trowers & hamlins

Publications —— Summer 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

1 ———— Foreword
2 ———— The off-site trap (and how to avoid it)
4 ———— Unfair ground rents and leasehold houses - should it be buyer beware or are they simply a bad idea for all?
6 ———— Developer contributions: reform with more acronyms
7 ———— Deregulation and the effect on charitable companies
8 ———— A build to rent arms race?
10 ———— Further updates to the JCT 2016 contract suite
12 ———— The Renewable Heat Incentive: A reformed scheme
14 ———— Right to manage – understanding its intended purpose
16 ———— Neutral dress codes and religious discrimination
18 ———— FCA compliance requirements
19 ———— Vendor fraud – still a risk despite a shift in the landscape
20 ———— How to deal with a statutory demand

Foreword

It seems only right to start my foreword to this edition with the terrible tragedy at Grenfell Tower. How and why it happened are questions to be addressed by the public inquiry. Suffice to say for now that, like all of you, we were horrified by the scenes relayed through the media and our hearts go out to all those who have lost loved ones and friends.

One wonders what sort of housing policy we are going to see pursued by the Conservative minority government. Will the levy on higher value Council properties come forward? As we know it is controversial and the implementation date had already been pushed back before the general election. If it goes, what of the voluntary right to buy which it is supposed to fund?

We have a new minister whose CV does not suggest a lot of previous housing knowledge. He follows Gavin Barwell who was I think, generally respected as someone who understood the issues and was interested in what the sector had to say. He will be a hard act to follow. We shall have to see whether he retains some influence through his new role at Number 10.

The focus in the media at present on the shortage of affordable homes and, in particular, social rented homes may mean the Government feels forced to act and to shift some of the current investment pot to such homes and away from affordable rent and home ownership. Sadiq Khan's housing plan for London is to be published in August. It would be no surprise to see in that a much greater emphasis on genuinely affordable rented housing.

The drive for more local authority involvement in housing delivery is very clear. We are seeing increasing levels of interest in local housing companies and in joint ventures between local authorities and the private sector, whether that be housing associations or developers. The move more generally to joint venture working is noticeable. Many of our housing association clients are tackling larger sites than they have done historically, often with significant amounts of market sale so sharing risk and funding support is very attractive.

I'm sure you will have noticed reference in the press recently to more and more new investment vehicles emerging, including Real Estate Investment Trusts or REITS, which have struggled to gain traction in the past in the housing sector. The level of interest from investors is greater than I have seen previously. The willingness of some to take on development risk and invest directly in all forms of rented housing has certainly moved things along. A number of such investors have gone as far as forming their own for profit registered providers. Regulation has not put them off. The attraction of long term, stable if unspectacular, returns has outweighed any concerns they might have had previously.

Ian Graham
Partner —— Housing and Regeneration

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

The off-site trap (and how to avoid it)

Modular housing has existed for many years but it still remains relatively unpopular in the UK market, which is generally wedded to traditional construction techniques. Perhaps due to the potential for improved energy efficiency, shorter construction programmes, lower labour demands and greater consistencies in the final product, this approach to project delivery is again gaining greater momentum and interest in the market.

So what are the key differences that developers (including those in the public sector) need to think about when considering delivery of modular housing rather than using traditional construction processes? Here are five things to think about.

1. Selecting a site and finding a contractor

Very few developers approach the contractor market in a way that encourages the use of off-site construction facilities. Developers fear that they are limiting the number of bidders who tender for the project when modular housing is required. This is not helped by the fact that modular housing has historically been considered to be more expensive to deliver than traditional housing, although this assumption is being challenged as technology improves and off-site construction becomes more prevalent.

It is important that developers understand the potential benefits and detriments of modular housing from a practical perspective and identify sites that may benefit from off-site construction, either for specific materials or the whole build. Approaching contractors at an earlier stage of the design process to procure a modular solution is something that many developers will consider a leap of faith.

The shorter construction periods with modular housing may also be appropriate for difficult sites where there are problems with access or a greater potential to cause nuisance. As the construction of modular developments can be much simpler, it can offer opportunities for smaller contractors to tender for larger projects and can enable a quicker, cheaper single-stage procurement. In short, modular housing may provide an opportunity for developers to build a property portfolio for sale or rent in a relatively short time scale on sites that may not be appropriate for traditional development.

2. Funding and insurance

The banking and insurance sectors do not offer a particularly extensive product range for modular housing and obtaining funding or insurance for modular houses can be challenging.

A number of organisations have developed products to give insurers and lenders comfort that off-site construction is a viable and secure process for delivering construction projects. For example the Buildoffsite Property Assurance Scheme (BOPAS) provides certificates assuring lenders of the quality and durability of key components. Schemes like these should help to build confidence in modular construction, allowing lenders and insurers to offer a wider range of competitively priced products for modular housing developers.

3. Payment

Developers are generally comfortable with the long accepted practice of making interim payments (either for completed work stages or periodically) for work done. This limits issues surrounding security of payment (as what is being paid for has already been delivered) and is also an approach that lenders are comfortable with. In contrast, the manufacturers of modular housing typically require a large part (if not all) of the cost of the pre-fabricated materials before work begins.

This puts the developer (and their funder) at risk in the event that the manufacturer becomes insolvent. This issue, however, also arises in traditional construction projects where certain materials may be subject to an advance payment before being delivered to site. The particular issue with modular housing is the scale of the risk as it may be the materials for the entire project that have been paid for in advance. Nevertheless, security documents such as vesting certificates, parent company guarantees and advance payment bonds can all be used for modular housing as required.

4. Ownership of materials

It is vital that any contract for off-site construction confirms the point at which legal ownership of the materials passes from the manufacturer to the developer. This should be no later than the date when they are paid for. This is important if the manufacturer becomes insolvent, because the materials should not form part of the assets to be divided amongst all unsecured creditors of the insolvent manufacturer. A vesting certificate could be used to confirm when ownership passes. Developers should not, however, treat the transfer of ownership as a comprehensive solution, mainly because there will be a host of practical difficulties to deal with. What use is it to a developer to own partly completed panels of a modular house? Can another manufacturer complete the job? How will the completed materials be transported to site? Who will complete assembly? As in any insolvency situation, achieving project completion may be complicated, time-consuming and expensive.

