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Contents

3 Foreword

4 Sustainable finance – how ESG can help housing associations access new funding

6 Pushing the boundaries of build to rent and integrated living

8 Supporting care leavers through procurement – a social value toolkit

10 Re-opening the Housing Revenue Account

11 "No DSS" – Court ruling declares housing benefit discrimination unlawful

12 VAT treatment of cladding works – zero is the hero

14 Termination of building contracts – avoid being locked in

16 Landowner's rights – Telecoms Code

18 Is litigation funding the answer to improving your finances?

19 Housing Ombudsman's oversight operations overhauled

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Foreword

As the affordable housing sector awaits the imminent publication of the Government's Social Housing White Paper, I thought it would be timely to reflect on some key themes that I've picked up on over a summer of virtual conferences.

- ESG (Environmental, Social and Governance) reporting has arrived in the sector in a big way. As Naomi Roper explains in her piece, ESG considerations have leapt to the top of investors' priorities and reporting on ESG factors will become a core part of RPs activities and part of the requirements to access funding. As Naomi says, it is no longer a "nice to have".
- Institutional Investment in the sector continues to grow, not only with the continued march of the "For Profit" RP sector but also with the deployment of very significant sums from institutional investors in so called "income strip" funding deals.
- The revival of councils as a housebuilding force. As Ian Doolittle flags in his piece, this revival is not limited to those authorities that retained their housing stock- we are seeing a significant number of authorities that pursued stock transfer now returning to affordable housing development- with some re-opening a Housing Revenue Account.
- Flexible working is here to stay. Covid-19 has dramatically accelerated the changes that were already happening to how we work - the Future of Work is here. Being flexible and agile has never been more important for employers. Our employment team are at the forefront of working with housing providers to put in place watertight homeworking arrangements fit for the Future of Work (and speaking of our employment team please do check out their fabulous "Trowers Tuesdays" which covers ever topical employment and pensions issues facing employers.
- Housing providers should now be making plans for the implementation of the Building Safety Bill. If you haven't found it already you can download our "Essential Guide" to the Bill here.

We look forward to (hopefully!) catching up with you all in person in the new year, but in the meantime please do make full use of our webinars and podcasts that can be found here.

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Sustainable finance – how ESG can help housing associations access new funding

Environmental, social and governance (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 that they should be asking their borrowers about their ESG credentials. It is a simple issue of risk management for them and there is a reputational risk in not being seen to be on top of this issue.

Sustainable finance is a natural fit for housing associations. After all, housing associations already focus on areas which can easily be badged as ESG, providing housing for the vulnerable, improving the energy efficiency of their stock, placemaking etc.

> *"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."*

The White Paper on standardising ESG reporting standards in the housing sector (published by The Good Economy, partnered by Trowers and others) should assist housing associations by giving them a toolkit they can use to report on their ESG metrics.

Improving their ESG credentials will assist housing associations in gaining access to a completely new stream of financing from new funders to the sector who are under pressure to increase their portfolio of sustainable finance assets. These investors (such as BNP Paribas who are at the forefront of sustainable finance in Europe) are extremely keen to lend. 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.

There are a variety of sustainable finance products available to housing associations. Green loans (which have to be in accordance with the LMA green loan principles) can be used to finance or refinance any eligible green project. The proceeds from a green loan can only be used for a green project and there has to be a clear environmental benefit to the green project such as tackling climate change, loss of biodiversity etc. The proceeds of a green loan have to be kept ring fenced in a separate account. The borrower also has to report on the green project and agree a series of performance indicators with the lender which will require third party verification.

Sustainability linked loans are a popular green finance product which some housing associations have already signed up to. The useful thing about a sustainability linked loan is that the proceeds can be used for any purpose. However, the margin under such a loan is linked to certain ESG related metrics which are set by the borrower. These metrics might relate to getting people back into work or improving the EPC rating of the housing association's stock. The borrower self certifies its own performance against these metrics, third party verification is not required. If the metrics are met then the margin under the loan reduces but if the metrics are not met then the margin under the loan will increase.

Sustainable finance can also be accessed via the capital markets by issuing green bonds or social bonds. There has been a huge increase this year in the number of social bonds issued. Under a social bond the proceeds have to be used for a "positive social outcome."

> *"The pandemic has focused peoples' attentions on their communities and social bonds have provided a stream of financing to those wishing to undertake social impact projects."*

The term "positive social outcome" is widely defined and includes the provision of affordable housing, employment generation, food security, socio economic advancement etc. For any kind of green or social bond third party verification of the ESG/social framework underpinning the bonds will be required from a green rating agency such as Sustainalytics which will have cost implications for the borrower.

Sustainable finance is an exciting possible stream of future financing for housing associations. It has the potential to open up a new stream of financing giving potential borrowers access to new players to the sector. Housing associations should be considering now how they can improve their ESG credentials.

> *"It is only a matter of time before funders in the sector start asking housing associations to provide details of their annual ESG reporting."*

As such there is simply no better time for housing associations to get ahead of the curve. Data will be key going forward as in order to establish the ESG metrics underpinning all these methods of sustainable finance, housing associations will need to know what ESG data they hold (particularly in relation to environmental matters) and what they should be capturing but currently aren't.

