trowers & hamlins

Publications —— Spring 2017

Quarterly Housing Update

—— Pioneering —— London —— Construction —— Public sector —— Energy —— Real estate —— Bahrain —— Tax —— IT —— Dubai ——
Connecting —— Knowledge —— Pragmatic —— Malaysia —— Exeter —— Thought leadership —— Housing —— Agile —— Creative —— Connecting
—— Local government —— Manchester —— Environment —— Focused —— Islamic finance —— Projects —— Abu Dhabi —— Corporate finance ——
—— Employment —— Regulation —— Procurement —— Expertise —— Specialist —— Planning —— Investment —— Committed —— Delivery —— IT
—— IP —— Corporate —— Infrastructure —— Value —— Development —— Private wealth —— Oman —— Governance —— Birmingham ——
—— Dynamic —— Pensions —— Dispute resolution —— Insight —— Banking and finance —— Arbitration —— Diverse —— Regeneration —— Care ——

Contents

Foreword

After what seems like a long wait, the deregulation measures in the Housing and Planning Act 2016 came into force on 6 April. For more information on the detail of the HCA's new notification regime please see the briefing paper on our website.

We shall have to wait and see whether RPs' behaviour changes materially as a consequence of these measures. My impression, at least from those I talk to regularly, is that that is unlikely. I have not picked up signs that we are about to embark on a wave of transfers of tenanted stock out of the sector. The response of others will be interesting, particularly funders, who will no longer have the comfort of knowing the HCA has vetted a proposal to merge, for example, before they are asked to give their consent. One thing we are picking up is increasing interest in the establishment of for profit RPs from investors and developers.

Some weeks have now passed since the publication of the Housing White Paper and people have had time to digest its content. I have been struck by the straight forward and engaging approach of Gavin Barwell at the events I've spoken at or colleagues have attended. What is very clear though is that CLG can only do so much. Other Government departments, Treasury and DWP in particular, will have a significant influence on whether we get anywhere near achieving the ambitions set out in the Paper.

I don't want to be negative about the White Paper because I do think it is a constructive document and its tone is welcome. On the one hand, however, there is encouragement to social housing providers of all types to build more and on the other we still lack certainty in terms of future rent policy, the supported housing debate rolls on and the full effect of the benefit changes are yet to hit home. For local authorities there is also the lingering uncertainty around the higher value property levy. When we look at development capacity, there are concerns about the availability of skilled labour and the potential for construction price inflation. None of these are positive when it comes to planning for a major hike in development output.

Having said all of that, there seems little doubt that social housing providers are ready and willing to do what they can to address our "broken housing market". There is a real opportunity to be seen as a key ally of Government in tackling that objective and to counter some of the negative perceptions generated by the previous administration.

Ian Graham

Partner —— Housing and Regeneration

t +44 (0)20 7423 8284
e igraham@trowers.coma

The Housing White Paper – key themes

The Housing White Paper identified a range of challenges and objectives to drive forward additional development, attract more institutional investment into the market and assist individuals with accessing owner-occupier and rented housing.

Planning

Over 40% of local planning authorities do not have a local plan which meets the projected growth in households in their area. Local planning authorities are required to identify sufficient sites to meet their "objectively assessed need" (OAN) over the coming five years. Failure to demonstrate an adequate number of sites renders authorities' planning documents out of date and the National Planning Policy Framework's (NPPF) presumption in favour of development' arises. This has led to a rise in planning by appeal resulting in piecemeal and unsuitable development and crucially, a lack of clarity for developers.

The White Paper promises to "simplify and speed up the plan making process". The Government proposes powers of intervention to ensure local authorities are meeting their plan - making responsibilities. While this is not a new idea, it is a step in the right direction although it remains to be seen whether local authorities have the ability and resources to deliver.

The Government intends to provide further guidance on OAN to serve as a measure of future housing demand. As OAN underpins the calculation of five year land supply, this is crucial if they are to end the practice of setting artificially low housing targets. At present, local authorities can put forward their own methodology for calculating OAN but this will be replaced by a standard approach. Local authorities will be free to opt out from the standard method although the Government promises "incentives" for those local authorities choosing to adopt it.

A "housing delivery test" will highlight which local authorities are failing to meet their new homes targets. This will be implemented by a tiered mechanism and, depending on the extent of failings, will trigger a series of policy responses. For example, if delivery falls below 25% of housing requirement, the presumption in favour of sustainable development will apply automatically.

Concerningly the Government has stated its intention to shorten the default planning period to two years from three, to promote quicker turnaround times on authorised developments. It seems that the misconception that developers are sitting on sites remains and completely overlooks the lengthy delays caused in discharging pre-commencement conditions.

Many were disappointed by the Government's unaltered stance on Green Belt status. Local authorities will be told to exhaust "all other reasonable options" before considering Green Belt development. Where land is removed, the impact must be offset by "compensatory improvements" to the remaining Green Belt land. It is clear that, with the exception of the garden villages, the extra capacity for new homes is to be found on currently appropriate or brownfield sites.

In other positive news, the Government has suggested a return to garden towns and villages developed away from existing urban centres which have the potential to "deliver more than 200,000 new homes in the next 20 years". We hope that sites such as the planned development at Ebbsfleet could be a genuine opportunity to begin to deliver quality new homes on the required scale.