5. Health and safety legislation

The assembly of pre-fabricated buildings falls squarely within the scope of the Construction Design and Management (CDM) Regulations and, as such, developers of modular housing projects should ensure full compliance with the regulations including in relation to the appointment of a principal contractor and principal designer. Those appointed must have sufficient skill and experience in ensuring the delivery of modular housing projects in a safe manner.

The interesting element with regard to modular housing, is the extent to which the manufacturing process is subject to the CDM Regulations. Although the regulations include no specific reference to the manufacturing process, the principal contractor and principal designer will need to be appropriately informed of the design and manufacturing process to ensure the safe installation of the materials on site.

Stuart Wilson

Partner —— Projects and Construction

t +44 (0)20 7423 8036
e swilson@trowers.com

Shivani Kesaria

Solicitor —— Projects and Construction

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

Unfair ground rents and leasehold houses - should it be buyer beware or are they simply a bad idea for all?

Ground rents are generally seen to be a way for the land owner to receive some form of rent for the value of the land on which a property is built, as opposed to rent on the property itself. In the main these rents are minimal sums and are often reviewed during a lease term, typically every 21 or 33 years.

The market in ground rents has thrived in recent years with companies set up solely for this purpose; it is seen as a good way to get higher returns on investment in an era of perpetual low interest rates.

Depending on the interest owned and the length of leases, potential lease extensions and even collective enfranchisements, can generate some significant income. Calculations of the sums payable for lease extensions and enfranchisement are based in part on the levels of ground rent in the leases, which has to be bought out.

In recent years, we have seen changes in the way developers have sold their properties, resulting in some selling leasehold houses on estates where there does not appear to be a justifiable estate management reason. The result is the developers benefit from granting leases, retaining a ground rent and retaining the opportunity to sell the ground rents and freeholds to a third party. Simultaneously there has been a significant change in the ground rent clauses inserted in these new builds, both for houses and flats. This has created increasing levels of long term returns for ground rent companies and increased income for developers who then move on to the next estate leaving problems for those individuals buying However, increasingly, this is looking like it may not be such a great idea after all.

It's important to remember that the lease is "king" and the importance of the obligations in the lease is often not impressed clearly enough on buyers. Some of these rent reviews include doubling rents every 5 or 10 years or rents linked to indices increasing every 10 years resulting in some leaseholders being trapped in their properties and unable to sell.

We are now seeing some in the market place, notably Taylor Wimpey, Nationwide and Yorkshire Building Society, understanding and dealing with this issue.

Taylor Wimpey have put aside £130 million to compensate buyers caught in a ground rent trap and are offering a Ground Rent Review Assistance Scheme for those qualifying to enter into deeds of variation.

Nationwide have said that they will no longer lend against any new build houses or flats where the ground rent is more than 0.1% of the value of the property or where a lease length is less than 125 years for flats or 250 years for houses. Yorkshire Building Society has also changed its CML requirements and will not lend on open ended ground rents nor those capable of being increased by an unspecified amount; they must be capped. This includes those where increases are linked to RPI. They will also not lend where there is a rent review in the first 21 years.

The effect these onerous ground rents are having on saleability and, therefore, value of the property is of importance to lenders and leaseholders.

There is another risk to the leaseholders and the lenders. Where the annual rents are between £250 and £100,000 outside

London or £1,000 and £100,000 in London then the rules relating to assured shorthold tenancies would apply. This includes the ability for the landlord to bring a claim for rent arrears under ground 8 of Schedule 2 to the Housing Act 1988. If a landlord can show that the arrears are at a certain level, the court is required to grant possession of the property to the landlord. Where rent is payable yearly, the landlord need only prove that at least three months' rent is more than three months in arrears. While a lender is likely to ensure that this does not happen, nevertheless, this risk may make such properties more difficult to mortgage.

In light of Taylor Wimpey's recent announcements and proposals to deal with the problem on sites they have developed, it is hoped that others will follow suit. It may not always be in the hands of the developers and indeed some ground rents may not be considered so onerous to have a big effect on marketability. The leaseholder does, however, have some rights they may want to consider.

For flat owners, statutory claims either to extend their leases or (collectively with their neighbours) to acquire their freehold, will either reduce their ground rent to a peppercorn in the case of lease extensions or will give them the ability to do so if they acquire the freehold.

For house owners, statutory claims to acquire the freehold will also extinguish the requirement to pay a ground rent.

In both cases, premiums will be payable to the freeholder and any intermediate landlord and the high ground rents will affect the sums payable. For leaseholders in this position, however, this may be the most cost effective way of making the property marketable.

For lease extensions being granted outside of the legislation, it is open to landlords and leaseholders to reach agreement on any terms they wish. This has, on occasion, also led to another circumstance where leaseholders have ended up with onerous ground rents in return, usually, for lower premiums. This may well be a false economy and the ongoing effect should be carefully considered as it can create an unmarketable and unmortgageable lease.

Leigh Shapiro
Managing Associate — Property Litigation

t +44 (0)20 7423 8736
e lshapiro@trowers.com

Developer contributions: reform with more acronyms

The objective that developers should contribute towards the costs of providing the infrastructure required to support their developments has proved surprisingly hard to implement. Following concerns about the effectiveness of the current twin-track Community Infrastructure Levy (CIL) and Section 106 system, a government commissioned review of developer contributions was published in February.

Key findings

- CIL adoption remains patchy and concentrated in more affluent areas with higher land values. In areas prioritising the delivery of affordable housing (not funded through CIL) there is lower adoption and greater reliance on Section 106 agreements.
- The number and complexity of exemptions and reliefs has reduced anticipated CIL receipts and risks higher rates being imposed on those developments that remain liable.
- The CIL charge setting and implementation process can be lengthy and expensive and there is a perception of opaqueness regarding how funds are spent.
- The Regulation 123 lists (published by authorities listing the infrastructure that CIL can fund) vary significantly, limiting their usefulness.

