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Quarterly Housing Update

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Foreword

A year into my role as editor of Quarterly Housing Update, the role has served as a continual reminder to me of the breadth and depth of knowledge in our real estate teams and perhaps even more importantly the passion of my colleagues to play their part in housing delivery.

Two of this edition's articles exemplify how our work will shape the future of the housing sector. As Emma Burrows explains, Leadership 2025 has brought the so called Rooney Rule firmly into the housing sector's focus and builds on the work that we, and others, have been doing in recent times to improve the diversity of the sector. On a more technical note, the rent setting regime for both housing associations and local authorities forms the cornerstone of our client's development programmes and so understanding how rents are to be based post April 2020 is of critical importance for the financial health of the sector. I am pleased that Ian Davis and Samantha Hall have shared their knowledge of the proposed new Rent Standard (on which consultation has just been commenced by the Regulator of Social Housing).

Housing, of course, remains high up the political agenda, and it will not have escaped your attention that April saw Government join the Labour Party in committing to an end of the s21 regime as we know it (aka no-fault evictions) for possession proceedings under the Assured Shorthold Regime.
The significance of this move cannot be underestimated, and it marks the beginning of the end of a neo-liberal approach to private sector housing that has now been in place for a generation. The ramifications for investors, housing associations and, of course, private sector landlords will be enormous and we will be relaying our thoughts in a future edition.

Finally, we look forward to meeting many of you at the Annual Housing Conference in Manchester in June. We will be running our usual programme of sessions, including the ever popular local authority "clinics" that I run with Ian Doolittle, Tonia Secker and Scott Dorling.

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Housing association board members: payment, taxation and employment rights

We are frequently asked whether board members should be paid, what to pay them, and how to pay them. This article explores some of these issues and also discusses taxation and employment status.

Do board members have employment rights?

This will depend on whether they are paid or not. If they are then they will almost certainly be protected from discrimination under the Equality Act 2010 and from detriment for whistleblowing. They will also be entitled to be paid the National Living Wage (NLW). Paid board members will also be entitled to paid annual leave under the Working Time Regulations. This is because under current legal definitions (which we explore below) they are usually treated as workers.

Currently unpaid board members do not enjoy any employment rights although there is a suggestion that volunteers should have some employment rights in future. It remains to be seen whether this will be the case.

Taxation of payments to board members

Once a decision has been made to pay, it's important to note that all board remuneration is generally taxable as employment income and liable to employee's and employer's NIC. A board member is an office holder for employment tax purposes and so is effectively taxed as an employee in respect of the duties he or she performs as a board member.

Some portfolio board members operate via service companies and often request their board remuneration payments to be made to their company. Rather than making a payment to an individual, the organisation may pay a fee directly to the service company for the services provided, with the payment made gross on the basis that the service company is not itself an employee (and legally cannot be an employee).

It is highly likely, however, that a board member being paid through a service company will be subject to the same tax liability as one who is not, thus defeating the object of being paid in this way, and also increasing the tax non-compliance risks for the employer organisation. First there's the issue of the need for a personal contract as a board member to consider, and in addition there's the Supreme Court's decision last year in Pimlico Plumbers Ltd and Mullins v Smith to take into account.

Personal contracts

The NHF Code of Governance states that it is good practice for a board member to have a personal contract and that this contract should set out the requirements of the role.

Meanwhile, the UK Corporate Governance Code states that the responsibilities of the board should be clear, set out in writing and made publicly available. Remuneration is linked explicitly to the time commitment and responsibilities of the role. The Corporate Code is supplemented by the FRC Guidance on Board effectiveness which makes reference to letters of appointment for non-executive directors and states that these letters should set out the expected time commitment.

Generally then, board members will be expected to have personal contracts clearly setting out their responsibilities. In other words, they will be expected to provide personal service. This means that any service company set up by the board member will not just be providing services in the way that any consultancy would, but the services of a specific individual, namely the board member.

The need for board members to have personal contracts means that it will be difficult for them to avoid the payment of tax (and even more so for the employer organisation to avoid having to deduct PAYE income tax and NICs at source), and this is reinforced by the Supreme Court's decision in Pimlico Plumbers.

Implications of the obligation to provide personal service

If board members provide personal service then it will be difficult to argue that any payment that they receive can be paid without the deduction of tax. This is particularly so in the light of the Supreme Court's decision in Pimlico Plumbers.

In Pimlico Plumbers the Court held that Mr Smith, a purportedly self-employed plumber, was in fact a "worker" with limited employment rights. This was because he worked under a contract whereby he undertook to do, or perform personally, work or services for Pimlico Plumbers. The Supreme Court upheld the tribunal's initial decision that the dominant feature of Mr Smith's contract was an obligation of personal performance. It found that the terms of the contract were clearly directed at performance by Mr Smith personally and, although there was a limited right to substitute (i.e. sub-contract someone to do his job), the Court found it to be so insignificant as not to be worthy of recognition in the written terms.