Starter Homes

Starter Homes were introduced by the coalition Government as a small scale, publicly funded initiative to encourage development on brownfield sites. The policy ballooned to a manifesto promise that Starter Homes would deliver 200,000 new homes by 2020 and would be a mandatory requirement for the majority of new-build developments. Little progress on the wider delivery of Starter Homes has been seen but the White Paper has provided some clarity as well as signalling an overall change in approach. The most significant change is the move away from the mandatory 20% requirement of Starter Homes on newbuild sites. This has been replaced with a milder general duty on local authorities to promote Starter Homes. The relaxation of the mandatory requirement, combined with the amendment of the NPPF to allow brownfield land to be released for development when a higher proportion of Starter Homes is included, indicates that the product is being returned to its original purpose.

Starter Homes will be restricted to those with a household income below £80,000 outside London and £90,000 in London. This mirrors the eligibility requirements for shared ownership housing and places Starter Homes in the category of an affordable homeownership product. The previous product parameters, including the price cap appear to continue to apply, alongside the restriction to first time buyers aged under 40.

The other notable clarification is the 15 year repayment period to ensure that some, or all, of the discount shall be repaid on sale. This will be welcome to lenders who expressed concern about a shorter discount period impacting on the accuracy of valuations. Clarity is still needed on how and to whom the discounts will be repaid.

Build to rent

Having spent several years being eclipsed by home ownership, it was great to see Build to Rent (BTR) encouraged and embraced in the White Paper. Three main points form part of the separate BTR consultation:

1. further emphasis on BTR via planning policy;
2. the possibility of a new affordable tenure - Affordable Private Rent;
3. strengthening the expectation to offer 3 year minimum family friendly tenancies.

The new affordable tenure is the most controversial. BTR developers in some parts of the country will embrace the offer and it makes sense for institutional investors who dislike losing control of part of an asset. It makes little sense in areas where it was already recognised that planning viability calculations for BTR could not support any affordable units.

The market will support another affordable tenure at the 80% mark. Our concern is the extent to which eligibility criteria will be applied on subsequent lettings outside any regulated environment with already overstretched planning teams.

Suzanne Benson
Partner —— Housing and Regeneration

t +44 (0)161 838 2034
e sbenson@trowers.com

Andy Barnard
Partner —— Housing and Regeneration

t +44 (0)20 7423 8329
e abarnard@trowers.com

Tom Barton
Associate —— Commercial Property

t +44 (0)20 7423 8592
e tbarton@trowers.com

The impact of NHS England Capital Grants Charges on future security

Capital Grants from NHS England (NHSE) are not a new concept and many housing associations will have previously entered into such agreements in order to acquire or develop properties for a specific care use.

In a grant funded situation, the affected title to the property is usually registered in the name of the housing association and the grant secured by way of a charge over the title in favour of NHSE (or, in the case of historic charges, its predecessors).

In a significant majority of cases, the grants provided by NHSE are actually equity mortgages whereby NHSE is entitled under the grant agreement to a proportion of the Open Market Value (OMV) of the property on a sale equal to the proportion of capital (purchase price plus the value of any capital works) they invested when the property was acquired. Typically (and especially in older agreements), this is 100%. This would also apply if there was another 'trigger event' such as a change of use of the property, given the property would have been grant funded on the understanding that it would be used for a specific care use and NHSE are obviously keen to preserve this.

Even though a housing association is the registered proprietor on the title, they do not necessarily have any equity in the property (certainly where the NHS provided a 100% grant). A housing association will maintain and service the property generating revenue from tenants where possible, but usually upon a disposal or change of use, they must repay the proportionate OMV of the property (at the time of the trigger event) to NHSE equal to the NHS's initial investment.

In the current market, should a housing association wish to put the grant-funded property forward as security in a charging exercise, this poses some problems: the current market determines that a lender requires a first ranking charge on the property title. Given the NHSE charge on the title of grant funded properties, the lender would only have a second ranking charge and, therefore, would not currently accept the property as security in a charging exercise if the NHSE charge remains on the title.

In order for NHSE to remove the charge from the title under the terms of the grant agreement, the housing association would be under an obligation to pay the relevant proportion of the OMV of the property to NHSE. Given there is no change of use nor is the property being sold, NHSE (keen to preserve the use of the property) would be likely to question why the charge is being removed. Even though under equitable principles, they would likely agree to discharge the charge, they may prefer to preserve the current use of the property. The majority of the grant agreements (especially the older ones) did not foresee that the grant recipient would need to charge the property in the future.

Should the charge be removed by NHSE, then the housing association would find itself in the position of having paid OMV for a clear title. In the current market, if there are any use provisions which bind the property to a specific use, a lender will only accept the property as security at Existing Use Value-Social Housing (EUV-SH), and the difference between this and OMV is significant. It will be important to check that if the NHSE charge were to be released, there are not any provisions in ancillary title documents which contain use provisions of a similar kind which would still bind the land and, therefore, still limit the property to a EUV-SH value in a charging exercise.

Given the terms of the grant need to be secured with a default mechanism, NHSE are unlikely to agree to securing their grant interest by way of notice or restriction on the title. In the event any terms are not met then NHSE would not have the necessary mechanism either to enforce use or sale. It is unlikely that the positon on securing grant funding by any method other than a charge is likely to change in the future.

Equally, although NHSE might agree to limit its priority if a compelling business case were made that the additional bank funded expenditure would benefit the residents, it is unlikely a deed of postponement would work in this situation; NHSE would not have a specific amount to defer (as the OMV would vary over time) and the new lender would not necessarily be willing to accept a deed of postponement. Whilst not completely unheard of, in the current market only certain lenders will accept this form of security. NHSE and the incoming lender would also have to consider the differential in value between EUV-SH and OMV.

Given NHSE has recently made £100 million available between 2016 and 2021 to support grant funded projects and the recent White Paper, grant funding will continue to be a feature in the affordable housing sector. Housing associations should, however, consider when entering into a grant agreement that they may not necessarily obtain equitable ownership of the property and it may not be as easy to use as security.