Key recommendations

CIL has not achieved its objectives and should be replaced by the following:

- A low level Local Infrastructure Tariff (LIT) applied universally to 'development' (retaining the CIL definition) and with fewer reliefs and exemptions than under CIL to boost revenue take. "Small developments" (10 units or less) would only pay LIT and no other tariffs. LIT would be calculated using a national formula based on local market values at a rate of "£x" per square metre; Regulation 123 lists should be abolished with authorities free to spend LIT on any infrastructure identified in their infrastructure plans.
- For "large developments" (over 10 units) authorities would use section 106 obligations to secure the provision of infrastructure (subject to the current 'acceptability' tests). Restrictions limiting pooling of more than five section 106 payments should be abolished given their complexity and failure to persuade authorities to adopt CIL. The provision of affordable housing would continue under Section 106 agreements.
- Development requiring infrastructure across a "Combined Authority" would be funded by a Strategic Infrastructure Tariff (SIT), similar to the London Mayoral CIL for Crossrail. A SIT would need to be at a sufficiently low level so as not to affect viability and take into account any LIT.

While the Government's promise to 'fix our broken housing market' via its Housing White Paper may have grabbed the headlines, it is easy to overlook a fundamental review of a system which is failing to deliver development. Original impact assessments suggested that CIL would raise between £4.7 and £6.8 billion over a ten year period; but many authorities are finding receipts to be as little as 50% of expected levels.

CIL was intended to be a fairer, faster, clearer and more certain system; it is failing but the proposed LIT changes might go a long way to remedying this.

Tom Barton
Associate —— Planning

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

Deregulation and the effect on charitable companies

The deregulation provisions set out in Section 92 and Schedule 4 of the Housing and Planning Act 2016 came into force on 6 April 2017, changing the disposal regime for registered providers (RPs) that are registered with the Charity Commission.

The Charities Act 2011 has always required an order to be obtained from the Charity Commission or the court if a charity is to dispose of, or mortgage, land. Until now, however, RPs that are registered charities have been able to rely on a statutory exemption to this if they obtain a general or special authority under another statute. The most common authority used by RPs has been consent granted by the Homes and Communities Agency (HCA) to dispose of and mortgage land.

Since 6 April 2017, the HCA's power to grant consent to a disposal has been removed and charitable RPs are now subject to the disposal requirements of the Act. This means that if an RP, which is a registered charity, wishes to dispose of land, it must either obtain an Order from the Charity Commission or court, or follow the statutory procedure set out in the Charities Act 2011.

The first such procedure is for the disposal of land, whether by leasehold or freehold transfer. It provides that the board of an RP must, amongst other requirements, obtain and consider a report by a qualified surveyor. For mortgages a charitable RP's board must, amongst other requirements, obtain and consider written advice (by someone who the board considers to have the necessary experience and expertise).

The Charities Act 2011 also contains a simplified procedure that can be followed for disposals by way of lease for seven years or less.

In addition to these procedures, the Charities Act 2011 provides exemptions to the disposal requirements. In summary these are:

- a disposal to a charitable beneficiary;
- a statutory preserved right to buy or right to acquire sale; or
- a disposal to another charity for less than the best price that can be reasonably obtained.

There are, however, scenarios where a charitable RP must apply for an order from the Charity Commission. This is where there is a disposal of permanent endowment land or a disposal to a 'connected person'. A 'connected person' includes family members of the trustees or employees and any trading subsidiaries of the charitable RP.

In light of the above and moving forward in the "new world" of deregulation, RPs that are registered charities, must now consider the type of disposal they are going to undertake in accordance with the procedures within the Charities Act 2011 at the beginning of any transaction so that it can be timetabled to avoid unnecessary delays. This will often require site specific advice. Additionally some RPs that are registered charities have converted, or are in the process of converting to registered community benefit societies (registered under the Co-operative and Community Benefit Societies Act 2014). One of the benefits of doing so is that registered societies are exempt charities and are not subject to the disposal requirements of the Charities Act 2011.

Rachel A Collins

Solicitor —— Housing and Regeneration

t +44 (0)20 7423 8408
e racollins@trowers.com

A build to rent arms race?

The build to rent sector is now established and appears to have gathered substantial momentum. We are regularly assailed with statistics demonstrating how much and how fast the build to rent sector is growing and at the same time the volume of investment ready and willing to commit to projects.

Earlier in the year, Trowers & Hamlins held a roundtable in Manchester to discuss what more can be done to enable build to rent to compete effectively for the purchase of land against build to sell. We asked participants to develop their ideas unconstrained by the current legal and regulatory framework. The result was a fascinating discussion which drew on experiences from other markets where build to rent is more established, especially the US and Germany. There was also some discussion of the Government's build to rent consultation and the introduction of a new and specific affordable tenure.

Dustin Fjeld of Fjeld Consulting provided some examples of the experiences they had in the States as Multifamily developers (US equivalent of build to rent), competing to beat "condo builders". Examples of the battlegrounds were:

- building more densely for rent, than for sale
- utilising tax efficient structures – such as the US Real Estate Investment Trust
- modelling in the capital growth associated with a secondary market for the assets
- extremely sophisticated data collection
- real time pricing of rent in a similar fashion to airlines
- using bulk buying power to drive down the costs of utilities and other services, e.g. satellite TV
- complex provision of priced amenities in addition to rent, with a view to generating an extra 10/20% on top of basic rent

Ed Ellerington (Director - PRS at Grainger), provided some useful comparative input in relation to the German market where there was not as much focus on methods to extract more revenue from occupiers, but instead to leverage the building itself; for instance by doing deals to derive revenue from solar panels built into the structure.