The dominant purpose of a board member's agreement will be an obligation of personal performance, particularly if roles, duties, time commitments and remuneration are mentioned.

Review your payment mechanisms

It is worth explaining to those board members who are currently paid via their service companies, or who want to set up this arrangement, that there is unlikely to be any tax advantage. Housing associations should consider how they should be paying their board members and what obligations they owe to HMRC.

Another issue to bear in mind when carrying out a review is the taxation of expenses for board members. As more board members carry out work from home, and even attend board meetings remotely, this gives rise to queries about the payment of travel and related expenses and ensuring tax compliance for the organisation.

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Removal of the HRA debt cap – is there still a role for the Local Housing Company model?

With the removal of the Housing Revenue Account (HRA) debt cap for local authorities (something that Scott Dorling and Ian Doolittle wrote about in the last edition of Quarterly Housing Update), questions have been raised about the longevity of the Local Housing Company (LHC) model, not least because the LHC model was devised to a large extent, as a means of allowing local authorities to develop new housing outside of the constraints of the HRA regime.

Whilst it is clear that the removal of the debt cap will make some LHCs moribund, recent months have demonstrated to us that there remains real interest in the LHC model and that for those authorities that have established (or are in the process of establishing) LHCs there are significant development and acquisition projects that will still be delivered by LHCs and notwithstanding the removal of the HRA debt cap.

There are three principal models that seem to be emerging for LHCs.

1. Market sale model

A significant number of LHCs remain solely focused on the delivery of housing for market sale, either as a means of producing a financial return for the local authority in its own right or (perhaps more frequently) as a means of providing a degree of cross subsidy for affordable housing elsewhere on a development.

For some authorities with a focus on the generation of capital receipts from development for sale, the LHC has morphed into the entry point for local authorities into joint venture structures (either with housebuilders or housing associations) and this is a trend that we expect to see continued.

2. Market rent model

There remain many LHCs whose remit remains to focus on a market rent product, especially in the context of the need for local authorities to become financially self-sufficient from next year (and for most local authorities the revenue generation of a housing company providing a rental product is more important than producing capital receipts via a sales programme).

3. The "squeezed middle" model

Perhaps the most interesting model is the emergence of an LHC rental model which looks to address unmet housing need which sits between the mainstream general needs and a market rent product (in other words what politicians might well describe as the “squeezed middle”).

This might be exemplified in some areas by a focus on key worker accommodation; elsewhere it might be focused on workers in low paid (perhaps unstable) employment but in either case, focused on people who cannot afford a market rent but who not sufficiently in “need” to find themselves close to the allocation of “traditional” council housing or nomination to a housing association property.

Some groundbreaking work is likely to emerge here as authorities look to develop flexible rent products and use the freedoms of the company structure to enable the implementation of a “living rent” product. The use of a company structure for this sort of approach is something that is likely to become ever more important with the advent of the new Rent Standard and for the first time the regulation of local authority rent by the Regulator of Social Housing and with that, difficulty in being able to operate an intermediate rent product within a council's HRA.

New approach

It may come to pass that one of the (perhaps unintended) consequences of the removal of the HRA debt cap will be an (arguably much needed) greater clarity of purpose for the LHC model as they no longer seek to be "all things to all people". In particular authorities that have retained stock, whose focus is on delivering housing for a different client group than mainstream general needs affordable housing.

We are likely to see local authorities running a "twin track" approach to housing development, with affordable housing delivery once more being delivered through the HRA and for that development to sit alongside "something else" in an LHC structure.

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Japanese Knotweed: "The rhizome that launched a thousand requisitions"

"A capital plant for the small town garden" Upon reading Victorian botanist John Wood's appraisal of the newly imported Fallopia Japonica, I can imagine the shrieks of bitter laughter erupting from 21st century conveyancers and homeowners alike.

First imported to the United Kingdom in the nineteenth century, Japanese Knotweed has established itself as Britain's most invasive plant. The weed itself has a rhizome system that enables it to rapidly colonise its surroundings and take advantage of various media such as waterways to disperse plant fragments for miles. Dying back in winter, the plant produces bamboo-like stems in summer that can exceed two metres in height whilst capable of growing ten centimetres a day in summer. Waterside Japanese Knotweed can have a devastating effect on flood management by damaging concrete barriers and other materials used to construct the flood defences. The plant is also infamous for its ability to damage buildings' structures, leading to rejection by mortgage lenders and costly treatment programmes to avoid potential criminal liability of incorrect disposal or the compensation claims for permitting its proliferation.