It is clear that ESG considerations are no longer simply a "nice to have" or something that is helpful for marketing purposes but something that should be absolutely integral to the heart of every housing associations' business plan. Most importantly evidence has shown that sustainable investments have weathered the recent pandemic induced economic uncertainty far better than other investments. There is huge pent up investor need to invest in green products and green growth in the UK is four times faster than the rest of the economy. There is no better time to jump on-board.

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Pushing the boundaries of build to rent and integrated living

Build to rent (BTR) is a relatively new sector in the UK housing market; it fills a gap for quality rental housing and provides not just a place to live but a community. Residents can benefit from the use of communal areas and shared facilities in a purpose built, well designed development in locations that would otherwise be unaffordable. As a result, the BTR market has shown itself to be a defensive and robust asset class, offering investors a long term, stable income.

BTR's resilience is particularly evident in the new covid-world we live in; whilst people can forgo shopping sprees and switch the office for their living room, there is no substitute for a roof over ones head and rent is the first expense to be paid. With the commercial, retail and hospitality sectors currently stalling, investors can turn to BTR as a safe investment and take the chance to bid for prime real estate that might not otherwise be viable.

A key selling point of BTR is the communal spaces it offers occupants; spaces such as roof-terraces, gardens, gyms and offices. This makes BTR a top candidate for "co-locating" or "integrated living" whereby two or more sectors are combined into one development to share facilities. BTR should therefore be a catalyst to drive and unlock mixed use development in its truest sense and there is a huge opportunity for investors to capitalise on this.

BTR has already dipped its toe into integrated living with student accommodation and senior living, both suitable matches given the similarity in uses and the facilities offered. The question now is whether, and how far, this integration can be pushed.

> *"There certainly seems to be an appetite in the sector to consider the possibility of integrating BTR with less obvious uses, such as retail, infrastructure, industrial and logistics."*

What are the benefits and challenges of BTR and integrated living?

The next generation of BTR could provide numerous benefits to both investors and residents. By co-locating, each asset class would offer something different to complement or enhance the BTR scheme and we have explored just some of those benefits below.

- **Retail** – with retail and shopping centres usually located within city centres, integrating with this asset class would offer residents the chance to live in central locations that would otherwise be unaffordable.
- **Infrastructure** – over station development is a potential solution to the rising demand in land for housing and has already been identified as an alternative development site. By integrating BTR with travel infrastructure, this would allow residents who might not have access to a car, to have immediate access to public transport links. There are already examples of this type of integration, such as the proposed development above Nine Elms Underground Station by Connected Living London.
- **Hospitality** – one of the key attractions of BTR is the provision to its residents of a variety of amenities. Given the hospitality sector offers a similar premium range of facilities, it is clear to see how combining these two sectors could work well.
- **Industrial/Logistics** – as these sectors go from strength to strength and logistic companies are snapping up prime real estate, BTR developers could take advantage of this and utilise otherwise unused space. We have seen this already at St Pancras Station with student accommodation above a Travis Perkins store and delivery centre.

However, for all the benefits, pushing the concept of integrated living in this way does present a number of challenges. For a start, obtaining planning permission for two quite distinct uses would be complex. Zoning and building approvals are a lot harder to obtain and from a design perspective, there are a lot more details you need to get right.

There is a potential drawback for investors who prefer to have complete control of an asset, if each asset class is to have separate owners. Depending on the structure of leases, the result could be less control of the cost in use of the asset than when it is in single ownership. This won't be an issue for investors who are able to hold multiple asset classes within the same fund and therefore maintain single ownership.

There are also operational challenges once the development is complete, for example how to apportion service charges and manage the day-to-day running of the buildings. Practicality is also a factor – realistically can warehouses and logistic facilities operate effectively without disturbing their residential neighbours? Similarly, as the majority of shopping centres are built on privately owned land and without any public realms, this makes designing new communities so that its residents can gain access a potential problem.

Summary

For all the challenges, this does not mean that the task is impossible; there are always ways to overcome these hurdles, be it through better technology to streamline management and operational systems or through more creative designs to deliver seamless integration across a development.

What is clear is that people's priorities and needs are changing and developers are now exploring co-locating as a way to deliver those needs. At its core, BTR is a lifestyle choice, offering residents the opportunity to live in diverse and intergenerational communities and who can benefit from a range of high quality facilities. Co-locating with more diverse sectors is a chance not only to develop more BTR schemes but also an opportunity to expand and enhance the facilities and benefits that can be offered.

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Supporting care leavers through procurement – a social value toolkit

Trowers & Hamlins has been working with the Care Leaver Covenant (the Covenant) to prepare a social value toolkit to help support care leavers through public procurement. The toolkit can be downloaded from the Covenant's website here.

The toolkit recognises that many local authorities have already developed excellent local offers to support care leavers, but highlights that there are further opportunities to achieve social impact for care leavers that can be identified through the procurement process.

The toolkit promotes a "Whole Council Approach" to the achievement of social value, recommending that local authorities take a "top down" approach and form a whole council forum to enable an integrated response in the council to achieving relevant social impact outcomes, including ensuring that procurement practices are used effectively to create a range of new opportunities for care leavers.

Whilst the Toolkit is aimed predominantly at councils (as "corporate parents", statutorily responsible for the welfare of those in care and care leavers), it can also be used by housing associations and other organisations seeking to support care leavers through their procurement activity. Housing associations already support the Covenant, with Peabody being the first to sign up to it.

With that in mind, we would encourage councils, housing associations and other place-makers to read the toolkit ahead of their future procurements.