Paul Belson (previously of the Government's build to rent taskforce and now consultant for LSL) referred to the survey that LSL had carried out of 37,000 renters in the UK. Whilst acknowledging that at this stage, the majority of those surveyed would not necessarily fall within the new build to rent Sector, it did still provide useful information. It indicated that on average, UK renters would only be willing to pay up to £50 per month in relation to extra amenities provided in their buildings/ developments. Premium rents would be available for "good landlords".

By comparison, the US market is extremely data rich with very detailed information available on all aspects of management. That information has revealed some facts that could be anticipated, such as renters who had made two or three new connections in the building were considerably more likely to renew their tenancies. Perhaps less obvious is that tenants with more work orders against their names were also more likely to renew. This demonstrates how landlords can do much to secure ongoing revenue by providing rapid and successful resolution of maintenance tasks.

The roundtable participants found the examples useful and the discussion turned to the current position in the UK market. Investors here are focussing on getting their initial buildings up and occupied. The expectation was that UK investors would want to be very careful about the reputational issues connected with seeking considerable additional revenue from amenities, but there was an expectation that this would become more normal as the

market developed. There was a view that we, too, will use "big data", and that other benefits offered to tenants via the internet of things would rapidly become a new norm.

There was an interesting comparison between the way in which affordable housing is dealt with in the US, where regulation was mostly city by city, and the UK wide approach that we generally see evidenced by our planning guidance. Kitson Keen)Head of New Rental at Home Group) pointed out that the variety in the UK real estate market meant that homogenisation of the build to rent market was not the way to go. There is too much variety in the real estate market in order for that to be the best approach long term. We have already seen some areas in the UK where the value of land associated with development for build to rent has come very close to matching that possible by sale.

Whilst it was pleasing to see the Government focus on build to rent particularly via its consultation, Kitson and others were concerned that a one size fits all approach to the length of build to rent tenancies and the application of the proposed new Affordable Private Rent would not work across the country. Talented planning teams would be needed in order to navigate the rules and achieve good outcomes for their particular geographical areas. Investors would certainly welcome being able to maintain control of entire assets, rather than (for instance) having to lose a number of affordable units to a registered provider.

In conclusion, the participants found the experiences from the US of particular interest. In the context of the UK market, the general view was that a one size approach will not achieve the best result. Build to rent developers will need to pay great attention to specific asset-related data as it becomes available over the course of the next few years in order to shape their new proposals, maximising revenue and value in the secondary market when it is established.

Andy Barnard
Partner —— Housing and Regeneration

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

Further updates to the JCT 2016 contract suite

Following on from the publication of the JCT 2016 Design and Build Contract, the Joint Contracts Tribunal has issued new editions of the JCT Measured Term Contract and the JCT Major Project Construction Contract, together with compatible forms of sub-contract.

Measured Term Contract (MTC)

This contract is for use by clients who have a regular stream of maintenance or improvement works (whether responsive or programmed) to be performed by a single contractor over a specified term, usually between one and five years. Orders for such works are placed with the contractor and payments are calculated by way of an agreed schedule of rates.

The 2016 edition does not materially change the risk allocation from the 2011 edition, but the main changes are:

- CDM provisions have been updated to comply with the Construction (Design and Management) Regulations 2015. The CDM Co-ordinator role is replaced with a "Principal Designer." Otherwise, the changes repeat the approach taken by the JCT in Amendment 1 to the JCT Measured Term Contract 2011 edition.
- Two new Supplemental Provisions (numbers 7 and 8) add provisions requiring contractors to comply with the Freedom of Information Act 2000 (FOIA) and the Public Contracts Regulations 2015 (PCR). These provisions automatically apply where the employer is a local or public authority or certain other types of body (including registered providers) or is otherwise subject to the provisions of the FOIA or PCR.
- Also in line with the PCR, the new edition provides for the contract to be terminated by the employer for specified breaches of the PCR by either party.
- As with the other contracts in the 2016 suite, the MTC takes a light touch approach to Building Information Modelling (BIM). The contract particulars include a section where the BIM Protocol is identified. It is unclear how BIM and the BIM Protocol would operate under a term contract and no guidance has been provided on this point.
- Payment provisions now include "Valuation Dates" on which the contractor submits payment applications to the employer. The intention is that Valuation Dates can, for Fair Payment purposes, be passed down the supply chain and improve the speed of payment to sub-contractors and sub-subcontractors.
- Insurance provisions allow for flexibility in approach for works to existing structures covered by insurances maintained by or on behalf of the employer.

Major Project Construction Contract (MPC)

This contract is for use on large construction projects for complex works, where the contractor takes on greater risk for the project. Once the employer has provided the contractor with its requirements, the employer's involvement in the project is limited to providing access to the site, reviewing and approving design documents and arranging payment.

The new features in the 2016 edition follow those for the MTC, with the following additions:

- There is provision for the contractor to provide a Performance Bond and/or Parent Company Guarantee for the benefit of the employer. Forms of Bond and Guarantee are not included, so employers should seek legal advice on appropriate forms.
- The payment provisions now establish "Interim Valuation Dates". The due date for an interim payment under the MPC is now

defined as the date seven days after the relevant Interim Valuation Date. These dates also apply to applicable sub-contracts and sub-subcontracts.

While the changes are welcome, the MPC is still a relatively underused contract, with employers and contractors preferring the more familiar Design & Build and Measured Term contract forms.

Framework Agreement (FA)

JCT first flirted with framework agreements in its 2005 suite, when it published a "binding" and "non-binding" framework agreement. As neither document was compliant with the then-current procurement regulations, they were seldom used, and JCT published an updated and expanded version in 2011. The 2016 version largely replicates the 2011 text, with updated references to PCR and FOIA.

As with the 2011 version, a number of limitations still apply. The Agreement is drafted for one employer and one contractor, and there is no provision for mini-competitions, making it unsuitable for use in multi-employer and multi-client frameworks. The contract terms are subject to those of the "Underlying Contract", limiting its use as a stand-alone framework agreement. The clauses encouraging collaborative working between the parties (early warning, supply chain engagement, risk assessment, etc) are mostly best endeavours or agreements to agree, rather than contractually binding obligations.