Upon acquiring a property afflicted by the plant, the purchaser becomes vulnerable under the principles established in Leakey v The National Trust (1981) in that a landowner has a duty in relation to foreseeable hazards present on their land with the potential to affect their neighbours. The Court of Appeal underlined the requirement for a pre-emptive fulfilment of this responsibility in Network Rail Infrastructure Ltd v Williams and another [2018] (the background to which will be explored later in this article). In this case, the Court rejected the notion that, whilst an injunction could be obtained against re-infestation, the claimant could only require the defendant to remove the infestation from their own land and were unable to require its removal from the defendant's land. Instead, the Court indicated that an occupier could be liable for failing to remove the hazard from their own land if it was reasonably foreseeable that it would cause damage to neighbours.

However, years of attempts at biological and chemical control have shown how profoundly difficult, and some argue impossible, it is, to eradicate the weed completely. Any treatments or disposal methods are expensive and take place under strict legal guidelines which require the plant material to be disposed of under controlled circumstances at an authorised landfill or incinerator. The treatments themselves can introduce new problems to the environment, particularly in the case of aggressive herbicides such as glyphosate. The conveyancer and potential purchaser must also bear in mind that where herbicidal treatment methods are used, the process can take years to complete, with the infested land being unusable during the process. Due to the plant's rhizome structure, it is also important to note that the radius of the infestation below the ground can be far greater than is indicated by the surface foliage, with rhizomes extending for up to seven metres laterally and to a depth of three metres.

If one is in the position of owning a property to which knotweed has spread from neighbouring land and wishes to make a claim to facilitate the costly remediation process, it is vital to examine the results of Williams v Network Rail Infrastructure Ltd [2017]. Here the freehold owners of two adjoining bungalows found their properties infested by knotweed which had spread from the adjoining railway embankment. Both claimants pursued a claim for private nuisance in the county court but one did so through the argument of encroachment whilst the other argued that the presence of the plant interfered with the quiet enjoyment and amenity value of the site as it negatively impacted the owner's ability to sell the property at market value. The presence argument succeeded but the encroachment argument failed due to the crucial fact that, whilst the plant had evidently spread onto the claimant's land, there was no evidence of any damage having occurred; a requirement under the root encroachment test established in Delaware Mansions v Westminster City Council [2001]. On appeal to the Court of Appeal upheld the County Court's decision but added that physical damage was not always a requirement.

Although the Property Information Form (Form TA06) questions a seller as to the presence of knotweed on a property, this can assume a level of horticultural knowledge that the seller lacks and, as is pointed out by the Royal Horticultural Society's entry on the plant, it can be confused with other species including Himalayan honeysuckle. Additionally, the plant's largely bland foliage means that the presence of an infestation can be masked, particularly on larger properties with surrounding undergrowth, in contrast to other invasive species such as Himalayan balsam or Rhododendron ponticum that are colourful and distinctive. Furthermore, in winter when the knotweed dies back, it is less easy to identify by the uninitiated. As a result of this, there are a small number of indicators as to whether the area is particularly at risk. The first and most important is the presence of a railway line. Aside from the plant's decorative properties, Victorian engineers purportedly used the plant to stabilise railway embankments with the rolling carriages providing the perfect medium to transport the plant fragments further afield.

In any due diligence assessment where the presence of Japanese Knotweed is established, before considering potential indemnities, it is crucial to establish the range and source of the infestation due to the possibility of an indemnity provider including a proviso resulting in their guarantee of treatment becoming void if the plant is reintroduced through the uncontrolled proliferation from neighbouring land. Furthermore, If offered a specialist contractor's insurance-backed guarantee in respect of treatment or removal works, always read the small print to ascertain the extent of the guarantee and the circumstances in which it can be called upon, as such products are rarely the panacea their promoters would advocate.

Although not a citable reference, organisations, including the BBC, have generated Invasive Plant Species Tracker apps that overlay a UK map with recorded sightings, and are worth a brief examination, if only as an indicator of the scale of the nation-wide infestation.

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Social housing rents from April 2020

The Regulator of Social Housing is consulting on the new rent standard to apply from 2020 which is based on the direction from the Secretary of State for Housing, Communities and Local Government and to government's rent policy which fills in additional details.

Like the 2015 Rent Standard the draft 2020 Rent Standard requires RPs to comply with the direction and (new) rent policy and this sets out specific expectations.

The consultation is focused only on the extent to which the draft Rent Standard reflects the direction so we do not anticipate material changes.

Application

The new Rent Standard will apply, as in previous years, to low cost rental accommodation unless it is specifically exempted or the tenant qualifies as a 'high income social tenant' (where the income thresholds remain at £60,000 per tax year).

Generally, applicable exemptions will be shared ownership low cost rental accommodation, intermediate rent accommodation, specialised supported housing, student accommodation, PFI social housing, temporary social housing and care homes.

All of these categories have specific definitions which must be checked before assuming a property is exempt from the regulatory requirements. An ability remains for the Regulator to exempt an RP where compliance would jeopardise the provider's financial viability.