What is the Covenant?

The Covenant is a programme developed under the Department for Education's "Keep on Caring" policy and it aims to improve outcomes for care leavers. It seeks to create practical, specific, offers by organisations in the public, private and voluntary sectors to support care leavers in living independently.

A care leaver is a young person aged 16-25 who has been looked after for at least 13 weeks in total. Compared with their peers, children in care face multiple challenges. They are more likely to underachieve in education, be lured into crime and suffer more emotional and health problems. Care leavers are also three times more likely to be NEET (Not in Education, Employment or Training) and are at greater risk of financial hardship, homelessness and poor mental health. Most care leavers will lack the social networks to support them in leading independent, fulfilling lives and the Covenant seeks to address these challenges by promoting five key outcomes so that care leavers are;

- better prepared to live independently;
- have improved access to employment, education and training;
- experience stability in their lives, feel safe and secure;
- have improved access to health support; and
- achieve financial stability.

The Whole Council Approach

The "Whole Council Approach" encourages organisations to involve stakeholders across the whole council (not just social services) to form a self-organising group to take forward the Covenant's agenda, recognising that more social impact and value can be created if a "top-down" approach is taken. This approach avoids silos and recognises that all relevant council departments should be involved in the scoping of the community investment requirement. This also helps take a more strategic view of the overall social value agenda and should hopefully avoid putting too much pressure on the higher value contracts to deliver all of the required social value outcomes.

The toolkit

The toolkit is designed to assist with the adoption of the Whole Council Approach, and to assist the council in securing the five key outcomes of the Covenant through their procurement processes, many of which can be aligned with their existing social value objectives. It has been drafted to complement the LGA's National Procurement Strategy and anticipates the use of the Social Value Portal's TOMS framework. Alternatively, the toolkit can be used by housing associations seeking to use HACT's Wellbeing Valuation Approach and its Social Value Bank of metrics.

The toolkit is designed to be used by anybody involved in a procurement process and sets out introductory background to the public procurement regime, as well as guidance on how social value outcomes can be effectively incorporated into the procurement process as well as template wording that can be used, if required.

Incorporating social value into each stage of the public procurement process

The toolkit explains how organisations can incorporate social value into every stage of the procurement process, starting with effective pre-market engagement (with both care leavers, and with potential bidders). This engagement exercise can help clients frame their social value requirements ahead of the procurement to ensure that the tenders received will meet (or exceed) the requirements and secure the impact and outcomes it desires.

The toolkit also explains how (where the procurement procedure permits the use of a selection stage) organisations can use the selection questionnaire as an opportunity to evaluate bidders' past experience in delivering social value objectives. The toolkit provides example wording that can be included to test experience in this area, as well as explore how bidders have ensured that their supply-chains can also deliver the required social value outcomes.

Organisations will also find example wording for the invitation to tender, as well as guidance on how to express its required social value outcomes as bid requirements or award criteria. This is the opportunity for organisations to evaluate and explore how bidders will ensure that their supply-chain will secure social value impact through performance of the contract and clients need to draft evaluation criteria that allow them to evaluate potentially different social value offers on a like-for-like basis.

Finally, the toolkit provides guidance on how contract management plays an essential role in ensuring the effective delivery of the required social value outcomes to support care leavers and should not be overlooked or underestimated.

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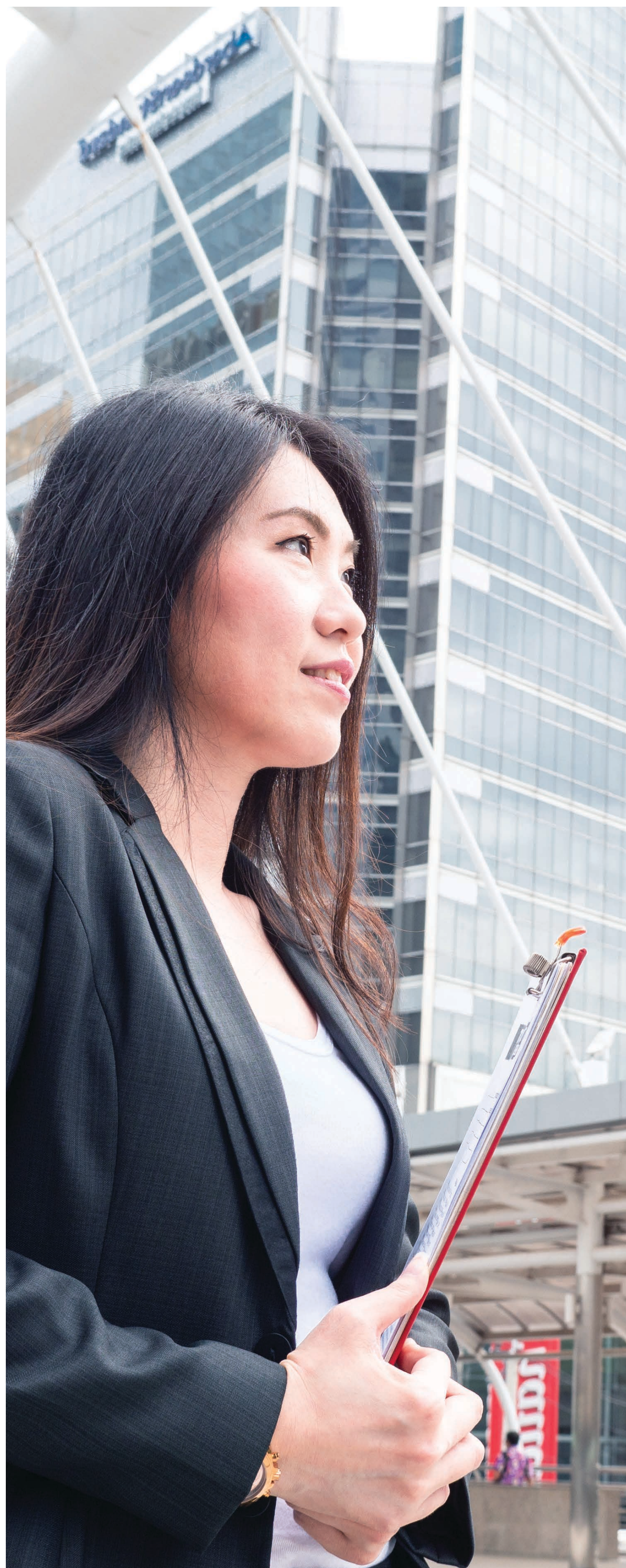

