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Publications —— Winter 2017/18

Quarterly Housing Update

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Foreword

As many of you will know I am retiring from the firm at the end of March. I have spent my entire career at Trowers & Hamlins, almost all of it working in the housing sector. We launched Quarterly Housing Update in the Spring of 2001 and the current edition is the 68th. It's been a privilege to edit the publication over those 17 years. I'm delighted to be passing the editorial baton on to Rob Beiley whose first foreword is below. I would like to thank all those who have contributed articles and helped with production of the magazine since 2001, particularly Kirstin Halliwell and Matt Bowen who are key players in the editorial team.

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It is a great privilege to step into Ian's shoes as editor of QHU. Throughout my career at Trowers, QHU has been a cornerstone of what we do best for our clients in the sector – that is to keep you abreast of legal developments that are likely to impact on your businesses, and critically, to identify trends that will shape your organisations going forward.

So what trends and issues do I see 2018 bringing? For me there are three things that will shape the housing landscape this year.

Firstly, the sector is starting an honest debate about what tenant engagement means and what it should look like. This is a crucial task, not only to make sure that tenants' concerns are properly listened to but also to ensure that where works to homes are needed (whether refurbishment or a more wholescale regeneration programme) that tenants understand what is needed and are able to shape the proposals from the outset. Mike Gaskell is leading the firm's work on this and we will hear more from him later in the year.

Secondly, I have no doubt that we will see more equity investment in the housing sector. The year has started with the news that the giant US equity fund Blackstone has invested in a "For Profit" housing association and I am certain that other deals will follow. This has potentially significant implications for the supply of s106 units to traditional associations and may cause some to fundamentally reappraise their businesses.

Finally, given the scale of the challenge that we face in delivering the houses we need, I see no end to the rise of the partnership approach to housing delivery; delivery at scale can only be achieved by local authorities, housing associations and private developers working together.

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Council debt caps – questions and answers

The Autumn Budget has once again brought councils' housing debt caps into focus. The Government announced it will lift borrowing limits for councils in areas of 'high affordability pressure', inviting bids for increases from 2019-20. £1 billion of additional borrowing is 'on offer' for the three years to 2021-22. The Government has said it will monitor how councils respond and then consider what further action may be required.

Readers will have read much about these debt caps, but usually without any explanation, i.e. what the debt caps are, how they might be relaxed and what the effect will be. We hope these questions and answers will be useful.

What is the HRA debt cap?

It derives from the self-financing settlement in 2012, when the Housing Revenue Account (HRA) subsidy system was dismantled and, in effect, the national HRA debt was re-distributed among stock-owning councils in England. 'Redistributed' is not quite right because more debt was distributed than was then in the system. The intention was that each council would be able to afford, from rents, the debt it was either left with or acquired; but for various reasons debt 'headroom' varied from council to council.

Why is the housing debt cap important?

For councils, it limits its capacity to borrow. The formula rehearsed above makes clear that capital expenditure financed by borrowing 'counts' against the debt cap and reduces any headroom which the council either had at the point of self-financing in 2012 or which it still has now. The HRA debt cap enables the Government to control the amount of debt within councils' HRAs, which as public sector debt 'scores' against the country's overall indebtedness. From a councils' perspective the HRA debt cap is critical in its ability to deliver new HRA housing and its ability to spend retained Right to Buy monies (not least because under the terms of a council's retention agreement, the retained monies can only be spent on 30% of development costs- the remainder having to come from other resources, so in effect via borrowing). Scott Dorling and Rachel Collins' article on page 10 and 11 in this edition explains more. The HRA debt cap is also critical for some councils in terms of their ability to fund fire safety and other improvement works.

Where are the debt figures to be found?

Annex B to the Limits on Indebtedness Determination 2012 sets out the maximum amount of housing debt that can be held by each council. In technical language, a council will breach its HRA debt cap if its HRA Capital Financing Requirement (CFR) on 31 March in any year exceeds the amount held on 1 April 2012.

What is the Capital Financing Requirement?

The calculation of the HRA CFR is set out in Annex A to the 2012 Determination. It is a complex calculation, but as implied it is essentially capital expenditure financed by borrowing plus the value of additional dwellings (but not acquisitions) less capital receipts used to repay the principal of any borrowings, similar payments by the Secretary of State to the Public Works Loan Board, the value of 'lost' dwellings/land (but not disposals) and provision for the repayment of borrowings.

Are there other debt restrictions?