As currently drafted, the 2016 Agreement would require substantial amendment to be fully compliant with PCR and to be a robust and workable framework agreement.

Availability of editions

JCT have advised that 2011 edition contracts will continue to be sold until the end of April 2018, to give users sufficient time to transition to the new editions. Sadly, the popular On Demand service ended, for both 2011 and 2016 editions, on 30 April 2017.

Mark Pantry
Associate —— Projects and Construction

t +44 (0)20 7423 8464
e mpantry@trowers.com

John Forde
Senior Associate —— Projects and Construction

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

The Renewable Heat Incentive: A reformed scheme

Launched back in 2011, the Renewable Heat Incentive Scheme was introduced to help kick-start the transition to low carbon heating in the UK by providing subsidies to incentivise individuals and non-domestic customers to move from conventional forms of heating to low-carbon alternatives. The Scheme has been through a number of iterations since its introduction but on the whole, the majority of installations have been small-scale and it has largely struggled to inspire the step change that was hoped.

In November 2015, the Government confirmed its continued support for the scheme to 2020-21 with a budget rising to £1.15bn, but acknowledged that significant change was required to boost uptake and deliver value for money. The Government consulted on proposed changes in March/April 2016 and published its response in December 2016.

The reformed scheme

The reformed scheme proposes changes both to the domestic RHI Scheme which is available to households heating a single domestic property and to non-domestic RHI which is open to renewable heat installations that provide heat to buildings and for purposes other than heating a single domestic property (i.e. public buildings or commercial properties, for industrial or agricultural uses, or to landlords of blocks of flats). The changes include revised tariff bands to promote deployment of supported technologies, simplification of the biomass tariff and additional feedstock requirements.

The most radical change to the non-domestic RHI Scheme is the introduction of tariff guarantees. This is aimed at providing new levels of certainty for potential investors in larger projects and aims to incentivise uptake while balancing the Government's spending commitments. This article focusses on the introduction of tariff guarantees to the non-domestic RHI Scheme and the renewed opportunities that we are seeing emerge for owners and investors.

Tariff guarantees

Tariff guarantees will be introduced in the non-domestic RHI scheme for:

- Large biomass boilers (above 1MW in capacity);
- large biogas plant (above 600kWth);
- Ground Source Heat Pumps (above 100kW including shared ground loop systems with a total installed capacity above 100kW);
- all capacities of biomethane, biomass-CHP and deep geothermal plant.

According to the Government's response to the consultation, there is likely to be a three-stage approval process as follows:

Stage 1: Provisional approval for a tariff guarantee: Applications can be made once plants are sufficiently advanced and a declaration that financial close is imminent can be provided. The bulk of the application data will be required at this point. If approved, the applicant will be awarded provisional approval.

Stage 2: Applicants that have been awarded provisional approval will have up to three weeks to submit proof that full financial close has been reached on the project. If approved, the scheme administrator will award the tariff guarantee. The tariff that is guaranteed will be the tariff that prevailed on the date that the Stage 1 application was received.

Stage 3: Application for full accreditation: Once the plant has been commissioned, the applicant will be required to apply for full accreditation. If approved, the applicant will receive the tariff confirmed at stage 2.

Tariff guarantees mean that investors will be able to secure a guaranteed tariff significantly in advance of commissioning and with no proposed time restriction on conversion to full accreditation, investors (and those seeking investment) will have greater flexibility in structuring proposed arrangements. This marks a change for the RHI Scheme which the Government will need to monitor carefully, but which should inject a level of confidence and certainty that the renewable heat sector has not previously seen.

The future of RHI

The Government had previously indicated that the proposed changes (including tariff guarantees) will be introduced in Spring 2017. Although the run up to the General Election has delayed implementation, the budget commitment to 2020-21 gives comfort that the reformed scheme may finally yield a transformation in renewable heat.

Megan Owen

Solicitor —— Projects and Construction

t +44 (0)20 7423 8307
e mowen@trowers.com

Chris Paul

Partner —— Projects and Construction

t +44 (0)20 7423 8349
e cpaul@trowers.com

Right to manage – understanding its intended purpose

The case of *Elim Court RTM Company Ltd v Avon Freeholds Ltd* [2017] EWCA Civ 89 establishes a new approach in the treatment of technically defective right to manage claims by leaseholders.

The intention of Parliament, as highlighted in *Elim*, was to create a simple procedure by which qualifying tenants of flats collectively could acquire the management of their building, in order to reduce the potential for challenge by obstructive landlords. What has evolved is the converse. Obtaining the right to manage, which on the face of it, is a no fault, staged procedure, complete with prescribed forms and company articles with no compensation payable, has become riddled with technicalities resulting in invalid claims.

The *Elim* case goes some way to readdress this balance, reversing the decision of the Upper Tribunal which was perpetuating the strict and technical approach. The case addresses three statutory requirements:

1. That the articles of association of the right to manage company (RTM company) should be available for inspection by the qualifying tenants of the claim on a Saturday, Sunday or both;
2. The signature requirements of the claim notice, and
3. The requirement to serve the claim notice on intermediate landlords.

In considering these points, the Court focussed on the consequences of non-compliance and who would be prejudiced by it. Although potentially far reaching, the judgment is to some extent fact specific.

On the first point, the purpose of providing company articles for inspection by non-members of the company at the weekend, was to allow for inspection outside normal working hours, clearly not something that affects the landlord. A failure to offer such inspection was not considered fatal to the validity of the claim. This was on the basis that a qualifying tenant can become a member of the RTM company at any time on application, the articles are in prescribed form and a copy could be ordered for a fee. Also, in passing, but specific to the case, the place for inspection was 250 miles from the property.

