from the developer, Grove End Gardens Limited (Grove). Grove entered into a JCT design and build contract with Dekra Penthouse Developments Limited (DPD) to construct the property. Grove and DPD were connected companies, which can be common on residential development schemes. Amtrust Europe Limited (the Underwriter) issued the certificate of insurance under the LDI policy in July 2016, putting the LDI policy on risk.

The 'developer' named on the certificate of insurance by Grove was "Dekra", which was understood to be a reference to Dekra Developments Limited, rather than either Grove or DPD. In early 2017, Dekra and DPD went into insolvent liquidation, and the homeowners subsequently made a latent defects claim under the LDI policy with the Underwriter in September 2017.

The LDI policy only covered the homeowners in relation to a 'developer' registered under the warranty scheme with whom the homeowners had entered into an agreement to purchase the property or who had built the property. Therefore the Underwriter denied cover on the basis that Dekra did not meet the definition of 'developer' for the purposes of the LDI policy. The Court agreed with the Underwriter, and the homeowners' claim for latent defects under the LDI policy failed.

Therefore despite the fact that the error in naming "Dekra" as the developer on the certificate of insurance was not due to the homeowners, and the Underwriter taking the payment of the premium, the homeowners were left without cover under the insurance.

This case highlights the importance of property owners (or their solicitors) taking care to check that the correct 'developer' is named on the LDI certificate. The case raises issues of an insurer being happy to take the premium but refusing to honour the policy, and also whether an LDI policy is truly a like for like protection in place of more traditional contractual security documentation.

LDI is perhaps not the silver bullet to replace collateral warranties that some would argue it to be. Property owners may need to review their existing policies in light of this recent development, and any documentation relating to properties currently in the process of being purchased should be checked thoroughly prior to completion to ensure the parties are named correctly.

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# Residential leasehold ground rent ban – first sight of the draft bill

**The long awaited Leasehold Reform (Ground Rent) Bill was published on 13th May 2021 and follows the Government consultations which started in July 2017. Ground rents have been the subject of much controversy since it was revealed that many leaseholders had signed up to 'onerous' rents with little or no knowledge of the damaging effect on the value of their property.**

The Bill seeks to ban ground rent in all new leases of dwellings, from a commencement date that the Secretary of State will decide, other than for leases of retirement homes where the ban cannot come into force before 1 April 2023.

As expected, the Bill simply prohibits any rent that is for more than a peppercorn (nil) in a long lease (over 21 years) of a dwelling. However, there are several points worth noting:

- "Business leases" are to be excepted from the ban. The exception will not apply to businesses that are run from someone's home (e.g. freelancers working from home) but rather where the use of the premises "as a dwelling" has a significant contribution to the purpose of the business. This may cover property rental businesses, including build to rent assets and other forms of institutional investment leases in the residential sector.
- A further exception applies to the surrender and re-grant of existing leases (for example where the boundaries of the premises are enlarged) allowing the same level of ground rent until the expiry of the original term.
- Shared ownership leases are not outright excepted from the ban, but the ban only applies to the tenant's share and the Bill does not seek to regulate the amount of rent that can be charged on the landlord's retained equity.
- In order to prevent landlords from simply relabelling ground rents as service charges in order to circumvent the ban, the definition of "rent" is wide ranging and "includes anything in the nature of rent, whatever it is called". This is a broad definition and could give rise to concerns that genuine service charges that are typically reserved as rent in a lease could be caught by the ban, although we assume this was not the intention.
- The enforcement provisions are significant, with fines payable by offending landlords of up to £5,000, along with the ability for leaseholders to recover any ground rents paid (including from managing agents and any successors in title to the landlord who had erroneously collected the ground rent).

A further Bill (comprising Part 2 of the Government's leasehold reform programme) is expected to address the ban of the grant of leasehold houses and possible further reform to enfranchisement rights allowing leaseholders to call for a 990 year extension to their existing leases whilst reducing their ground rent to nil.

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# No contract – no claim: the importance of collateral warranties in construction projects

**A recent Technology and Construction Court decision has confirmed a duty of care was not owed by a third party design consultant to a main contractor on a multi-party construction project.**

The judgment in *Multiplex Construction Europe Ltd* (the main contractor) *v Bathgate Realisations Civil Engineering Ltd* (the sub-contractor) & Others has provided some unsettling authority for those considering legal action against third party consultants engaged on construction projects, and serves as a careful reminder to ensure collateral warranties are in place across the supply chain.

## Facts

The main contractor on this project was engaged to design and build a large scale development at 100 Bishopgate in London and passed down those obligations to the sub-contractor in relation to various concrete works. In performing its obligations, the sub-contractor engaged several third parties, but none directly contracted with the main contractor.

RNP Associates Ltd (the consultant) was one of those third parties, and was engaged directly by the sub-contractor to "check" designs for the contracted works. To this end, the consultant provided certificates to the sub-contractor. The main contractor later claimed those certificates included multiple warranties, which were only provided to the sub-contractor as agent for the main contractor.