Re-opening the Housing Revenue Account

It is now recognised that councils have a major role to play in the supply of new housing. Councils are building again, at scale; and this renaissance has encouraged some stock transfer councils back into ownership. Their motivations and ambitions vary but the number of re-entrants is becoming significant – well into double figures. Now is a good time therefore to reflect on the issues a council needs to consider when it decides to be a landlord once again.

What is involved in 're-opening' the HRA?

From a legal point of view the formal and not entirely facetious answer is, nothing. A council must simply account separately (i.e. ring fenced from the General Fund) for any property provided under Part 2 of the Housing Act 1985. The Secretary of State can however waive that requirement by making a 'direction' and MHCLG's website guidance explains that obtaining a direction to hold up to 200 dwellings in the General Fund will usually be a formality. Most of the councils which have 're-opened' their HRAs are those which have either reached that number or expect to do so.

What HRA rules have changed?

It is five years or more since the last whole stock transfer and most of the transfers took place before the abolition of the HRA subsidy system in 2012. Some of the new 'HRA councils' have not owned stock for 25 years or so. They will need to remind themselves of the old rules and familiarise themselves with the new ones. They may be disappointed to find that the last official HRA Manual appeared in 2006-7 (though MHCLG's website guidance is a valuable starting-point and resource). Most of the significant changes arise from the introduction of self-financing in 2012 but councils will appreciate that the debt cap which was imposed then was removed two years ago.

What else has changed?

The key change is regulation. Councils have formally been registered providers for many years but it is only recently that this has had a real impact.

> *"The Regulator of Social Housing has been particularly concerned to ensure that councils are aware of their health and safety responsibilities and has served enforcement notices on a number of councils."*

In addition, the Rent Standard was applied to councils for the first time from April this year, with the effect that social rents for secure tenants are restricted in the same way as for assured tenants.

What is likely to change in the future?

All local housing authorities will be aware that current Government policy is difficult to predict; but the main features of 'A new deal for social housing' – the Green Paper published two years ago – may well be implemented. If so, councils with stock can expect to be subject to closer scrutiny from tenants (and leaseholders), KPI-based performance monitoring and streamlined complaints procedures – together with a more expensive Decent Homes standard (driven also by the Green agenda), not to mention the new building safety regime. None of this is likely to deter councils determined to provide more homes for their residents, but there are challenges now which they did not have to face before stock transfer all those years ago.

Please ask Ian or your usual contact at Trowers for the firm's Unofficial HRA Manual.

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"No DSS" – Court ruling declares housing benefit discrimination unlawful

Anyone with experience of the private rented sector will be familiar with the phrase "No DSS", even though the DSS (Department for Social Security) itself is long gone. Two recent court rulings should mean the phrase goes the same way as its namesake.

In July, York County Court gave its judgment in a case regarding whether a blanket policy not to let to prospective tenants on the basis that they are claiming benefits is unlawful. According to the homelessness charity Shelter, this was the first time the courts have considered a case of this nature in the UK.

Many low-income tenants claim Universal Credit (UC) or its predecessor Housing Benefit, which UC is gradually replacing (together with several other benefits). These cover some or all of the tenant's rent.

The first case concerned a 44 year old single mother of two (the Claimant), who was in part time work and had references, but was also receiving housing benefit due to a disability. However, her application to rent a property was rejected by a letting agent because it had a blanket policy not to accept tenants receiving housing benefit at all. The Claimant thought this was discriminatory and sued.

The District Judge held that rejecting a tenancy application simply on the grounds that a prospective tenant is receiving benefits is indirectly discriminatory and therefore unlawful. The Claimant had two characteristics protected by the Equality Act: her sex and her disability. The blanket "No DSS" policy was discriminatory because Shelter's research showed substantially more women (18.8% of private renters) claimed benefits than men (12.4%). It was a similar picture when comparing disabled and non-disabled tenants. If this could be shown to be a proportionate means of obtaining a legitimate aim, it could be lawful; this was not the case here.

Then, in September, a second case in Birmingham County Court followed the same reasoning as regards a disabled father. Having first suffered the indignity of being evicted for having asked for adaptations to be made to his home, a letting agent he approached said it was company policy not to house those receiving benefits, regardless of the strength of their payment history. The Birmingham court followed the same reasoning as its Yorkshire counterpart, with the same result.