Yes. The Local Government Act 2003 (the 2003 Act) imposes limitations on a council's statutory power to borrow. Section 3 of the 2003 Act requires it to determine and keep under review how much money it may borrow. Councils are required to have regard to the Prudential Code for Finance in local authorities but this is less prescriptive than the housing debt cap,

requiring the council's finance officer 'sign off' that any borrowing is indeed 'prudent'.

How can debt caps be relaxed?

New determinations could relax or (theoretically) remove those limits. Any relaxations are likely to be specific. An example is the amending Determination in 2013 which allowed councils to deduct from their HRA CFR receipts used to meet capital expenditure on General Fund assets except for expenditure on affordable housing or regeneration projects. The effect was to control such housing or regeneration expenditure within the HRA debt cap regime. Councils in 'high affordability pressure' areas bidding for the new borrowing power may well benefit from a similar determination. Or there may (also) be an agreement akin to the Right to Buy receipts 'retention agreement'. Understanding what is on offer will be as important as the bidding criteria and process.

Is relaxation of the debt cap the answer?

Not for every council. Having debt capacity and the revenue to use it are very different things. Councils have been criticised for not using their debt cap limits to the full extent possible and in some cases this will be because those councils simply cannot find the surplus rental income to service that additional debt.

What about "joining up" councils with debt capacity and those without?

This has been often considered and would not increase overall public sector debt, thus allaying Treasury fears. On the other hand there are statutory difficulties. The Localism Act regime permits only individual debt caps and not joint ones. Statutory provisions apply to each council, so as well as the political difficulties with joint decision-making the legal barriers are significant.

Further information

We recommend "Raising the Roof", a report just prepared by the Association of Retained Council Housing and the National Federation of ALMOs. Please also contact us if you would like to see what we are calling the Unofficial HRA Manual. It is still in draft and we welcome input. The last official Manual was issued in 2006/7! The debt cap is one of the items in it. Meantime we will monitor Government plans in order to be ready to help councils make use of their head-room and in due course make bids for the £1 billion announced in the Budget.

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Overage – Assume nothing, question everything, expect the unexpected

Overage is a notoriously tricky thing to get right. What can seem to be straightforward commercial principles, agreed without difficulty or acrimony, can be highly difficult to capture legally. A couple of recent cases have demonstrated this, and the importance of being clear about what is being agreed.

Overage for beginners

Overage is a right for a seller of land to a further payment in addition to the price following a sale, on the occurrence of a defined trigger event. It shares the benefit of any uplift in value (or protects a seller against a sharp buyer "making a turn"). The two most common types are:

- Planning overage, where the trigger is (generally) the grant or implementation of a planning permission meeting certain criteria. For example, a price may have been agreed one the basis 100 units can be built. If the buyer gets consent for 120, it would want a share of that extra value;
- Sales overage, where the trigger is an onwards disposal or disposals, possibly over a certain level.

The complexity stems partly from competing imperatives: the buyer wants to be able to deal with its land with a degree of freedom, to develop it and realise a reasonable return on its investment, while the seller generally wants the highest possible level of protection for its right to a payment, whether because there is a real prospect of a further return, or simply as an "anti-embarrassment" measure. In unvarnished terms, a lot of it comes down to how much the parties trust each other.

But partly, it is simply because there are so many issues for the parties and their advisers to consider. Essentially, overage relates to uncertain future events, so the careful solicitor must try to anticipate every eventuality, and "expect the unexpected".

For example, consider a planning overage. What period should the overage endure for? What will trigger a payment? Is it payable on the grant of planning permission, or implementation, or even at some other stage? Does it bite on any planning permission, or only planning permission for something specific? What if the buyer obtains planning permission, and simply waits for the overage period to end? Should there be a positive obligation on the buyer to actually go and get planning permission, and deliver the development? What if (as has happened in the author's experience) the local planning authority grants planning permission for something other than what was applied for (a mistake in the officer's report to committee meaning there was no affordable housing requirement, since you ask)?

Two recent cases highlight the importance of thinking through very carefully what you want to achieve, and whether the drafting achieves this.

Is something so obvious it goes without saying?

In Sparks v Biden, the seller granted the buyer an option, exercisable on the grant of a satisfactory planning permission for eight dwellings. There was an "all reasonable endeavours" obligation to gain planning permission, and the buyer was then to build "as soon as practicable". The price was £500,000, plus overage on the sale of each dwelling. Seems straightforward, doesn't it? What could go wrong?