A significant change in the upcoming standard, is that due to the ongoing roll-out of universal credit and the consequent roll-back of the effect of 'limit rents' and the related subsidy system, for the first time it will apply to local authorities. Local authority landlords will therefore need to ensure they meet the standard's requirements unless exempt under the categories listed above, or if the accommodation qualifies as 'relevant local authority accommodation'. What relevant 'local authority accommodation' is hasn't yet been defined, however, the Policy Statement indicates that it is accommodation which the Secretary of State has agreed is exempt. The process for obtaining exemption is expected to follow.

Rent setting in the year following the end of the statutory rent reduction period

For both affordable and social rented properties, the maximum weekly rent for an existing tenant must be capped at the '2020 limit'. Broadly, the 2020 limit is calculated by taking the average weekly rent payable in the final 'relevant year' under the rent reduction legislation, and increasing it by CPI +1%. An existing tenant who moves home is not caught by the 2020 limit provisions.

Social rents

Rent setting where the 2020 limit does not apply – The maximum social rent for a tenant granted a tenancy for accommodation for the first time is formula rent. Formula rent calculations should follow the method set out in the Policy Statement, which permits flexibility levels of up to 5% for general needs housing and 10% for qualifying supported housing. Rent caps continue to apply.

Rent increases – Annual rent increases are capped at CPI +1%, other than where the tenant's rent exceeds the applicable flexibility level, in which case the maximum increase is limited to CPI.

Affordable rents

Rent setting where the 2020 limit does not apply – The maximum rent (inclusive of service charges) for a tenant under a new tenancy is 80% of market level, unless this would result in a rent below formula level, in which case the maximum is formula. A 'new tenancy' in this context is one that is granted to a tenant in relation to accommodation for the first time.

Rent increases – Annual rent increases at affordable rent properties are capped at CPI +1% where a property is re-let to the existing tenant this cap will apply to the new rent.

Intermediate rents

Some intermediate rents could find themselves caught by the new Rent Standard. This is because, in contrast to previous treatments of this rent category, the 'intermediate rent' exemption is defined. As such, in order to be exempt from the rent standard from April 2020, an intermediate property must satisfy either (1), (2) or (3) below:

1. The accommodation was built or acquired by the private registered provider without public assistance;

1.1 is provided on an assured shorthold tenancy (other than a probationary tenancy) or licence, either to a tenant who is not nominated by a local housing authority under section159(2)(c) of the Housing Act 1996, or

1.2 to a tenant nominated under section 159(2)(c) where any conditions set by the local housing authority regarding the circumstances in which the registered provider may grant a tenancy of intermediate rent accommodation are satisfied in respect of that accommodation, has not previously been let on a social rent basis, and is not affordable rent housing.

2. The accommodation is low cost rental accommodation which was funded wholly or in part by public assistance under a programme identified by the Regulator as an intermediate rent accommodation enabling programme, and any conditions under that programme regarding the circumstances in which the accommodation may be let as intermediate rent accommodation are satisfied.

3. The accommodation is key worker housing. So long as one of the three tests is satisfied, then the rent standard falls away (although bear in mind other external considerations, such as grant conditions, Section 106 Agreements, policies or business plan assumptions which need lender approval may apply). Notably, the first test only applies to private registered providers, and so would be unavailable to local authorities.

Changing tenure

The draft Rent Standard makes it clear that RPs are not free to convert affordable or social rent properties to market rent (except for high income social tenants) or to intermediate rent. Social rent properties cannot be converted to affordable rent without inclusion in a housing supply delivery agreement with Homes England of the Greater London Authority or certain local authority properties. This means that RPs considering active asset management will need to continue transferring or leasing relevant properties to a non RP as part of the process.

Conclusion

The draft Rent Standard reflects the direction and rent policy and so there are few surprises, but a few helpful clarifications. RPs will now be able to plan for their rent increases 2020 onwards.

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The Rooney Rule and positive action

The Rooney Rule was first taken up by the National Football League (NFL) after a diversity initiative led by Mr Dan Rooney in 2003. It was adopted by the Football Association (FA) last year in attempts to boost diversity in the game. Now, when recruiting for senior coaching positions, the FA must interview a BME applicant.

Leadership 2025, which is an intensive 9-month leadership development programme available to senior leaders from BME backgrounds working in the housing sector, has promoted the Rooney Rule and several housing associations have adopted it. There is some evidence that adopting it from the board down does change the way an organisation approach diversity.

What are the differences between positive action and positive discrimination? Positive discrimination, where one person is treated more favourably than another because they have a "protected characteristic" (such as sex, race or sexual orientation), is generally prohibited under the Equality Act 2010, unless an occupational requirement applies. Positive action is different. Not just the adoption of the Rooney Rule but the whole of the Leadership 2025 programme is based on positive action, and it is lawful.