While the cases establish that policies such as "no DSS" or "no benefits"' are unlawful, landlords should be wary they are not inadvertently discriminating in other ways. For example, properties are often advertised as being suitable for "young professionals". Could this be seen as "No DSS" by the back door?

> *"Landlords will need to be sure they are not discriminating against anyone with a protected characteristic, or they could face a challenge."*

It is worth noting that although these are county court judgments, and not binding on other courts, the court's reasoning in each case is clear, and the willingness of the second court to follow the first clearly sets the tone. Each tenant should be treated as an individual, and it will be a foolhardy landlord who continues to discriminate.

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VAT treatment of cladding works – zero is the hero

As any residential landlord may be aware, VAT incurred on costs relating to its rental business will not be recoverable. Such irrecoverable VAT is an additional cost to the landlord's business and VAT incurred on replacing cladding on residential property is no different.

HMRC's position on zero rating

The general rule is that the supply of construction services to construct new dwellings is zero rated for VAT purposes (i.e. VAT at 0%). This enables the contractor to recover any VAT it incurs in supplying those services and also means that the employer land owner does not, in the main, suffer any VAT costs. In VAT terms, zero is the hero – but can construction work undertaken now to replace defective cladding be zero rated?

The answer is not simple, partly due to HMRC's shifting guidance on the issue and also, the potential for the original circumstances to have altered since the building in question was completed.

HMRC has not published clear guidance but, in our experience, HMRC's view is that all of the following conditions need to be satisfied for zero rating to apply:

- the original construction or conversion of the building was zero rated;
- the cladding being replaced was included on the original plans and formed part of the construction of the building;
- the property is still owned by the person who commissioned the zero-rated construction or conversion of the building (i.e. the developer or freeholder);
- the cladding is unsafe and is therefore being replaced to correct a fault;
- the property developer or freeholder (i.e. the person who originally commissioned the zero-rated construction or conversion) organises the replacement of the cladding (e.g. by appointing a contractor); and
- the cladding is replaced as soon as possible.

Given the lack of published guidance from HMRC, we recommend that a clearance is obtained from HMRC that the work is zero-rated in order to provide certainty. In our experience, this is fairly straightforward if the above conditions are met. Of course, HMRC would expect the landlord to be able to demonstrate that the conditions are met if asked by HMRC. For example, documentation confirming that replacement of the cladding is being undertaken on the advice of suitably qualified professionals.

There has been some confusion as to whether the person commissioning the cladding replacement is required to engage the same contractor who carried out the original construction. The settled view now is that the original contractor does not need to carry out the works. This is helpful in addressing a practical hurdle to achieving zero rating where, for example, the original contractor is no longer operating, unavailable or too expensive.

However, circumstances may not always be straightforward, for example, where a management company is involved or where the cladding works form part of a wider contractual dispute with the original contractor involving other alleged construction defects. Are there any alternatives if the zero rating conditions are not met and are there any traps to be aware of?

Alternatives, opportunities and traps

The work could qualify for the reduced rate of VAT (at 5%) as the installation of energy-saving materials in residential accommodation. HMRC have acknowledged this possibility where the "dominant purpose is to improve the thermal efficiency of the building". However, "dominant purpose" may be difficult to prove where cladding has been deemed to be faulty and the works are for the dominant purpose of making the building safe.

> *"Even if a landlord or management company is applying for grant funding to cover the cost of the work, it is recommended that the application or agreement for funding covers any irrecoverable VAT costs to ensure there is no shortfall."*

Early engagement with the contractor to understand the anticipated VAT treatment of the works and whether the zero rate or reduced rate can be applied is therefore prudent as this could help to minimise costs and ensure that the grant funding arrangements sufficiently cover anticipated costs, including any VAT costs.

It will also be important to sense check the original contractual supply chain and whether this will need to be replicated to any extent in procuring any cladding work. This will be of particular relevance to corporate groups where a group company was engaged internally (commonly under a framework design and build contract)

to procure the original works for the landlord property owning company within the group. Such arrangements are common within the housing association sector and may need reviewing in the wider context of cash flows and which entity may be receiving any grant funding.

Whilst the above focusses on standard blocks of flats, it is worth considering the VAT treatment of cladding works to other buildings whose construction was zero rated, such as student accommodation, and whether the zero rate can apply in those scenarios.

Whether you are a contractor supplying cladding work and needing to charge and account for the correct amount of VAT or a landlord or management company procuring such works and seeking to identify VAT costs, agree costings and/or apply for grant funding to meet such costs, it will be important to understand the VAT treatment of the proposed work. Zero rating of works is achievable where circumstances permit but the devil is in the detail.

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Termination of building contracts – avoid being locked in

Significant changes to corporate insolvency law were introduced on 26 June 2020 when the Corporate Insolvency and Governance Act 2020 (CIGA) was enacted. It represents the government's latest attempt to assist companies affected by the financial repercussions of Covid-19.

Section 14 of CIGA limits the exercise of termination, or other 'ipso facto' rights, within supply contracts following a customer's insolvency. This article focusses on the implications of this restriction for the construction industry.

For the purposes of this article, a company supplying goods or services under a contract shall be referred to as "Supplier", whilst a recipient company shall be referred to as "Customer".