With this in mind, should you require any advice on existing properties you may think have been affected, or if you are thinking of entering into a new grant funded acquisition or development, please contact us.

Rachael Pallier

Associate —— Housing and Regeneration

t +44 (0)161 838 2005
e rpallier@trowers.com

Kyle Holling

Partner —— Housing and Regeneration

t +44 (0)20 7423 8292
e kholling@trowers.com

Procuring for Growth Balanced Scorecard

On 14 October 2016, the Crown Commercial Service published a Procurement Policy (Note 09/16 and an accompanying guidance paper), introducing a new scorecard system to ensure that major government procurements take into account social and environmental factors and wider economic considerations when designing procurement exercises.

The Scorecard is required to be used by all central government departments, executive agencies and their non-departmental public bodies (together called "In-Scope Organisations") for all construction, infrastructure or capital investment procurements commenced on or after 14 October 2016 with an individual value of £10 million or more.

The Scorecard is essentially a framework of prompts for In-Scope Organisations to consider the inclusion of social and environmental factors in procurement exercises, alongside more traditional criteria such as quality, price and risk. Clients can use a "scorecard" to allow assessment and scoring of seven "Strategic Themes" in relation to a proposed project. These are: (1) Solution Quality; (2) Cost; (3) Supply Chain; (4) Employment & Skills; (5) Environmental Sustainability; (6) Health & Safety; and (7) Outcome Benefits.

Each Strategic Theme has associated Critical Success Factors (CSFs). In-Scope Organisations are required to assess how relevant each CSF is on a case-by-case basis for each particular project. The "scorecard" for each project should demonstrate how CSFs are taken into account in the various stages of a tender. In response to CSF2, for example – "production/delivery/construction process", clients may note that the specification has been drafted to consider environmentally friendly building materials. The guidance also states that not all CSFs will be relevant for every project, and that additional criteria may also be considered.

The guidance sets out examples of circumstances in which particular Strategic Themes and CSFs may be relevant and when and how they can be factored into the procurement process. This information is contained in Annex B "Strategic Themes and Critical Success Factors". A template scorecard is appended as Annex C "Scorecard Assessment."

The guidance provides a useful initial template for identifying how social and environmental criteria can be included in procurement exercises. However, as with any template guidance, it needs to be applied carefully to each procurement exercise on a case-by-case basis, to ensure that all Strategic Themes and CSFs used are reasonable and proportionate. Some of the success measures identified – such as a measure of the number of UK jobs created by the procurement – will need to be handled carefully, so as not to discriminate illegally in favour of bidders who are locally based.

It is not clear whether the Government intends to extend the guidance to cover all UK contracting authorities. Until then, contracting authorities can use the guidance as best practice for their existing procurements, alongside other products like the HACT Social Value Toolkit.

John Forde

Senior Associate —— Projects and Construction

t +44 (0)20 7423 8353
e jforde@trowers.com

Jack Eustice

Solicitor —— Projects and Construction

t +44 (0)20 7423 8235
e jeustice@trowers.com

Here we go again... the problems with letters of intent

Letters of intent are used widely in the construction industry, to agree commercial terms between contracting parties and secure payment obligations ahead of formal contract documents being signed.

Despite the commercial usefulness of letters of intent, they are risky from a contractual standpoint. Drafting is often hurried and incomplete, lacking the clarity and certainty of a signed contract. Unsurprisingly, many letters of intent are referred to the courts when parties cannot agree on the terms or even if the letter constitutes a binding contract.

The recent Technology and Construction Court decision in Spartafield v Penten Group Limited considered a letter of intent entered into between the employer (Spartafield) and a contractor (Penten) for a programme of demolition and building works. The intended form of building contract was identified in the tender as a JCT 2011 Intermediate Building Contract with Contractor's Design, but the contract documents had not been signed by the works commencement date. To prevent further delays, the parties entered into a letter of intent for a fixed value of works and works commenced on site.

Nearly two years later, Penten had still not executed the JCT contract, which had been signed on behalf of Spartafield and presented to Penten for execution. Penten wrote to Spartafield informing them that its costs incurred had exceeded the value authorised under the letter of intent and subsequently suspended the works due to late payment. Spartafield argued it was only obliged to pay for works certified under the JCT contract. Following two adjudication decisions decided on the basis the parties were operating under the letter of intent, Spartafield sought declaratory relief against Penten to the effect that the parties had entered into the JCT contract.

In its judgment, the Court held that the letter of intent did not impose a condition that the JCT contract must be executed for the contract to be valid and that the critical commercial terms weren't conditional on signature of formal contracts. The Court concluded that the parties had contracted on the basis of the JCT contract terms, despite the contract not being formally executed.

The Court's decision was good news for Spartafield, but claimants aren't always so lucky. This case reiterates the importance of contracting parties entering into formal contracts as soon as possible after appointment, rather than relying on letters of intent. Where a letter of intent is commercially necessary, it must be drafted clearly and concisely, with clarity as to agreed fees and the scope of works. Ideally, letters of intent should be time-limited and not rolled over indefinitely to become a de facto form of contract.

Jennifer Dalby
Associate — Projects and Construction

t +44 (0)121 214 8823
e jdalby@trowers.com

New ways of working with the NHS

The BBC has been leading an expose into problems at hospital A&E departments. Our previous article in last Autumn's edition looked at opportunities for joint working with the NHS on new staff accommodation projects, or step down/intermediate care.

This has given rise to a groundswell of interest from housing associations supported by the National Housing Federation and the Housing Associations' Charitable Trust.