The main contractor discovered defects in the sub-contractor's works, which resulted in around £12 million of losses being incurred. The main contractor sought to recover those losses from various parties, including the consultant's insurer, Argo Global Syndicate (the consultant's insurer), as the consultant was in liquidation.

The main contractor's claim included allegations of negligence, negligent misstatement and breaches of warranties, which the main contractor alleged were provided for its benefit (in the certificates provided to the sub-contractor).

## No contract – no duty of care – no claim

In order to succeed in its claim, the main contractor needed to establish that it suffered financial loss as a result of a specific duty of care and/or contractual obligations being owed to it and breached by the consultant.

To this end, the Court considered two preliminary issues:

- (1) did the consultant owe a duty of care to the main contractor; and
- (2) did the consultant provide any warranties to the main contractor during its appointment (so as to establish a contractual relationship)?

The Court decided that the answer to both issues was no, and the claim against the consultant's insurer was dismissed.

It was found that neither of the following existed here:

- any relevant direct engagement between the consultant and the main contractor; and
- any evidence that any warranties were provided for the main contractor's benefit.

To impose a duty of care or contractual liability upon the consultant here would, Mr Justice Fraser suggested, "short circuit" existing contractual relationships on the project between sub-contractor and consultant, sub-contractor and main contractor, and main contractor and the developer.

## Liability gaps

Gaps can sometimes exist in contractual relationships, which can leave a party without a remedy to pursue when loss occurs, but can in certain circumstances be filled by the Court imposing a duty of care in the law of tort (in the absence of contractual obligations). If loss is suffered as a direct result of an imposed duty being breached, an actionable remedy will accrue against that party. However, despite contentions to this effect from the main contractor, the Court did not consider that there were any gaps to fill here given the carefully structured contractual relationships at all levels of the supply chain on this project.

## Commentary

The scope of the consultant's involvement on this project, and any engagement with the main contractor, was notably limited. It remains to be seen whether there would have been a different outcome in Court if relationship lines were less clearly drawn across the supply chain. Based on the facts, this judgment may well be a "sensible and just outcome" (as described by Mr Justice Fraser himself), and no doubt will offer comfort to third party consultants and insurers. However, the case provides food for thought for those parties without contractual ties to members of the supply chain on projects they are (or have been) engaged on.

It serves as an important reminder for parties engaged on construction projects to ensure their contractual relationships are clearly defined, and to make it a condition of any contract with downstream contractors that any third parties engaged by them are required to provide collateral warranties for their benefit in order to protect them in the event that any loss is incurred as a result of their performance on the project.

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# Changing the way we prepare witness statements for trial, a sign of things to come?

**Those QHU readers who have been asked to prepare witness statements for trial, or who have assisted in their preparation, will be aware that it can be a daunting task, even more so, when considering the prospect of being called to give evidence in a court room. Here we examine the current procedure and how this is changing.**

In an update to the Civil Procedure Rules, the blueprint for court procedure, the Business and Property Courts have issued a new Practice Direction 57AC (PD57AC) which changes the way trial witness statements are to be prepared and executed. The Business and Property Courts is the umbrella term for several of the specialist divisions and lists in the High Court, including the Commercial Court and the Technology and Construction Court.

PD57AC reminds us that the purpose of a trial witness statement is to set out in writing the evidence in chief that a witness of fact would give, if they were allowed to give oral evidence at trial without having provided a statement. It should contain only evidence as to matters of fact, of which the witness has personal knowledge, that are relevant to the case and need to be proved at trial. PD57AC highlights the need to differentiate between evidence and opinion or argument.

## Interviews and drafting

Legal representatives will typically prepare witness statements through a combination of interviews, written accounts and disclosed documents. PD57AC includes a 'Statement of Best Practice', which is to be followed by the legal representative preparing the statement. Trial witness statements should be prepared with as few drafts as possible. Legal representatives should prepare a statement by interviewing the witness and documenting the conversation in a record or note. They may obtain evidence by other means (such as a questionnaire), but should follow the guidance where possible.

For parties more familiar with giving witness evidence, it might be helpful to prepare a first draft statement for review, in addition to giving an account of events over a call.

Witnesses can assist their legal representatives by gathering the relevant documents which relate to the claim, and which they will be making reference to in their statements, as early as possible in the process.

## Document referencing and format

Currently, it is common practice to prepare witness statements with an appendix containing documents and embedded references to the documents in the witness statement (such as 'EX1' for exhibit 1). These documents are sometimes repeated copies of documents contained elsewhere in the trial bundle.

PDF57AC stresses that a witness should not exhibit documents to a statement which have already been disclosed in the proceedings and should only exhibit any new documents sparingly and so far as these are necessary to refresh the memory. Where possible, the witness should list the documents being referenced, rather than appending these documents in full to the witness statement. If documents disclosed elsewhere are to be referenced in a witness statement, these should be given a designation understood by the parties. 'EX1' might become 'the Section 21 Notice'.