On the second point, the signature requirements of a claim notice are not specified in the legislation other than in the prescribed forms. The forms simply require a signatory authorised by the RTM company. Strict company execution requirements were, therefore, held not to apply and as long as the signatory to the notice was authorised by the RTM company, the claim would be valid.

The third point is more fact specific and should be considered of more limited application. The legislation requires the RTM company to serve all landlords of the premises. The purpose of this is to ensure all those with an interest in the property are aware of the claim and that the management responsibilities will be changing, this being especially relevant where an intermediate landlord of a property has management liabilities under the lease. However in *Elim,* the Court looked at the circumstances of the intermediate landlord and the consequences of not being served. The Intermediate landlord's interest was over only one flat and they had no management responsibilities. Whilst accepting that the intermediate landlord should have been served, the only consequence to them in the acquisition of the management by the tenants would be the loss of the right to give consents under the lease. The failure to serve them with the claim notice didn't invalidate that notice.

An important statement in the judgment, dictates the approach going forward to some extent, "Where a notice is capable of two interpretations, one of which will lead to the

conclusion that it is valid, and the other that it is invalid, the former interpretation should be preferred". The tribunal judges may, therefore, look for a way to validate notices and procedural defects, which may in itself stave off applications from landlords seeking to invalidate claims.

Whilst *Elim* does not mean that deviation from the detail of the statutory procedure will always be acceptable, it is a step towards ensuring the intended purpose of the right to manage is upheld.

William Bethune
Associate —— Property Litigation

t +44 (0)20 7423 8558
e wbethune@trowers.com

Neutral dress codes and religious discrimination

The Court of Justice of the European Union (CJEU) has recently held in the conjoined cases of *Bougnaoui v Micropole Univers and Achbita and another v G4S Security Systems* that the prohibition on employees from wearing outward signs of political, philosophical or religious belief will not be discriminatory under the EU Employment Equality Directive. This is subject to the proviso that the ban is based on a general company rule which prohibits political, philosophical and religious symbols from being worn visibly in the workplace, and not on stereotypes or prejudices against one or more religions or against religious beliefs in general.

Interestingly the two cases had different outcomes when they were considered by two different Advocate Generals before they reached the CJEU, so the court's decision has provided some welcome clarity on the matter.

Request to remove headscarf amounted to unlawful direct discrimination

In *Bougnaoui*, a design engineer was sent by her employer to clients. A customer complained that the veil she wore "embarrassed" a number of its employees and asked that this did not happen again. Mrs Bougnaoui's employer discussed this with her and asked her to observe a principle of "neutrality" in relation to her dress when dealing with clients. She refused and, as a result, was dismissed.

She brought a claim for discrimination and France's Court of Cassation referred the issue to the CJEU, asking if the wish of a customer no longer to have the services of the company provided by an employee wearing an Islamic headscarf will constitute a genuine and determining occupational requirement under Article 4(1) of the Equality Directive.

The Advocate General concluded that a company policy requiring an employee to remove her Islamic headscarf when in contact with clients, constituted unlawful direct discrimination. In the Advocate General's view the requirement was not a genuine occupational requirement. Although the freedom to conduct a business is a principle of EU law it is subject to, amongst other things, the need to protect the rights and freedoms of others. The Advocate General considered that although a neutral dress code policy might be in the interests of the employer's business and, therefore, constitute a legitimate aim, it was difficult to see in this case, how the employer's prohibition could be regarded as proportionate.

Neutral dress code lawful

The Opinion in *Bougnaoui* was in direct conflict with the Advocate General Opinion in *Achbita*. In *Achbita*, a Muslim receptionist who was contracted out to work for a third party informed her employer, G4S, that she was going to begin wearing a headscarf in the workplace. G4S informed her that the wearing of any visible symbols was contrary to its "strict neutrality" rule in the workplace. The receptionist was dismissed as a result of her refusal to go to work without a headscarf.

She brought a discrimination claim and Belgium's labour appeal court sought guidance from the CJEU on whether or not a rule forbidding all staff from wearing any visible political or religious symbols could lead to direct discrimination against Muslims who wish to wear a headscarf at work.

In *Achbita* a ban on wearing Islamic headscarves was held to be a genuine and determining occupational requirement and the employer's adherence to a neutral dress code was held to be both legitimate and proportionate. In the Advocate General's view the ban was appropriate as a way of implementing a legitimate corporate policy of neutrality

The CJEU has agreed with the Opinion in *Achbita* that the prohibition on wearing a headscarf where the employer's rule prohibits all employees from wearing outward signs of political, philosophical or religious belief will not constitute direct discrimination under the EU Employment Equality Directive.

Good practice points

Employers will be reassured that neutral dress code policies will be lawful, provided that any ban on political, philosophical and religious symbols worn in the workplace is based on a general company rule, rather than on stereotypes or prejudices.