Restriction of 'Ipso Facto' rights

The popular standard form building contracts include express provisions which say that, in the event that the Customer (e.g. Employer) becomes insolvent, then the Supplier (i.e. Contractor), will automatically accrue the right to terminate the contract.

However, under section 14 of CIGA, suppliers cannot exercise contractual rights to terminate or "do any other thing" (an Ipso Facto Right) during the Customer's insolvency period if:

- The right arose as a result of the Customer entering into a "relevant insolvency procedure" (defined by CIGA); or
- The right arose (for any reason) before the start of the Customer's insolvency period, but the accrued right was not exercised.

Effectively unless any of CIGA's exemptions apply (see below), if the Customer goes bust then CIGA will 'denude' any contractual provision which would otherwise have entitled the Supplier to terminate or "do any other thing" following the Customer's insolvency. The Supplier will then potentially become 'locked-into' a supply contract with the insolvent Customer. CIGA also prohibits the Supplier from making its continued performance (i.e. supply) under the contract contingent on the Customer's payment of pre-insolvency period debts.

The potential ramifications of CIGA for the construction industry are therefore extremely significant.

When can the Supplier still exercise an Ipso Facto Right?

Under CIGA, a Supplier may still exercise an Ipso Facto Right if:

- The right arose during the insolvency period and was not exercisable due to the Customer's insolvency;
- The Customer or the insolvency office holder consents to the exercise of the right;
- The Supplier applies to the Court and the Court agrees that continuing the contract with the insolvent Supplier would cause the Customer "financial hardship" (not defined by CIGA);
- The Customer and/or Supplier is a provider of financial services (subject to exceptions in CIGA); or
- The Supplier is a "small entity" as defined by CIGA (this is only available until 30 September 2020).

Comment

By way of example, a contractor that has entered into a JCT 2016 Design & Build Contract (D&B) with an employer which has since become insolvent will now be prevented from exercising its right to terminate due to the employer's insolvency under clause 8.10.

However, it may still be possible for suppliers (e.g. contractors) to avoid being 'locked into' contracts under certain circumstances. CIGA does not appear to prevent a contractor from terminating under D&B clause 8.9 as a result of non-payment by the employer. A contractor therefore ought to be able to terminate and avoid being 'locked-in'. However, there may be a significant period of lag between an employer entering insolvency and any failure by the employer to make a payment of a sum that has subsequently fallen due.

In addition, CIGA does not appear to 'denude' s122 of the Construction Act (s122), under which a Supplier has a statutory right to suspend performance when a due payment has not been paid by the Customer after seven days' notice. This is because whilst CIGA restricts contractual rights, the right to suspend under s122 is a statutory right. In addition, the Supplier's s122 right arguably arises as a result of non-payment by the Customer, not the Customer's insolvency (although both may occur simultaneously). The industry awaits any guidance from the Courts on this point with great interest.

Practical points

Suppliers should be alert to signs that customers may be struggling so that they can exercise any Ipso Facto Rights before the Customer becomes insolvent and therefore before the Customer secures protection under CIGA. Early indicators may include high staff turnover and lack of responsiveness or progress.

If the Customer becomes insolvent, the Supplier should consider whether they are able to benefit from one of the statutory exceptions outlined above. However, the Supplier considering the "financial hardship" exception should keep in mind that an application to the Court could lead to problems with its own suppliers if they hear of the application and begin to fear that the Supplier itself may be under threat of insolvency due to the Customer's financial problems.

As CIGA provisions will override any incompatible clauses, suppliers must review their existing supply contracts and also consider the impact of CIGA when negotiating future contracts. It may be possible to negotiate additional protections into future supply contracts to avoid some of the problems referred to above, for example by introducing clauses that enable the Supplier to terminate a future contract in the event that certain 'early warning' events of future insolvency by the Customer occur, or potentially introducing a right for the Supplier to terminate 'at will'.

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Landowner's rights – Telecoms Code

The uncertain waters surrounding the rights of operators of telecoms apparatus became considerably choppier at the end of 2017 when the Digital Economy Act bought into force the new Electronic Communications Code (the Code).

The goal of the Code was to provide sufficient rights to telecoms operators to be able to meet the public's increasing demand for connectivity. The Code not only gives greater security to operators with equipment in place, but also provides operators with the ability to carry out surveys to assess prospective sites.

The question of survey rights and where these fall within the Code was examined by the Court of Appeal *(The University of London v Cornerstone Telecommunications Infrastructure Limited [2019] EWCA Civ 2075)*.

The telecoms operator served notice requesting a survey of a potential apparatus site on the roof of university halls. The Court of Appeal upheld the decision by the Upper Tribunal that such surveys are capable of being a Code right, satisfying the public policy of improving electronic communication services. A key consideration in CTIL's favour was that its apparatus on an adjoining site was being removed due to redevelopment, but this decision effectively enshrines the rights of Code operators to carry out surveys on private land.

Should a landowner receive a request from an operator to carry out a survey and push back, the operator may serve a formal notice for interim Code rights. If the site provider fails to agree to the terms of the notice within 28 days then the operator may apply to the Upper Tribunal for an order. There are practical points to consider – such as the availability of alternative sites in the area; however, following the University of London case, it is likely that any application by an operator for interim Code rights to carry out surveys would succeed.