The law contains provisions concerning lawful positive action. These are designed to apply where persons who share a protected characteristic suffer a disadvantage, have particular needs or are disproportionately under-represented. An employer can take any action which is a proportionate means of achieving the aim. The aim must be to enable or encourage people who share the protected characteristic to overcome or minimise the disadvantage identified, to meet the needs identified, or to enable or encourage people who share the protected characteristic to participate in the activity in which they are under-represented.

Positive action in recruitment and promotion

As well as taking general positive action, housing providers can take positive action in recruitment and promotion. This applies where an employer reasonably thinks that people who share a protected characteristic suffer a disadvantage connected to that characteristic, or where participation in an activity by people who share a protected characteristic is disproportionately low. So, it can use the Rooney Rule to improve the diversity of colleagues. Such action is only allowed if individuals are equally qualified for a position, the employer does not have a policy of treating people who share the protected characteristic more favourably in connection with recruitment or promotion than people who do not share it, and the action is a proportionate means of achieving a legitimate aim.

Proportionate action

What is considered proportionate will depend on the seriousness of the disadvantage, the extremity of the need or under-representation and how else you can counter such need.

Housing providers should consider whether the action is appropriate to achieve the stated aim. They will then need to consider whether the action is reasonably necessary to achieve the aim, or whether it would be possible to achieve the aim as effectively by other means that are less likely to result in less favourable treatment of others.

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Anti-money laundering in the housing sector

The property and housing sectors have traditionally been viewed as particularly vulnerable to money laundering. This has continued in 2019, with Countrywide Estate Agents recently being fined £215,000 by HMRC for money laundering breaches.

This is of particular importance to housing associations for two reasons. Firstly, most housing associations are subject to regulation by HMRC for anti-money laundering (AML) purposes under the Money Laundering Regulations 2017 because they carry out estate agency business. That is because when a housing association re-sells a shared ownership property, it usually acts as the estate agent on behalf of the co-owner.

The fine imposed on Countrywide was part of a week-long crack down on money laundering in the property industry. Whilst housing associations may have lower money laundering risks than commercial estate agents, it is important for housing associations to have identified which of their active fees are regulated under the Money Laundering Regulations 2017. Estate agency work is one type of regulated business. Another is lending, which can include associations giving equity loans or extended payment terms for service charges. Having identified their regulated activities, associations then need to ensure that they have implemented the new AML structures and processes imposed by the Money Laundering Regulations 2017. Those regulations made significant changes to their predecessor legislation, the Money Laundering Regulations 2007, and so a thorough review will be necessary if this has not already been carried out.

Secondly, housing associations are likely to carry out activities which, although not regulated under the Money Laundering Regulations 2017, nevertheless give rise to heightened money laundering risks. Higher risk activities include tenants exercising right to buy and right to acquire, in particular where purchases are funded by large deposits, staircasing, especially where a tenant acquires a small initial interest but rapidly staircases to own a more significant proportion, overpayments to sinking funds which are then requested to be refunded, lump sum payment of rental arrears, and receiving cash.

While these activities are not regulated under the Money Laundering Regulations 2017, they nevertheless give rise to money laundering risks, in many cases can be more serious than the regulated activities. Those risks can include members of staff committing the substantive money laundering offences under the Proceeds of Crime Act 2002. Criminal investigations tend to be expensive, time consuming and damaging to an organisation's reputation with regulators and the public alike.

For these reasons, best practice in the housing sector is moving towards the voluntary extension of AML processes to non-regulated higher risk activities such as those mentioned above. This usually involves updating policies, putting in place procedures which are effective and streamlined and training relevant staff to identify the risks and react accordingly. The typical involves working with associations' sales, finance and governance teams to ensure that processes are agreed and there is an appreciation of the indicators that should be reviewed as red flags.

The author has recently updated the National Housing Federation's sector guidance on AML.

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Residential leasehold portfolios – enfranchisement and reform

The problem

A neglected or unknown residential leasehold portfolio is a problem that grows over time. Diminishing lease terms affect occupational tenants as well as the value of the property as an asset or as security for borrowing. Although there is an increasing awareness of enfranchisement and lease extension rights, many housing providers are not monitoring or addressing their own leasehold portfolios.

It is good practice for providers to have an informative database of all property held as leaseholder, be it an estate, block or single flat and should form part of an assets register. The most important elements of a lease to be aware of are the term, demise and rent, which directly influence the value of the property and the cost to extend the lease. This information is readily available at the Land Registry with only reference to the registered title, so the initial preparation of such a database can be less daunting than first thought.

The shorter the lease, the less the property is worth. Together with an increasing ground rent, a short lease can become expensive to extend. However the problems are not a simple as that; a short lease or diminishing term has more wide ranging effects:

- Any extension of an under-tenants lease is limited to the term the housing provider holds. This causes problems for tenants on obtaining a mortgage, refinancing, sale and value, of which can cause reputational damage.
- Where the lease drops below 80 years an additional value is payable on a statutory extension, known as marriage value. This can in some cases double the premium payable.
- A provider's own ability to charge or refinance the property will be limited.