Well, the buyer complied strictly with the express terms of the agreement. He got planning permission, and built the dwellings. Then he occupied one as his home, and let the others on assured shorthold tenancies, so there was no disposal under the

agreement, something he argued he was perfectly within his rights to do.

One might admire his chutzpah. Unsurprisingly, the seller did not. It argued there was an implied term that the buyer had to sell within a reasonable period.

The High Court agreed. To presumably hefty sighs of relief from the seller's solicitors, the court ruled that the buyer's interpretation undermined the agreement as a whole. The obligations to obtain planning and build were aimed at realising a return for the seller as soon as possible, and without it, the agreement was commercially incoherent. The buyer was ordered to sell the units.

Social housing as a social purpose

There was a similar issue in the second case, Burrows v Ward. The seller sold to a developer with planning permission for 62 units. Overage bit if the developer sold units at a price above a set level per square meter, but this did not apply to permitted disposals, which included arm's length residential sales, and disposals of land for utilities, as public open space or "other social/community purposes".

The developer obtained revised planning, which required a housing association to take five units, which it did. The developer treated this as a residential permitted disposal; the seller disagreed.

At first instance the judge agreed this could not be a permitted disposal, as it had not been made on the open market, but held it constituted a "social/ community purpose".

This was overturned on appeal. Completed dwellings could not be "land", within the permitted disposal definition, given the nature of the other exemptions within that definition (e.g. sub-stations, highway, open space). The developer should have negotiated with the seller, paying for release of the obligation if necessary.

The moral of the story

Overage is complicated. Words have multiple meanings, and people don't act like they're supposed to. Ask yourself "What's the least attractive way I could interpret this wording?". You may be surprised. The courts may assist, but why count on it?

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The abolition of Employment Tribunal fees

Over the summer, Employment Tribunal fees were abolished following the Supreme Court's decision in R (on the application of UNISON) v Lord Chancellor.

Unison argued that:

- The introduction of fees breached the fundamental principle of EU law, that legal rights must have an effective remedy, and that the fees made it impossible in practice, or excessively difficult, for claimants to enforce their rights; and
- The fees were indirectly discriminatory against claimants with particular protected characteristics under the Equality Act 2010.

The Supreme Court upheld both grounds commenting that access to the courts is a vital component of the rule of law, and noting that fees had resulted in a substantial and sustained drop in the number of claims brought.

It found that the fees were indirectly discriminatory, noting that a higher proportion of women brought discrimination claims (which attracted a higher fee) and that this caused a disproportionate impact on them. The higher fees were not objectively justified by the Government's aims of deterring unmeritorious claims and transferring some of the tribunal running costs from the public purse to claimants as they were no more effective than lower fees at achieving these aims.

Refund scheme

Following a period of limbo the first stage of a refund scheme for employment tribunal fees was launched towards the end of October. It has since opened to everybody to apply for a refund if they paid fees in respect of a tribunal claim or appeal since fees were introduced in July 2013.

Anyone who paid a fee can apply for a refund online, or use one of the prescribed forms to apply by post or email. As well as having their original fee reduced, successful applicants to the scheme will also be paid interest of 0.5%, calculated from the date of the original payment up until the refund date.

Other effects

Meanwhile the number of claims being issued is on the rise. Since the beginning of August the London Central tribunal has seen a 65% increase in claims, while other tribunal offices are reported to have had increases of 100%! We've certainly noticed an increase in claims too. This will have an effect on claims in the system as the resources of the tribunal system are already stretched.

Employers and HR departments will need to re-assess the risk profile for dealing with employment disputes. Those that would not have brought a claim before may now do so because there are no fees. We believe that will result in an increase in resourcing of employee relations advice within many employers.

Employers will also need to assess the worth of claims that are made and may now have a greater incentive to engage with the Acas early conciliation system, and employees may be more bullish in early negotiations now there is no prospect of having to pay a fee.

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Considerations for housing associations prior to the introduction of GDPR

The introduction of the General Data Protection Regulation (GDPR) in May 2018 sees another piece of legislation that housing association (HA) will need to consider when certifying to the Regulator of Social Housing that it has complied with all law.

Accountability is a key theme throughout GDPR and having adequate internal procedures will assist greatly with compliance of the regulations. Below are just a couple of the issues that HAs should prepare for ahead of May 2018.