Inevitably housing associations and other voluntary organisations have a number of questions to ask about engaging with the NHS, including:

Who do I talk to?

The 2013 NHS reorganisation has only really just settled down. With the advent of Sustainability and Transformation Plans (STPs) there may be further changes ahead. Recent commentary by Simon Stevens, Chief Executive of NHS England suggested that STP leads may be in a position to recommend reconfigurations in relation to Clinical Commissioning Groups (CCGs) or NHS provider organisations. However, the NHS is generally shying away from mergers or creation of new organisations, given the serious business of delivering on the NHS Five Year Forward View targets.

Being connected to the local NHS decision makers makes good sense – you will have early warning of upcoming opportunities, the chance to influence these and be able to position your organisation to succeed.

The Chief Executive and Chief Financial Officer of your local CCG should be known to you. Linking up with Social Services may assist, as many NHS bodies and local authorities are working jointly on integration of older peoples and family services, with resulting opportunities to tender for services, with or without a built environment angle.

Another obvious connection to make is with the local hospital trust, i.e. where there is the most acute need for relief from "bed blocking". Person centred planning on individuals in their own homes and in care homes can also help avoiding their admission to hospital.

The same agencies are involved in discharge planning and housing associations have a role to play here. Early identification of necessary aids and adaptations and carrying them out could speed up discharge and make the receiving environment much safer.

Some housing associations are offering voids in existing sheltered accommodation schemes to hospitals. We know, however, from recent comments by a senior NHS hospital manager that hospitals are not generally aware of the range of discharge opportunities available. They are under the impression that there is no alternative to a care home bed if the person is unable to return directly to their own house. Housing associations could set out an attractive range of options and make sure that the Chief Operational Officer and their team at the local hospital are fully aware of these.

The issues are different in mental health, but again there are some good examples of discharges into the community or, at least, to lower secure settings. With the Government's emphasis on mental health and pilots in certain parts of the country, again for those organisations with a specialised care and support offering, there are genuine opportunities here.

The community health care estate previously held by primary care trusts is now owned by the two Department of Health owned companies NHS Property Services (NHS PS) and Community Health Partnerships. The latter holds the LIFT estate, approximately 330 new fit for purpose health centres, although there may be scope for variations and new models of service delivery. NHS PS owns the residue and may be a useful partner in terms of releasing land for development.

Do I have to tender for the opportunity?

Contracting authorities may be able to place opportunities without going through a full OJEU process. However even once Brexit is fully in place, best public procurement practice will still require following rules similar to those practiced today.

An exemption is a development opportunity based on a land deal, e.g. a lease of the land on which a new development is built, if the contracting authority is not overly involved in the specification of the development. The recent Berkshire West case has provided some helpful guidance as to what can be achievable.

Do I have to work with a Foundation Trust?

Foundation Trusts have greater freedoms. They are now monitored by NHS Improvement as are NHS Trusts, but the regime is somewhat different. It is not dissimilar to a bank's credit committee authorising transactions to proceed.

NHS Trusts can enter into joint ventures, either for income generation purposes, or using a contractual as opposed to a corporate joint venture mechanism. There is a degree of each side educating the other as to the opportunities available here – the sorts of joint ventures housing associations have worked on with developers and house builders over many years are not necessarily as well known to the NHS but can provide similar economic, social and wellbeing returns. Meanwhile the NHS has a complex, but not insurmountable, set of capital business case and other requirements which must be navigated. We have the legal and commercial knowledge of both sides and the contacts to pull ventures together where there is a will on both sides.

The key is to identify the benefits that will be realised, the inputs of the various proposed partners, and the proposed sharing of risk and reward. Then you can structure the correct organisational or contractual solution to achieve your aims.

We have a dedicated health and social care team, comprising expert property, procurement and public sector contract lawyers and would be happy to discuss any of the issues in this article with you.

Hilary Blackwell
Partner —— Housing and Regeneration

t +44 (0)20 7423 8366
e hblackwell@trowers.com

The return of modular construction

Tough times in the construction industry have renewed interest in modular and off-site construction methods. Here are the key commercial and contractual risks that employers should look out for.

Modular construction dates back to the end of World War II, when a huge demand for new homes forced housebuilders to maximise the speed of construction projects by manufacturing houses in factories and assembling them on site. In today's market, it is rather less popular: a 2016 National House Building Council report found that the proportion of homes built with an element of offsite construction fell from 24% in 2008 to 16% in 2015.

The tide appears to be turning again. In October 2016, the Farmer Review (entitled "Modernise or Die – time to decide the industry's future") focussed on the need to encourage "pre-manufactured" construction to make cost savings. The Government's Housing White Paper also sets out support for the efficiencies of off-site building, and developers including Berkeley, Crest Nicholson, Urban Splash and the NHS have also expressed interest in adopting these methods.

Modular construction has a number of commercial and social benefits. Manufacturing is undertaken within a controlled manufacturing environment, resulting in fewer work related injuries than work on construction sites. It also requires a highly skilled, permanent workforce, which provides new training and employment opportunities.

Construction projects employing modular construction carry a number of contractual risks for employers, especially regarding the storage of materials off-site. The general rule is that ownership of materials passes when the materials are delivered to site and/or incorporated into the works. However, many standard construction contracts state that ownership of materials passes to the employer when the goods are paid for. The employer is, therefore, at risk in relation to materials that it doesn't have physical ownership or control over.

A contractual solution can be to make evidence of the contractor or supplier's ownership of the off-site items a condition precedent to payment. Whether in the UK or elsewhere, a vesting certificate (or the jurisdictional equivalent) can stand alongside a construction contract setting out the employer's requirements on ownership, storage and insurance of the materials. Advance payment bonds can also mitigate the risk of non-delivery of modular construction materials.