This follows a general trend of upholding Code rights that have a clear link to achieving widespread connectivity. This has been seen in decisions that protect continued coverage where a redevelopment ground was not viable and only used to frustrate Code rights *(EE Ltd & Hutchison 3G UK Ltd-v-Sir James Chichester [2019])* or to ensure that an operator remains in occupation *(Cornerstone Telecommunications Infrastructure Ltd-v-Compton Beauchamp Estates Ltd [2019])*.

With operators able to apply to the Upper Tribunal for interim rights, in the event of receiving a request for a survey, the best course of action may be for a landowner to work with the operator from an early stage to establish favourable commercial terms. This can include requirements for a certain level of public liability insurance and indemnity for damage. Accompanied access may prove more difficult with Covid-19 restrictions in place, and recent government guidance has indicated that it is vital for access to be provided for repairs, maintenance and upgrades, although the extent of this is yet to be tested. Early communication with the operator may also allow a landowner to set the perimeters of a potential future occupation, with an effect on valuation.

As well as considerations on acquisition, the buyer needs to be aware of potential issues for raising finance by using the property as a security. Very often telecoms infrastructure is owned by a third party – telecoms provider – and the terms of the use of such infrastructure is governed by either a lease or a licence.

> *"When charging, consideration should be given to the terms of any such lease or licence from the position of the lender as there is a requirement to report on any such documentation in a charging exercise."*

In particular, the lender will be looking at any third party rights and reservations over the property in order to repair and maintain the telecoms infrastructure, what may happen should any damage be caused to the property whilst the third party is accessing the infrastructure, the term of any such lease or licence, the position on security of tenure and any forfeiture clauses which may prejudice the lender.

A lender will need to ensure that, should it find itself in an enforcement situation, the security is not compromised by any such lease or licence that is in place.

Under the new regime, reporting to the lender on such issues becomes more problematic in that these types of leases and licences do not need to be registered at the Land Registry in order to be binding on the land. Where there is no such evidence of such rights noted on title but they still exist over the land, further searches and client input will be required to reveal any such information.

There is also now an automatic right to assign electronic communication code agreements, whereby operators can assign code rights without the consent of the landowner and any contractual provision to the contrary will be void, which may cause issues when trying to identify the current operator of any such infrastructure on the property.

Thinking of the alternative scenario where the landowner has property which is already in charge and wants to enter into arrangements with a telecoms provider for the placement of such infrastructure or equipment on its property, the owner should check carefully in its terms with the lender as to whether or not consent from the lender is required. In almost all cases, the lender's charge will be protected by a restriction on title and in order to register any new lease or licence on the title to the property, the lender's consent would need to be granted in advance of entering into any such lease or licence. This may become less relevant now as not all leases and licences will need to be registered in order to be binding but in all cases a check with the lender as to whether they need notification of such agreements will be required.

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Is litigation funding the answer to improving your finances?

With stretched resources meaning that investigating and pursuing significant litigation can often take a back seat, Lucy James and Charlotte Clayson discuss how litigation funding can resolve some of those issues, and allow you take an active role in returning a significant share of damages to the balance sheet.

What's the issue?

Those working in the sector often struggle to access the necessary up-front investment in terms of financial and practical resources needed to bring damages claims, particularly against well-resourced defendants. Whilst many organisations have potential litigation that they could pursue, investigating and pursuing those claims can often be put to the bottom of the 'to-do' list whilst other, more urgent, matters are prioritised and resourced.

However, this approach often sees organisations missing out on significant potential damages that can be returned to the balance sheet in a successful claim: limited resources should not be the sole reason that you decide not to pursue litigation that has merit and that might generate significant income.

What is the potential solution?

Litigation funding is a financing arrangement where a funder agrees to pay your legal fees in bringing a claim to settlement or trial in accordance with an agreed budget. The funders can often also assist with 'seed funding' in the first instance to allow you to properly investigate the claim and test the merits before committing to pursuing litigation.

Generally, the funding works on the basis that if the claim is unsuccessful, you will not have to pay anything, and the funder will lose the money it has invested in the case. If successful, the funder will be entitled to a return on its investment from the damages that are received at the end of the case, with the balance being released to you for reinvestment.

Funding therefore provides organisations within the sector with the finances to pursue litigation, and to pay external advisors and experts to manage, resource and advise on the case, whilst matching the resources of defendants with deep pockets.

How is it relevant to the housing sector?

Organisations in the housing sector often have significant damages claims that merit further investigation and pursuing through litigation. For example, potential claims against commercial partners for breach of significant contracts and failure to meet KPIs, claims against contractors for works undertaken, cladding and health and safety related issues, or claims in negligence.

It's a misconception that litigation funding cannot be used successfully in this sector. We have been actively involved in engaging with both the private and public sector, alongside litigation funders, to discuss how funding can be unlocked, and have advised on navigating the governance and reputational issues associated with using litigation funding along with the necessary decision making procedures to put it in place.

With careful consideration and the right team, litigation funding can and should be a key tool in your toolbox to give you the finances and resource to actively consider and pursue significant claims and return a share of damages to the business.

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Housing Ombudsman's oversight operations overhauled

September marked the start of the Housing Ombudsman's new powers. What effect will this have on RPs?

Readers will no doubt be familiar with the general system of regulation of the affordable housing world. Various bodies oversee various aspects. Primus inter pares is the Regulator of Social Housing. This is concerned largely with the way RPs are run: issues like governance, financial viability, and resident involvement. The Regulator sets standards and has various statutory powers to make sure RPs meet them. Although it exists to protect tenants, its remit is wider, and it is necessarily more focussed on organisational and operational matters at a corporate level.