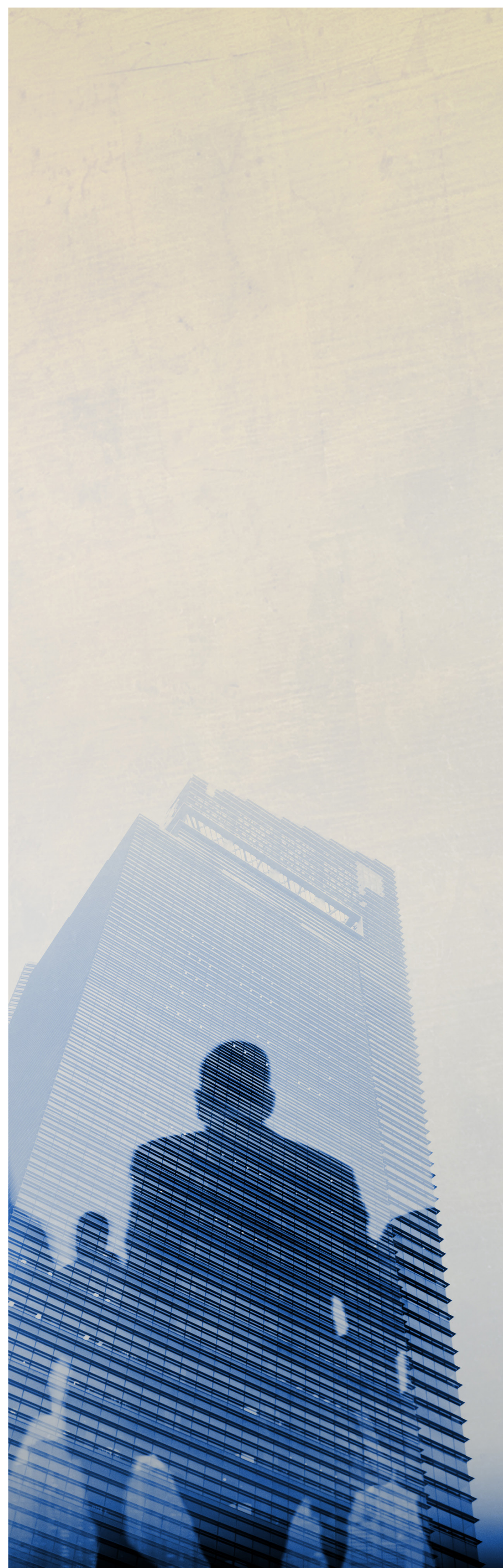
An individual's right to manifest their religious beliefs under the European Convention on Human Rights should, however, also be taken into account. An interference with this right was demonstrated in *Eweida and others v United Kingdom* where the UK was held to have failed to protect Ms Eweida's right to wear a discrete cross outside her uniform. Interestingly this failure did not extend to Mrs Chaplin, a nurse who wished to wear a crucifix at work, on the basis that her employer's restrictions were in place to protect the health and safety of nurses and patients and so were not disproportionate.

While neutral dress codes may have been given the all clear, there is still the possibility that individuals will rely on *Eweida* to bring a claim that their employer has interfered with their right to manifest their religious beliefs.

As a matter of good practice employers should ensure that they avoid dress codes that restrict an employee's right to wear things associated with their religious beliefs. If there is a prohibition within a dress code then it will be up to employers to ensure that the balance between the reason for the prohibition and the disadvantage to the employee is properly considered.

Nicola Ihnatowicz
Partner —— Employment

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



FCA compliance requirements

Now the excitement of obtaining FCA authorisation has passed for a lot of the sector, the next challenge for many is grappling with the new FCA annual reporting requirements. Given the changes to the FCA's regime for treatment of secured lending by housing associations that came into effect last year, for many this now carries the additional challenge of reporting under a full authorisation permission.

The FCA takes a proportionate approach to regulation, meaning that they concentrate resources on the greatest potential risks. This means that firms with limited permission can expect less intrusive supervision than firms with full permission and firms with consumer credit related income of less than £5m need report less frequently than firms with income in excess of this amount.

Reporting is done through the FCA's GABRIEL (Gathering Better Regulatory Information Electronically) system. GABRIEL uses the information it has about a firm to decide which reports they need to submit. Unsurprisingly, reporting is mandatory, and firms that do not complete their reporting requirements by the due date must pay an administrative fee of £250. If a firm does not pay this, the FCA may take enforcement action which may result in the firm losing its authorisation.

The FCA's Principles for Business require that all firms deal with the FCA and (in the case of housing associations) the HCA in an open and co-operative way and firms must disclose anything which a regulator might reasonably expect to want to know. There is no definite rule as to what information needs to be disclosed under this principle, but the relevant section of the FCA's Handbook states that any matters having a serious regulatory impact, civil, criminal or disciplinary hearings, fraud, breaches of consumer credit legislation and insolvency proceedings should be reported.

Aside from standard GABRIEL reporting, firms need to let the FCA know each time they might wish to make changes to their contact details, to the approved person who oversees the regulated activities, to the regulated activities themselves, or if their firm undergoes a change of control or change of legal status. In relation to mergers and amalgamations, it is worth noting that while in other respects the FCA will treat a newly merged body as a successor of its predecessors, it takes a slightly different approach when it comes to consumer credit. The FCA effectively treats the merged body as a brand new organisation for consumer credit purposes, meaning that upon merger or amalgamation a firm's existing permissions will not transfer to the amalgamated body and a new application for authorisation will need to be submitted.

Regulated firms must also deal with any complaints they receive fairly and promptly. Firms are subject to the compulsory jurisdiction of the Financial Ombudsman Service (FOS) to whom customers have a right to refer any consumer credit complaint. Firms must publish details of their internal procedures for the reasonable and prompt handling of complaints. If complaints are received, they must be investigated promptly, competently, diligently and impartially within defined timeframes and in a prescribed manner. If a complaint is reported to the FOS, firms must co-operate with it in resolving that complaint. Firms with limited permission need to inform the FCA of the number of complaints received, while firms with full permission must report the number of complaints received, when they were dealt with, the amount of any compensation paid, the number of outstanding complaints and the number of complaints which were not upheld.

Tom Wainwright

Senior Associate — Housing and Regeneration

t +44 (0)161 838 2068
e twainwright@trowers.com

Vendor fraud – still a risk despite a shift in the landscape

Purchasing a property can be a stressful experience. Those that have been through the process will undoubtedly recall the moment that the property was first viewed, and when the offer was accepted; almost as much as remembering the nervy moments running up to exchange of contracts (the point at which the sale becomes binding). It is perhaps, therefore, entirely understandable that the vendor's identity is not routinely questioned by a purchaser (in circumstances where the vendor has instructed their own solicitors and the purchaser's solicitors have not raised specific concerns as to the vendor's identity).

In Dreamvar (UK) Ltd v Mischon de Reya and others [2016] EWHC 3316 (Ch) Dreamvar (UK) Ltd (Dreamvar), a property development company that had been the subject of a vendor fraud, sought damages (of circa £1.1m) for negligence and breach of trust from its own solicitors, Mischon de Reya (Mischon) and damages for breach of trust, breach of warranty of authority and breach of undertaking from the rogue vendor's solicitors (MMS).