Where a contractor or supplier becomes insolvent, the question of who legally owns the off-site materials becomes crucial. Contracts often deal with this by including requirements to clearly label and separate materials and to require the contractor to take out materials insurance for the benefit of the employer. Once materials have been delivered to site, the employer's all-risks insurance policy will also need to be updated to include them.

Employers engaging contractors and suppliers who use modular construction methods should ensure that their contract documents, prices and insurance requirements are drafted adequately to cover these risks.

Nicola Conway

Associate —— Projects and Construction

t +44 (0)20 7423 8088
e nconway@trowers.com

Forthcoming changes to payment terms

The Small Business Enterprise and Employment Act 2015, enacted in mid-2015, provided the blueprint for further legislation and regulations in relation to payment practices. In this article we survey the anticipated law changes.

Reporting requirements on payment practices

The Reporting on Payment Practices and Performance Regulations 2017 came into force on 6 April, requiring large companies and limited liability partnerships to report information about their payment practices and their recent performance in complying with these practices (e.g. average time taken to pay invoices). This information must be published in a prominent position on a government provided web-based server within 30 days of the end of the reporting.

One of the intended enforcement mechanisms for proper reporting will be through "behavioural change" including pressure from complying companies and public pressure caused by the transparency of published statistics. However, it will also be a criminal offence not to report or to report falsely, with the company and directors liable for fines (not exceeding the statutory maximum) on summary conviction.

Organisations that are contracting authorities for the purposes of the Public Contracts Regulations 2015 are already required to publish annual statistics on their payment practices, so for those organisations, the new requirements should reflect existing business practice.

Restricted assignment of SME debt

The 2015 Act also introduced an express power for the Secretary of State to create legislation preventing contractual measures restricting the assignment of debts as part of an initiative aimed at supporting Small and Medium Enterprises (SMEs). Typically, assignment of debt is used to assist SMEs in obtaining reliable sources of finance by allowing them to assign rights to future payments in exchange for a loan of up to the full value of future payments, easing cash-flow requirements. However, employers can include contractual restrictions preventing such assignment. The draft implementing regulations state that restrictions on assignment will only apply to business to business contracts. They will exclude contracts creating interests in land (as there are already significant laws in place in respect of land contracts) and financial services contracts (as some financial services products are dependent on non-assignment).

The draft regulations still require clarity in some areas – particularly as to whether charges over receivables are included as "assignments". It is also unclear which organisations the regulations will apply to. Following formal consultation, the Government stated that the regulations will only apply to transactions using English law where at least one of the parties conducts business in the UK. However, these restrictions are not captured in the draft regulations as currently drafted. After missing the anticipated 2016 implementation, there has been no information regarding when these regulations will be implemented and any amendments will be carefully watched.

Shivani Kesaria

Solicitor —— Projects and Construction

t +44 (0)20 7423 8205
e skesaria@trowers.com

Mandatory gender pay gap reporting

Since 1997, the gap between men and women's average pay has been monitored at a national level by the Office for National Statistics (ONS) as part of its Annual Survey of Hours and Earnings.

The Explanatory Memorandum to the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the Regulations) states that the overall UK gender pay gap was 25% ten years ago and is now 18.1% according to ONS statistics from October.

The Regulations

The Regulations came into force on 6 April 2017. They provide that employers in the private and third sector with over 250 employees on the "snapshot" date must produce annual gender pay gap reports. Similar requirements for public sector employers are contained in The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 which came into force on 31 March 2017.

The "snapshot" date for private and third sector employers was 5 April. So the first gender pay gap reports must be published by 4 April 2018. For those in the public sector, the date was 31 March, so the information must be published by 30 March 2018.

What needs to be reported?

Affected employers will have to publish the overall difference in the mean and median gross hourly rates of pay between male and female employees; the difference in the mean and median bonus pay; the proportion of male and female employees who have received bonus pay; and the number of men and women in each of four salary quartiles, based on the employer's overall pay range.

The information must be published on the employer's website as well as being uploaded to a government sponsored website. A written statement confirming that the information is accurate must accompany the required information.

Voluntary narrative

The provision of contextual information about gender pay gap information is entirely voluntary. However, guidance issued by Acas and the Government Equalities Office states that a narrative can be a useful way of explaining a gender pay gap and showing that it does not necessarily mean that the employer has acted inappropriately or discriminatorily.

Managing the gender pay gap

As well as publishing equal pay gap reports, employers should ensure that they take steps to manage the gender pay gap. It is important that a plan is developed to redress any imbalance and that actions taken under the plan are implemented, monitored and evaluated.

While the new measures will lead to greater transparency and will hopefully, over time, redress the gender pay imbalance, they will also lead to a greater administrative burden on employers. In addition, the obligation to publish pay information will highlight the issue of equal pay and employees may look more closely at existing pay practices to see if they have any potential claims.

Nicola Ihnatowicz
Partner — Employment

t +44 (0)20 7423 8565
e nihnatowicz@trowers.com

The apprenticeship levy

The apprenticeship levy was introduced on 6 April (although funds will not appear in an employer's digital account until just before the end of May for levy paid on their April payroll). It is being introduced by the government as part of a drive to help people get the skills they need for a successful career and aims to put the funding of apprenticeships on a sustainable long-term footing.

Employers with an annual pay bill of more than £3 million will need to spend 0.5% of their total pay bill on the apprenticeship levy. A "levy allowance" of £15,000 per year is being introduced, so the total amount that an employer needs to spend is 0.5% of their pay bill, minus £15,000.