In tandem with this is the Housing Ombudsman. All social landlords must be members of the Ombudsman's scheme, and it's open to any occupier, whether tenant, leaseholder or otherwise, to complain of maladministration.

It is more consumer-focussed, although, like me, you may not be entirely comfortable with the use of the word "consumer" in the context of something as fundamental as people's homes. Nonetheless, it's a good descriptor for what it does. Residents who feel their landlord has not adequately addressed their complaint can go to the Ombudsman, which can investigate, and seek resolution informally or formally. It is much more focussed on individual cases than the Regulator.

The system has worked pretty well, but there is potential for issues to fall between the gaps. For example, a tenant's complaint to the Ombudsman about a specific repair and maintenance issue may be a symptom of a more serious underlying problem of wider concern. If a landlord is struggling to fix a leak, perhaps there is a wider issue with responsive repairs. Where leaks are going unfixed, perhaps gas certificates are not being done on time. Patterns may become clear to the Ombudsman that the Regulator ought to know about, but would previously have struggled to pick up on.

Enter the revised Housing Ombudsman Scheme, which aims to solve this. What has changed?

There is a new complaint handling code, which sets out how landlords must treat complaints. This provides a universal definition of "complaint", and sets out the processes and timescales landlords should meet. Landlords must now self-assess against this annually.

From 1 January 2021, the Ombudsman can issue 'Complaint Handling Failure Orders'. These can relate to a specific complaint, or to more systematic problems in dealing with them. If the latter, there is a new power to undertake broader investigations, and, crucially, there is a broader power to refer to the Regulator. The Ombudsman will notify the Regulator of findings of serious maladministration where there is potential breach of a regulatory standard or a complaint handling failure order.

So plenty for governance teams to consider. Is this where regulatory reform ends? By no means. The long-awaited Social Housing White Paper will have a regulatory focus, and is expected this autumn. We're in the midst of post-Grenfell building safety reform. No doubt there is more to come!

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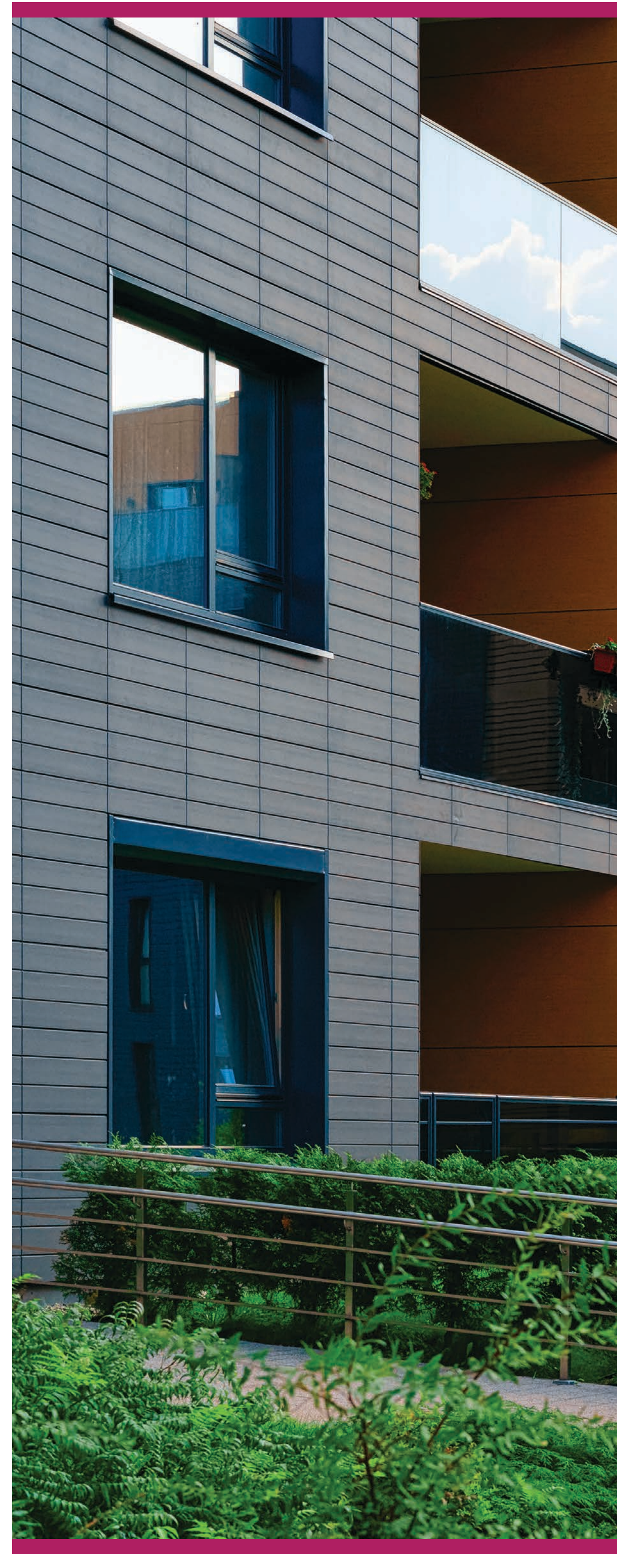

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