Data Protection Officer

The appointment of a Data Protection Officer is required if you are a public authority or if your core activities consist of carrying out large scale systematic monitoring of individuals. It is likely that a landlord processing the details of its tenants would be considered to be a "core activity", and as such, most HAs will need to appoint a Data Protection Officer. As a minimum, the officer is to inform and advise the organisation of their obligations under the law and be the first port of contact for supervisory authorities and importantly those how data is being processed. The officer is allowed to hold another role within the organisation so long as it does not conflict with the individual's duty as Data Protection Officer.

Internal procedure and reporting timescale

The GDPR will impose a duty on all organisations to report certain types of data breaches to the ICO and in certain circumstances to the individuals themselves.

A report of breach to the ICO will apply where the breach is likely to result in a risk "to the rights and freedoms" of individuals (e.g. discrimination, financial loss, etc.). Any breach must be reported "without undue delay" and this must be within 72 hours of the organisation becoming aware of the breach. It is for this reason that robust internal procedures are essential. Where it is necessary to notify affected individuals, this must be done without undue delay. Failure to notify a breach when required to do so may result in a substantial fine from the ICO of up to €10 million or 2% of global turnover and this is separate from the potential penalities which may be applied for the breach itself (which in the most serious cases can be up to €20 million or 4% of global turnover). The ICO in its guidance emphasise that it will expect transparency. The individuals will have a right to bring their own legal proceedings against the organisations.

Although fines at these levels are not expected to be common place, the risks of non-compliance must be taken seriously. However, given the significant impact that such a fine could have on an HA, it is imperative that all staff understand and appreciate what constitutes a breach. Training should be given to help demonstrate the circumstances which may give rise to a breach and staff should also be trained on the internal procedure that must be adopted once a breach has been identified (including notifying the Data Protection Officer) so that organisation is able to comply with its reporting obligations and avoid the risk of a fine. If staff are generally unaware of the procedures and a breach occurs then it is likely that the organisation fails to comply with its obligations under the regulations.

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Tenant consultation – who, how and when?

While it may be considered a 'soft' discipline when compared to more nuts-and-bolts matters like undertaking repairs or setting rents, tenant consultation is an important aspect of the work of a social landlord.

Do you need to consult?

Consultation duties can stem from a tenancy contract or statute, or more generally from the recently revised RSH's Tenant Involvement and Empowerment Standard.

Most commonly, a duty to consult will be triggered, where:

- There's a planned significant change to housing management: e.g. demolitions and redevelopments, closure of facilities, outsourcing of repairs or other services, changes to tenant involvement structures such as TMOs, or altered tenant services.
- Alterations are proposed to tenants' rights: e.g. removal of 'rent free' weeks, changes in mutual exchange or succession policies, alterations to services (all subject to the terms of individual tenancy agreements and in relation to service charges, the consultation requirements of the Landlord and Tenant Act 1985).
- A stock transfer or corporate restructure/merger is proposed: which would cause a change in the identity or nature of the landlord or its business (the statutory consultation required prior to a LSVT of tenanted council housing to a housing association is beyond the scope of this article).

Who?

Tenants who are to be affected by the proposed change must be consulted, as well as tenants' groups. There is no minimum number of tenants who must be affected before the duty is triggered – so if a single tenanted dwelling is to be transferred, the tenant of that dwelling must be properly consulted.

Landlords should give consideration to the 'reach' of consultation methods – does the message get to all tenants who need to know? How can hard-to-reach groups be included? Would different methods of consultation (e.g. emails, roadshows, meet-ups) extend reach and make consultation more effective? What about 'hard to reach' tenants?

How and when?

Consultations must be carried out fairly and on a genuine basis. They must be undertaken when the proposals are still at a formative stage, and adequate time given for tenants to consider the material and respond by a given deadline. Language should be conditional (e.g. 'would be' rather than 'will') to make it clear no decision has yet been made.

Proposals and rationale must be set out in an appropriate amount of detail – enough to allow tenants to understand the implications, but not so much that the information confuses. Options should be outlined, and actual and potential advantages and disadvantages (with costs) to tenants should be explained as these will apply both in the immediate and the longer term.

Responses must be taken into account when finalising any proposals and a board meeting should discuss the consultation and take responses into account, before a final decision is made. Timing is critical with major decisions that could require tenant consultation. Landlords should be able to demonstrate to tenants (and the Regulator) how they have taken the consultation outcome into account when reaching a decision.

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Endeavour and good faith obligations: slotting the pieces together

These obligations are often used together but what do they entail and what are the traps?