Housing providers are therefore encouraged to have a good handle of what leasehold properties they own, which properties are owned on short leases and what rights are available to address the issues.

The solutions

Housing providers as leaseholder have the same rights as any residential individual leaseholder, subject to qualification criteria, being:

- Statutory lease extension of a flat for an additional 90 years at a peppercorn rent, whether held under an individual lease, block or estate headlease (where there is no long lease under tenant).
- Collective enfranchisement rights for the freehold of a building containing flats, exercised together with other leaseholders in the building.
- Statutory enfranchisement claim to the freehold of a house or lease extension.
- Claims for the freehold or lease extension where the freeholder is absent.

It is essential to be aware of these rights, how they apply to a portfolio and to exercise them when needed. Where multiple individual leasehold properties are owned with the same landlord, group claims can be made in order to save time and costs.

Benefits of a healthy leasehold portfolio

In exercising these rights not only is an extended lease term or freehold obtained, a new lending opportunity arises on the newly invigorated asset. Therefore a leasehold portfolio that on the face of it looks like are large problem, can become a new source of financing.

The crucial element is to identify the leasehold properties most at risk, in terms of extending the term or buying the freehold. Where leases approaching 80 years are identified, notices can be served freezing the valuation date so additional marriage value not payable to the landlord as part of the premium.

Where under tenants seek to re-mortgage, extend their own underlease or need to vary terms, with a longer lease or freehold interest housing providers can be more flexible in what they can offer to under tenants. Where the freehold has been obtained there may also present the opportunity of extending the property into roof, basement or garden space or perhaps adding a residential unit to the property.

Leasehold reform

The Law Commission has recently concluded a consultation on dramatic reforms to enfranchisement rights, the objective of which is to make the statutory rights easier and cheaper to exercise for leaseholders. Housing providers will be in position to take advantage of these reforms as leaseholders by making less costly claims for longer leases and freeholds.

In addition to enfranchisement the law commission are also consulting on ground rent, right to manage and common hold with the aim of overhauling the entire leasehold system of ownership.

The intentions of the reforms should create a cheaper system of re-invigorating leasehold portfolios, however the timing of such reforms coming into law is far from certain and short leases should still be addressed when at risk and where possible before leases drop below 80 years remaining.

Whilst there is a welcome proposal for leaseholders, housing providers in their landlord seat may equally have cause for concern. A cheaper system for leaseholders means the landlords will lose out in the recoverable premiums due from leaseholders. In addition there are suggestions of limited costs recovery from leaseholders. A review of the general portfolio of stock can reveal where there may be risks of losing value. The key point to loss of value is in the valuation methodology, currently based on the loss to the landlord or ground rent, the reversion and marriage value. Suggestions of a ground rent multiplier or percentage of capital value for lease extension and freehold claims would substantially devalue assets across the country.

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Sustainable finance

Since the World Bank issued the first 'green' bond in 2008 (in response to a request from a group of Swedish pension funds who wanted to invest in projects which help combat climate change), there has been a fundamental shift in the bond market.

Investors now understand that the power they have to support the initiatives which their shareholders care about does not have to undermine returns. In fact, investing in an issuer with good sustainability practices will generally be a better investment. That first World Bank bond sparked a revolution in the bond market, one which housing providers can and should be taking advantage of.

In 2018 US$125,000,000 of new green, social and sustainability bonds were issued. Ten years after that first 'green' bond, the issuing of green, social and sustainability bonds is no longer the preserve of governments, agencies and supra-nationals. Companies and financial institutions who are either looking to raise money to invest in, or support their own, projects which have an environmental, social or governance (ESG) impact have recognised the value of issuing, and investing in, such bonds.

As the recent issue by the Loan Market Association of both 'green' loan principles and 'sustainable' loan principles shows the loan market is now catching up, lenders increasingly see the power and benefit of lending to borrowers who are looking to raise finance for projects which can demonstrate an ESG impact. Refinitiv reported global green and ESG loan volumes of nearly $60 million in 2018 and this market is only likely to grow.

Making sustainable finance available is good business and evidencing the ESG impact is increasingly important for businesses both for reputational reasons and to attract good quality shareholder and stakeholder investment.

So what is sustainable finance?

Very simply, it is finance for sustainable development. Sustainable development is defined by the United Nations (the UN) as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

To achieve sustainable development, the UN recognises that it is crucial to harmonise three core elements: economic growth, social inclusion and environmental protection. Each of the 17 Sustainable Development Goals (SDGs) set out in the 2030 Agenda for Sustainable Development broadly fits within one of these categories. The SDGs include:

- the eradication of poverty and hunger;
- access to affordable clean energy;
- investment in infrastructure and in cities which provide opportunities for all, with access to basic services, energy, housing, transportation and more; and
- action on climate change to action to protect our environment.