The claims against MMS failed, and the prospect of a fruitful recovery from the fraudster appeared to be perilous. Mischon had not acted negligently for, amongst other things, failing to seek an undertaking from MMS in respect of the rogue vendor's identity (as this went beyond standard practice). Mischon had, however, committed a breach of trust by transferring Dreamvar's purchase monies to MMS in the absence of a 'genuine' completion. Despite acting honestly and reasonably, Mischon was refused relief from liability under section 61 of the Trustee Act 1925 because Dreamvar had no other avenues for recourse (e.g against the rogue and MMS) and Mischon (as a city law firm) was in a better position to handle the financial consequences of the breach of trust (with or without PI insurance) than Dreamvar.

Mischon have been granted leave to appeal and it is understood that the Law Society is considering intervening in the appeal (given the ramifications for the legal services market).

The judgment is a reminder that vendor fraud is a real risk and the reality is that it has taken several years for Dreamvar to get its money back. Social landlords, and those involved in the purchase or sale of properties, should remain vigilant (particularly because of the involvement of public money):

- If an opportunity sounds too good to be true, it usually is. Do your due diligence;
- be conscious of 'high risk' transactions;
- consider requesting an undertaking from the vendor's solicitor in respect of the vendor's identity; and
- if in doubt, talk to your solicitor. They are best placed to provide specific advice in relation to the risk of a transaction, and how that risk can be mitigated.

Chris Recker
Solicitor —— Commercial Litigation

t +44 (0)121 214 8842
e crecker@trowers.com

How to deal with a statutory demand

It is not uncommon for a registered provider (RP) to be on the receiving end of a statutory demand, the most tempting (and worst) solution is to bury it in the top drawer. If a statutory demand is received, there is a good chance that a winding up petition will follow three weeks later if the debt is not paid. If an RP does receive a statutory demand, it will need to consider its options quickly and take decisive action to deal with it appropriately.

The first three questions for an RP to consider on receipt of a statutory demand should be these:

1. Is the demand in the appropriate form?

Many companies will prepare their own statutory demands and procedural mistakes are common. We anticipate these mistakes will increase in light of the new 2016 Insolvency Rules which took effect from 6 April 2017. Procedural mistakes are also common in the winding up petition itself, such as (for an RP) including reference to the Companies Acts, rather than the provisions of the Co-operative and Community Benefit Societies Act 2014. A procedural defect in a demand (or winding up petition) may lead to the proceedings being dismissed for breaching the prescribed requirements of the Insolvency Act 1986 and Insolvency Rules 2016.

2. Is the debt genuinely disputed?

There could be any number of reasons why an invoice has not been paid. If the debt is genuinely disputed, insolvency proceedings (and therefore the demand) are not appropriate and the insolvency court is not the correct forum. If you think this is the case, you should write to the demanding party as soon as possible seeking an undertaking to prevent a winding up petition being issued. If no undertaking is given, an application should be issued to restrain the issue of a winding up petition. If you only dispute part of the debt, you should also pay the undisputed part.

Similarly, if the RP has a counter-claim against the demanding party the sum claimed may be 'set off' against the amount in the statute demand. You should set out the amount of set off in writing to the demanding party and request an undertaking that a winding up petition will not be issued whilst the parties resolve their differences in an appropriate manner.

3. Who do we need to tell about the demand?

In accordance with the Governance and Financial Viability Standard, *"registered providers shall communicate in a timely manner with the regulator on material issues that relate to non-compliance or potential non-compliance with the standards."* Insolvency proceedings against an RP certainly falls within *"potential non-compliance"* so a winding up petition, and even a statutory demand depending on the severity of the circumstances, should be disclosed to the relevant authority and prompt advice sought. *"Timely manner"* is an ambiguous phrase so it is not clear exactly how quickly the relevant authority need to be updated. What is clear is that any delay should be brief and with good reason.

RPs may also be required to inform others whom they have commercial relationships with. Typically, an office lease will require that the landlord is informed that the tenant is subject to insolvency proceedings and commercial supply agreements with business parties may have similar clauses, although these clauses may only apply to a winding up petition and not a statutory demand. The relevant agreements will need to be reviewed but, the general rule is disclose the issue early but set out the steps currently underway to resolve the issue.

Dan Butler

Senior Associate —— Commercial Litigation

t +44 (0)161 838 2116
e dbutler@trowers.com

Simon Banks

Solicitor —— Commercial Litigation

t +44 (0)161 838 2127
e sbanks@trowers.com

trowers & hamlins

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

Contact

London

Tonia Secker

3 Bunhill Row
London
EC1Y 8YZ

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

Birmingham

Digby Morgan

10 Colmore Row
Birmingham
B3 2QD

t +44 (0)121 214 8800
f +44 (0)121 214 8801
e dmorgan@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

If you would like to be removed from the mailing list for this publication, or our contacts database (and therefore not receive any of our mailings) please contact marketing@trowers.com.

If you would like more information on our privacy policy please contact the marketing team, Trowers & Hamlins LLP, 3 Bunhill Row, London, EC1Y 8YZ or visit our website www.trowers.com.

© Trowers & Hamlins LLP 2017

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

Front cover image: Shutterstock

Trowers & Hamlins LLP is a limited liability partnership registered in England and Wales with registered number OC337852 whose registered office is at 3 Bunhill Row, London, EC1Y 8YZ. Trowers & Hamlins LLP is authorised and regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Trowers & Hamlins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlins LLP's affiliated undertakings. A list of the members of Trowers & Hamlins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate, but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlins LLP recommends that no action be taken on matters covered in this document without taking full legal advice. Trowers & Hamlins LLP holds the copyright for Trowers & Hamlins' Quarterly Housing Update which is sent to you on the basis that it should not be used or reproduced in any material or other medium produced by you or passed to any third parties without the prior consent of Trowers & Hamlins LLP. All Images sourced from Fotolia or Istock.