When sharing documents with legal representation, it saves time to eliminate duplications where possible and to share documents with intuitive file names or indexed. Documents can then be reviewed in the context of the witness statement and considered how to be presented most clearly to support the narrative. = This will ensure the witness statement presents the most complete picture and is appropriately supported by the evidence which reduces the number of challenges that may be brought against a witness statement during proceedings.

PD57AC supplements the wording of the usual Statement of Truth with a 'Confirmation of Compliance' which rehearses the principles of the practice direction. To give a false statement can put the witness in contempt of court, which can have serious consequences for the claim and the witness. It is therefore important to carefully review the final statement and address any questions with your legal representative before signing the statement. PD57AC also introduces a 'Certificate of Compliance' which is to be signed by the legal representative to affirm that the witness has been properly advised and that the statement complies with the practice direction.

## When does this apply?

PD57AC applies to trial witness statements signed on or after 6 April 2021 in both new and existing proceedings in the Business and Property Courts. It will not have any immediate impact on the preparation of witness statements in other types of claims which are perhaps more familiar to the affordable housing sector (such as property possession claims, rent arrears claims or any building claims under a value of £75,000). However, the Business and Property Courts are often used as a test bed in preparation for more extensive roll outs, so we are likely to see the new measures being introduced into a wider range of cases in the future.

PD57AC does not inhibit the existing wide discretion of the courts to order for witness statements to be redrafted, struck out or only partly relied upon, or to have the witness give some or all of their evidence orally. The changes introduced by PD57AC do offer a best practice approach and even in cases where the parties are not yet required to follow some of the specific changes, keeping to the spirit of the guidance will put you on the right footing and reduce the risk of adverse sanctions being imposed.

Witness statements are a tricky part of the litigation process with mistakes potentially costing the success of a claim. If PD57AC is a sign of things to come, there will be an even greater scrutiny by the courts on these important documents. Luckily, our experts at Trowers and Hamlins are on hand to help you navigate through these changes.

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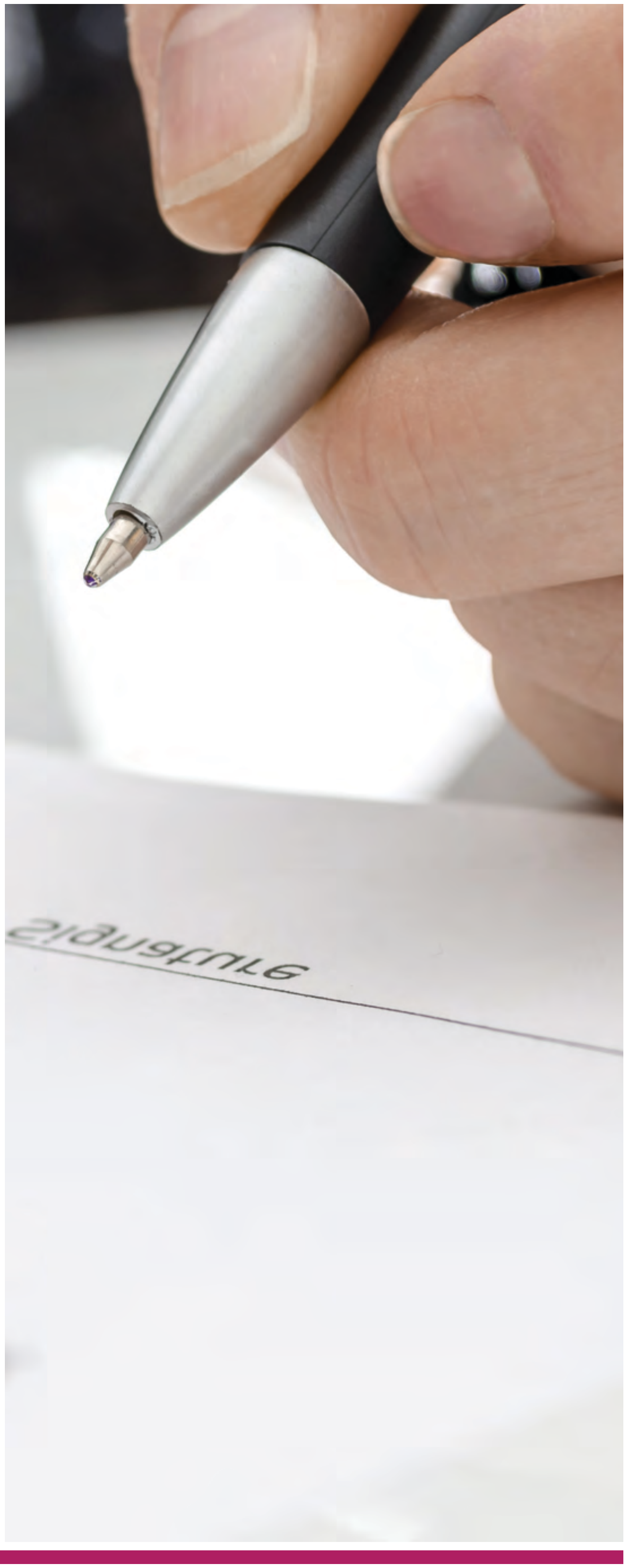

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