Why has sustainable finance taken off?

Growing public awareness of the challenges which the SDG's aim to address and an increased commitment from government and business in the UK to meet these challenges coupled with the realisation that individuals (through technology and shareholder activism), as well as businesses and government, can make a difference, has resulted in an increase in investment in projects which have an ESG impact.

The desire (and ability) of individuals to invest in projects which have a positive environmental and/or social impact has driven the bond and loan markets to develop products which support projects that meet these aspirations. Add to this:

- the recent changes to the UK Corporate Governance Code putting the onus on directors to promote the long term sustainable success of their companies and;
- the forthcoming changes to pension trustees fiduciary duties which will require pension scheme trustees to consider ESG factors when making investment decisions

and the result is that housing providers are well placed to take advantage of both increased funding availability and the incentives being offered by institutions who want to deploy the funds they have available in a way which meets their ESG aims and those of their stakeholders.

Many lenders have committed to making loans available to borrowers who are prepared to agree to meet specific, measurable environmental targets. In return, borrowers will receive margin discounts and other benefits. Those same institutions, as well as alternative lenders (such as pension funds) are also looking to deploy funding through the capital markets. So now is the time to consider whether adhering to the Loan Market Association's 'green' or 'sustainable' loan principles or the International Capital Market Association's green bond principles, social bond principles or sustainable bond guidelines could give you an edge when seeking to raise funding. All of them are designed to give certainty to lenders and investors that funds will be used for projects that will have an impact on ESG issues,

Why is sustainable finance an opportunity for housing providers?

Given that many of the principles articulated by the SDG's are already at the heart of the activities of housing providers there has never been a better time to seek long or short term finance for projects which will have an ESG impact. Given how uniquely placed housing providers are to take advantage of the availability of such bonds and the potential pricing benefit, this is an avenue that housing providers should be exploring with their treasury teams.

When Danone issued its first €300 million social bond in March 2018, the bond (which was the first to follow ICMA's Social bond principles) was oversubscribed 2.3 times with demand for the bond exceeding €700 million. Likewise MorHomes recent £250 million bond issues, which also follows ICMA's social bond principles, and carries a 3.4% coupon which is paid half yearly, was almost twice oversubscribed.

We are seeing more and more "green" financing products offered (not just in the capital markets) as the traditional funders to the social housing finance sector seek to capitalise on the desire of investors to invest in safe, sustainable assets with a social impact.

It is easy to see that, market participants are responding to the demands of their stakeholders. They want to be able to demonstrate their commitment to supporting sustainable businesses and projects which have an ESG impact. The measures being implemented by government which, despite not having the force of law, are designed to incentivise businesses to focus on these issues. So you have a perfect storm of opportunities which housing providers should be considering taking advantage of. What is the sector waiting for?

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Q&A on the Tenant Fees Act 2019

The changes introduced by the Tenant Fees Act 2019 were promised in the Autumn Statement in 2016. The legislation was introduced into Parliament last May. Here is what you need to know:

Q: When does the Tenant Fees Act 2019 (the Act) come into force?

A: 1 June 2019. The Act will apply to all tenancies signed on, or after, this date.

Q: Who will be affected by the Act?

A: All landlords, including housing association, will be prohibited from charging tenants fees for anything which is not categorised as a "permitted payment" in Schedule 1 of the Act.

The ban applies to all assured shorthold tenancies, student accommodation and most licences. It does not apply to assured non-shorthold tenancies or where a property is let to a company.

Q: Does the Act apply in Wales?