The new apprenticeship funding system starts on 1 May. Any apprenticeships started from this date will be funded according to the new rules. This applies to all employers, both those paying the levy and those who do not.

What is an apprenticeship?

An apprenticeship is a job with an accompanying skills development programme. There must be a genuine job available after the apprenticeship has been completed. An apprentice will gain the technical knowledge, practical experience and wider skills needed for their immediate job and future career through a mixture of learning in the workplace, off-the-job training and the opportunity to practice new skills in a real work environment.

Apprenticeship training

Once the levy has been declared to HMRC the employer will be able to access funding for apprenticeships through a new digital apprenticeship service account. Funds from the account can only be spent on training from a government-approved provider.

Providers who want to deliver less than £100,000 of apprenticeship training per year as a subcontractor can choose to apply for inclusion on the Government's Register of Apprenticeship Training Providers but it is not compulsory.

What is an Apprenticeship Training Agency?

An alternative to an individual employer either obtaining training from an approved provider or providing training to its own staff as an approved training provider, is for a number of providers to form a cost sharing group to provide training by way of an Apprenticeship Training Agency (ATA). An ATA is an organisation whose main business is employing apprentices who are made available to employers for a fee. It has to be set up as a distinct legal entity so that apprentices can have employment contracts with the ATA.

It is possible for an ATA to be set up as a company so if a cost sharing group was established to provide training this structure would work. In order to become a recognised ATA it will be necessary to comply with the features and behaviours detailed in the ATA framework.

Imogen Reseigh
Senior Associate — Employment

t +44 (0)20 7423 8742
e ireseigh@trowers.com

Building affordable housing in breach of restrictive covenants – a great leap forward?

The Upper Tribunal (Lands Chamber) has issued an important decision indicating that restrictive covenants will – in an appropriate case – be modified or discharged to permit housing developments where there is a demonstrable public interest, even where those covenants are knowingly breached.

Millgate Developments v Smith [2016] UKUT 515 (LC) is one of the most encouraging cases in recent years for affordable housing providers and property developers. The case concerned the common situation where a property developer wishes to construct a new housing development and the development site is subject to restrictive covenants prohibiting the construction of buildings and the use of the land for housing.

The facts

In order to meet the local planning authority's affordable housing requirements, Millgate commenced the construction of 13 properties and intended to transfer them to a housing association for use as affordable housing. The land was subject to restrictive covenants prohibiting the construction of buildings and requiring the land not to be used other than for parking.

Millgate applied to the Upper Tribunal under section 84 of the Law of Property Act 1925, which empowers the Upper Tribunal to modify or discharge a restrictive covenant where certain conditions are met. The application was made under section 84(1)(aa), which provides that a restrictive covenant can be discharged or modified where the restriction:

- impedes a reasonable use of land; and
- either (1) the covenant does not secure any practical benefit of substantial value or advantage to the benefiting party; or (2) is contrary to the public interest; and
- money will be adequate compensation for the disadvantage suffered by the benefiting party as a result of the discharge or modification.

Part of the benefiting land was owned by a charity that was in the process of constructing a children's hospice. The charity objected to the covenants being modified or discharged, primarily on the basis of a loss of privacy and seclusion for the hospice land, which would be partially overlooked by the newly constructed properties.

The Upper Tribunal's decision

The Upper Tribunal found that the covenants secured a practical benefit of substantial value or advantage to the charity, because the construction of housing on the application land would cause the users of the hospice's services to have a more urban, less private, less secluded and less attractive environment than would have been the case if the covenants were observed. Accordingly, the application failed under the first limb.

Under the second limb, however, the Tribunal found that the restrictions were contrary to the public interest, because the housing in this case was social housing intended for occupation by tenants who were highly likely to have been waiting for such accommodation for a very long time. The Tribunal considered that the public interest outweighed all other factors in this case and that it would be an unconscionable waste of resources for those houses to remain empty.

The Upper Tribunal also considered that money would be adequate compensation for the injury caused to the charity. The Upper

Tribunal therefore exercised its discretion to modify the restrictive covenants, on the condition that Millgate pay £150,000 compensation to the charity. This sum was based on an open offer that Millgate had made to the charity, taking into account the likely cost of appropriate landscaping to screen against the loss of amenity, plus a generous allowance for hassle and intangible consequences.

Implications for property developers

This decision is undoubtedly good news for those who develop land for affordable housing. Whilst the Upper Tribunal was at pains to discourage property developers from thinking that it will be easier to secure a modification by going ahead and building in breach of restrictive covenants before applying for a modification or discharge, that is one possible conclusion to draw from this case.

The Upper Tribunal has certainly demonstrated a greater willingness amongst the judiciary to permit property development that is considered to be in the public interest to proceed, even where that involves overriding an innocent third party's private contractual rights. However, every case is dependent on its particular facts and circumstances and it must be noted that the Tribunal retains the discretion to refuse to discharge or modify a covenant if the applicant's conduct is sufficiently egregious and unconscionable.

For these reasons, *Millgate Developments v Smith* should not be viewed as a green light to breach covenants or to proceed without undertaking full due diligence or considering insurance solutions, where appropriate. It does however represent an important shift in the balance of judicial attitudes towards favouring the public interest over private rights. This should enable property developers, affordable housing providers and insurers, to approach restrictive covenants with greater confidence that they are obstacles to be managed, but not complete barriers to development such as to prevent the delivery of much needed housing.

Douglas Rhodes

Senior Associate — Property Litigation

t +44 (0)20 7423 8343
e drhodes@trowers.com

Changes to funding for supported housing from April 2019

At the end of last year, the Government announced its consultation on changes to funding for supported housing. Whilst we know the Government is committed to supported housing, there is a concern that the Government's commitment might be tested to its limits in a time of economic uncertainty. If the changes are not delivered in a way which gives confidence to the sector it will be a huge negative in terms of growth and could lead to the closure of existing services.

Currently, Housing Benefit covers all housing costs for tenants who are eligible and have the right kind of landlord. The new model will introduce a cap above which an application needs to be made for top up funding. The cap is to be set at LHA levels in the same way as for private sector tenants currently. An assessment has been carried out to determine how much Housing Benefit goes towards supported housing and the intention is to put the difference between that and the cap in a ring-fenced fund to be administered by local authorities.

These changes will affect both specialist supported housing providers and housing providers generally, where their rents are above LHA levels; those levels being based on the type of accommodation and its location.

We have already seen the sector react with concern to the proposed changes, particularly in terms of how local authorities will administer the top up funding. The uncertainty surrounding the income streams which can be generated by supported housing developments has caused some providers to reconsider the merits of their current building plans and in some cases, to halt proposed developments. For instance, Hightown Housing Association in Hertfordshire has recently abandoned plans for a supported housing scheme in Aylesbury because of the uncertainty in the sector. The Anchor Trust, Bromford Group, Magenta Living, Hanover Housing Association and Housing & Care 21 have all been vocal in their belief that the proposed changes could cause the sector to grind to halt in terms of new development.

Supported housing providers have been quick to point out that 'downsizing' and matching occupiers with homes of an appropriate size for their needs was a feature of the recent White Paper and yet the effect of the LHA cap could be to reduce the number of properties available for those downsizing, particularly the elderly.

This is the first stage of the consultation so we will keep an eye on developments over the coming months. The Green Paper is due to be published this Spring but the local authority funding allocations won't be known until the Autumn.

Rachel Collins

Partner —— Housing and Regeneration

t +44 (0)20 7423 8608
e rcollins@trowers.com

Changes in the Consumer Code

The Consumer Code for Home Builders applies to any builders who are registered for new home warranties under National House Building Council (NHBC), Premier Guarantee or Local Authority Building Control (LABC) and are also the seller of the homes. The Code's pre-sale and handover requirements apply to home buyers who are the first purchasers of a home and to subsequent purchasers in the two year period after the first legal completion.

Although housing associations are not usually directly caught by the Code (as it is unusual for them to be registered with NHBC or Premier) you may wish to consider applying the Code to your sales process as a matter of best practice and in order to ensure you are meeting the market's expectations.

A new version of the Code has just been published which applies to all reservations signed on or after 1 April 2017 and which implements various changes:

- Marketing the Code – the Code should be made freely available to all customers and some of the changes are to ensure the Code is advertised properly.
- Pre-contract information – the guidance has been amended on management services and fees. Details of all costs that the buyer will incur, and how they are to be calculated must be included in the pre-purchase information given to the home buyer.
- Reservations – home builders are required to give home buyers a reservation agreement that sets out clearly the terms of the reservation of the dwelling. An audit of reservation agreements has shown that there is inconsistency in how the current guidance has been interpreted and the consultation proposes that agreements should clearly set out an itemised breakdown of costs that will be included in the management services and fees that the buyer will be obliged to pay. It should also be clear what proportion of the reservation fee may be retained by the home builder in the event of cancellation.
- Independent Dispute Resolution Scheme – the home buyer is only able to bring a complaint after 56 days have elapsed since first raising it with the home builder (rather than the previous timescale of 3 months) and no later than 12 months after the home builder's final response. Further, the limit for the discretionary award has increased from £250 to £500.
- Vulnerable customer – the new draft includes a new definition of "vulnerable customer" in order that home builders can identify customers especially susceptible to detriment more easily and, therefore, act with an appropriate level of care.

Athina Finding
Senior Associate —— Housing and Regeneration

t +44 (0)20 7423 8173
e afinding@trowers.com

Loan security in a deregulated world

The coming into force of the deregulation provisions of the Housing and Planning Act 2016 should make giving security for social housing loans easier, but there are a few, perhaps less than obvious, consequences that need to be borne in mind.

The headline is that charging of social housing assets will no longer require HCA consent under section 172 of the Housing and Regeneration Act 2008. Although many housing associations have had the benefit of a general consent which covers most types of property charging, there are still many who don't have this consent and for all housing associations there have remained categories of charging where a specific consent application has still been required, for example charges given to support index-linked structures or to finance certain types of on-lending.

But despite this apparent new freedom, there remain a number of practical restrictions on a housing association's ability to charge its social housing assets – these are highlighted in the HCA's recent guidance "Deregulatory measures for social housing regulation from 6 April 2017" (published in February 2017) and include:

- the Regulator's standards, including any current guidance;
- the terms of any grant funding and lending agreements; and
- applicable charity law (for those housing associations which are charitable).

This guidance also makes the point that the Regulator will not be able to give any such consents in the future. This means the HCA will no longer be able to give any consents in relation to charges given at some point in the past. So, for example, if reliance is being placed on an existing charge for which HCA consent cannot be evidenced, it is no longer an option to go back to the HCA and ask them to confirm their consent. For this reason, it is a good idea to keep hold of historic consents. Pre-existing security may be restructured or amounts owed under it may be increased and there may still be a need in the future to be able to evidence that security was validly given in the first place.

Bear in mind also that the Regulator may wish to ask questions and seek assurances after the event. In support of this, a new notification regime will be introduced on 6 April 2017. The detailed requirements for this have just been announced (March 2017). All housing associations will have to provide details of properties charged to support "Non-Standard Finance disposals", which includes sale and leaseback transactions and "other new and novel arrangements". Only housing associations with less than 1,000 social housing units will have to notify details of all charging of social housing in support of finance transactions. In all cases the details required look to be a lot less onerous than on the current application form – for example only the numbers of properties being charged (not the addresses of each) have to be provided.