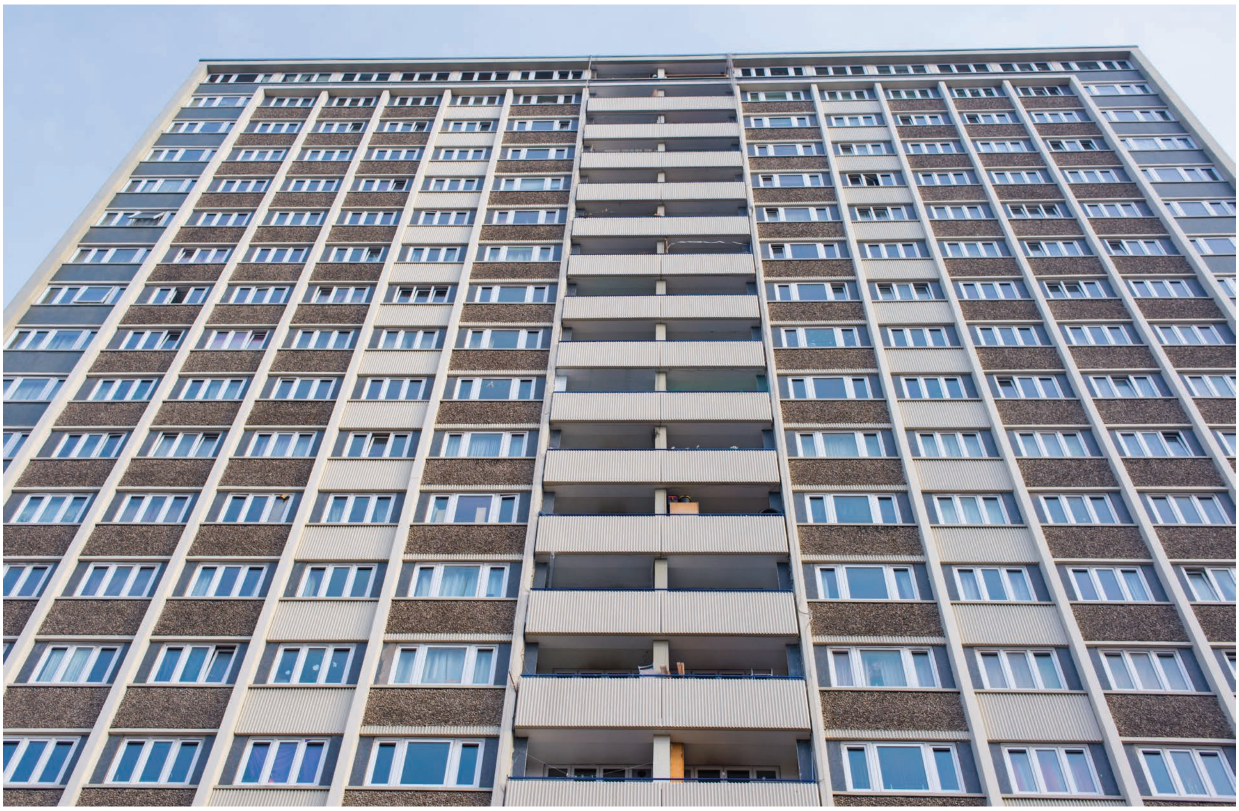
A: The Act only applies in England. Scotland introduced a similar ban in 2012, Wales is considering introducing a ban and in Northern Ireland, fees are still permitted.

Q: Why was the Act introduced?

A: To minimise the additional costs tenants have to pay especially when entering into a tenancy for the first time. It is estimated the ban will save tenants up to £700 for each move.

Q: Does the Act apply to current tenancies?

A: No, the Act will only apply to tenancies granted before 1 June 2019 from 31 May 2020. This means that landlords and letting agents can continue charging fees but only where they are required to be paid under the terms of the tenancy agreement. From 1 June 2020, the ban will apply to all tenancies regardless of when they were granted.



Q: What is a permitted payment?

A: Details of these are contained in Schedule 1 of the Act and are:

- Rent;
- Tenancy deposits. These will be capped at five weeks' rent if the annual rent is less than £50,000 and six weeks rent if the annual rent is more than £50,000. Any excess will be considered to be a prohibited payment;
- Holding deposits will be capped at one week's rent. Any excess will be a prohibited payment;
- Payments in the event of default. Under section 4 of Schedule 1 of the Act, a "relevant default" for the purposes of the Act are:

  i. Loss of a key or other security device;

  ii. Where a tenant fails to pay rent after 14 days of it being due. Section 4(5) of Schedule 1 states the annual percentage rate that can be charged is 3% above the Bank of England base rate;

  iii. Payment for variation, assignment or creation of a new contract between the parties. Limited to £50 or the "reasonable" costs of the landlord/ letting agent in connection with undertaking such work;

  iv. Payment on termination of a tenancy at a tenant's request before the expiry of a fixed term or without giving a period of notice where the tenancy is periodic;

  v. Payments in respect of council tax, television licence or utilities. Utilities under the Act are electric, gas or other fuel or water or sewerage only; and

  vi. Payments in respect of communication services which are defined as telephone (other than a mobile), internet, cable or satellite television. Charges should be reasonable as any excess will be treated as a prohibited payment

Q: What will be the impact of the Act?

A: It is predicted rents will increase to compensate for the ban. However, landlords need to keep their rents at a level to ensure they are competitive to avoid long void times. Letting agents will need to decide whether to increase their fees to landlords. If they do it could make them less competitive and the lettings market could contract as a result.

Q: What are the implications of breach?

A: Trading Standards has enforcement powers. Action can be taken against any landlord/letting agent who breaches the Act which could lead to a fine of up to £5,000 in respect of a first breach.

If there is a further breach within five years, Trading Standards can prosecute in the Magistrate's Court alternatively; they can impose a fine of up to £30,000. Local authorities are able to keep the fines and may be an incentive for robust enforcement. A fine will not amount to a conviction.

Q: Where can I obtain further information?

A: The Government has introduced statutory guidance for enforcement authorities, guidance for landlords, letting agents and tenants, together with a glossary of terms. This documentation can be found at www.gov.uk.

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