LSVT properties

Deregulation will also have a potentially significant effect on all properties which were originally transferred by a local authority to a housing association.

Until now, all such properties have only been attributed existing use (EUV-SH) value for loan security purposes given that any disposal of these properties would require the consent of the HCA under section 133 of the Housing Act 1988. This applied not only to the original LSVT stock, but also newbuild properties on stock transfer land.

The requirement for this consent will also be removed as part of deregulation which means that in principle all former LSVT properties could be valued on a market value subject to tenancies (MV-T) basis instead.

This looks to be a point for much discussion between housing associations and their funders in the future, but the practical effect of this change may be limited, at least in the short term, for a number of reasons such as:

- properties may be subject to additional title restrictions meaning that only an EUV-SH valuation basis would be appropriate anyway
- many loan agreements provide that legacy LSVT stock may only be valued on an EUV-SH basis, whatever the underlying title position may be
- in many cases, given the nature and location of these properties, these two valuation bases may provide the same result, but there is an argument (being considered by valuers) of a possible uplift in value for those newbuild properties on stock transfer land.

Early indications are that there would not necessarily be an automatic uplift in value to MVT for LSVT stock already in charge, but that possibly further due diligence may be required by funders.

Valuers have suggested that it may be time for a new definition of EUV-SH, but they query whether this would be accepted by funders. We wait to see how funders will direct valuers and in turn, how valuers will seek to reflect the behaviour of housing associations in the new deregulated world.

Housing associations which are registered charities

For those housing associations which are charities registered with the Charity Commission, a further consequence of deregulation is that the giving of any new security post-6 April will require the provisions of the Charities Act 2011 to be complied with. In order to give security these housing associations must certify that they have been advised

(i) that the proposed funding is necessary in order for the housing association to be able to pursue the proposed course of action

(ii) whether the terms of the proposed funding are reasonable having regard to the status of the housing association; and

(iii) as to the ability of the housing association to repay on the terms proposed.

Neil Waller
Partner —— Banking and finance

t +44 (0)161 838 2032
e nwaller@trowers.com

Melanie Comer
Partner —— Housing and Regeneration

t +44 (0)161 838 2011
e mcomer@trowers.com

Our Think Tank sessions at the CIH Annual Housing Conference

A new mindset for local authority housing delivery?

Tuesday 27 June 11.30 – 12.30pm

The Housing White Paper – Fixing our broken housing market - has given encouragement to local authorities looking to start or indeed intensify their involvement in the direct delivery of new home starts. The government has welcomed the many innovative models that local authorities are using.

In this session Scott Dorling and Rob Beiley of Trowers & Hamlins will look at:

- A number of those models including corporate and contractual joint ventures both with the private sector and with housing associations
- Local housing companies and their numerous permutations

Natalie Elphicke, Chief Executive of the Housing and Finance Institute will give an insight into many of the examples of local authority good practice in increasing housing supply over the last couple of years. John East, Strategic Director for Growth and Homes at the London Borough of Barking and Dagenham, will talk about his council's ambitious plans for delivering thousands of new homes and how this is planned to be achieved.

Driving value through energy partnerships

Wednesday 28 June 9.30 – 10.30am

With the Government's drive for district heating, committed funding for local authority involvement and the forthcoming relaunch of Energy Company Obligation (ECO) funding, it is a good opportunity to look at the potential for establishing longer term partnerships in the sector.

In this session Chris Paul of Trowers & Hamlins will look at:

- Key approaches for joint working, including ESCO and JV opportunities for district heating
- Lessons learned from the last ECO experience
- Challenges presented by more complex energy performance contracts

This session will also feature guest speakers who will share their experiences of successfully delivering these types of long term partnerships.

Housing Delivery Partnerships – breaking down the barriers

Wednesday 28 June 3.30 – 4.30pm

Formal partnerships or joint ventures for housing delivery are recognised by many as an obvious solution but have not been universally taken up – now is the time to challenge why and to consider and promote the benefits that partnerships can offer.

In this session Tonia Secker and Amy Shaw of Trowers & Hamlins will look at:

- How Housing Delivery Partnerships (HDPs) can unlock development?
- HDPs as a tool for wider economic regeneration
- Key drivers and benefits for housing associations, local authorities and the private sector

Tom Shaw, Development Director (South) at The Hyde Group will join the session to share his own perspective and experiences of joint working as a means of aiding housing delivery.

trowers & hamlins

For futher information please contact our offices
or visit our website at **www.trowers.com**

Contact

London

Ian Graham

3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
e igraham@trowers.com

Birmingham

Amanda Hanmore

10 Colmore Row
Birmingham
B3 2QD

t +44 (0)121 214 8850
f +44 (0)121 214 3584
e ahanmore@trowers.com

Exeter

Joseph Acton

The Senate
Southernhay Gardens
Exeter
EX1 1UG

t +44 (0)1392 612600
f +44 (0)1392 612601
e jacton@trowers.com

Manchester

Mike Gaskell

55 Princess Street
Manchester
M2 4EW

t +44 (0)161 838 2000
f +44 (0)161 838 2001
e mgaskell@trowers.com

London — Birmingham — Exeter — Manchester — Abu Dhabi — Bahrain — Dubai — Malaysia — Oman

Produced by Trowers & Hamlins LLP, 3 Bunhill Row, London, EC1Y 8YZ.

Front cover image: Fotolia