An endeavour obligation is an obligation to try and achieve a result; for example to obtain planning permission so a contract becomes unconditional. Case law indicates a spectrum of obligations and care is needed as their satisfaction is assessed by reference to circumstances at the time of performance which may be more onerous than when the contract was entered into.

The least stringent is 'reasonable endeavours' where there may be several ways of achieving the objective, but only a requirement to take one reasonable course of action rather than exhausting all options. Although it is not toothless and could involve reasonable expenditure, there is no obligation to act against your commercial interests.

The next is 'all reasonable endeavours' which was often considered as sat between 'best' and 'reasonable' endeavours, but recent case law indicates, it may be closer to 'best'. It is likely to require the taking of all reasonable courses of action until no more are available, but there is a margin of discretion as to discharging the obligation acknowledging that some actions may be outside of a party's control. It potentially involves some sacrifice of commercial interest, a higher level of expenditure and is likely to include a duty to report on progress with compliance.

'All reasonable but commercially prudent endeavours' arose in the 2010 CPC Group case where the court held that (in the context of obtaining planning permission) the parties were not expected to act against their respective commercial interests, but rather could follow another course of action if advised it had a greater chance of success.

'Best endeavours' is not an absolute obligation, but is the most onerous with the requirement to take all reasonable courses of action available. Once those options are exhausted, it would be unwise to 'down tools' without reference to all parties. It is likely to involve significant expenditure (but not so that a party incurs financial ruin) and an obligation to litigate or lodge, for example, a planning appeal.

English contract law has no general doctrine of 'good faith', but the courts will uphold express obligations to act in good faith. It is wider than just behaving honestly, with a requirement for fair and honest dealings. This can mean remaining faithful to agreed common objectives and being obliged to act in the 'spirit' of the agreement even if your contractual obligations may have been less constrained. If good faith obligations are used then consider limiting them to a specific purpose (such as obtaining third party consent) rather than agreeing to act in good faith in the performance of all contractual obligations.

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Making the most out of Right to Buy receipts

The Local Authorities (Capital Finance and Accounting) (England) Regulations 2003 (the Regulations) restrict a local authority's use of certain "capital receipts" that it receives, requiring these to be pooled and paid to the Secretary of State. The capital receipt is received when a local authority sells a property under the Right to Buy (RTB) (Schedule 6A of the Housing Act 1985) is a capital receipt that is subject to this pooling restriction.

However, Section 11 (6) of the Local Government Act 2003 allows 'RTB receipts' capital receipts to fall outside of the pooling requirements where an agreement has been entered into between the Secretary of State and the particular local authority. Most local authorities in England have entered into an agreement with the Secretary of State allowing them to use, subject to certain restrictions, their RTB receipts to provide social housing – the "RTB Retention Agreement".

Social housing for the purposes of the RTB Retention Agreement is defined as "low cost rental accommodation" as defined in section 68(1)(a) of Housing and Regeneration Act 2008 (the 2008 Act). This definition then directs you to section 69 of the 2008 Act which defines low cost rental accommodation as that which is:

- made available for rent;
- at below the market rate; and
- made available in accordance with rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market.

In addition to having to be used for the provision of social rented housing, the RTB receipts must constitute no more than 30% of the total amount spent on the development costs associated with this.

The development costs include those associated with the acquisition and construction of the social housing, with part 6 of the RTB Retention Agreement setting out the specific development costs which can be funded. The remaining 70% of the cost of developing the social housing must be funded by other sources (excluding grant from Homes England or the Greater London Authority).

A local authority that enters into the RTB Retention Agreement has a three year timeframe to use their RTB receipts, before these must be paid to the Secretary of State, with interest, if unused.

So how can RTB receipts be utilised?

Whilst restrictive, the RTB Retention Agreement does allow local authorities to use RTB receipts in a variety of ways to provide new social rented housing, often with local authorities working together with housing associations and other third parties.

We have advised many local authorities on the different types of models that can be used in accordance and some of these are described below.

Local Authority spends the RTB receipts itself.

Local authorities can use the RTB receipts themselves. This requires the local authority to fund the remaining 70% themselves from reserves or borrowing. This may prove problematic for local authorities who are at, or close to, their HRA debt cap. Also the lack of availability of land and / or the potential lack of skill set to manage construction for some might make this option less attractive.

Independent charitable Community Benefit Societies

RTB receipts can be "gifted" to bodies in which the local authority does not own a controlling interest and we have advised

a number of local authorities who have sponsored the establishment of (or are in the process of doing so) independent organisations, usually community benefit societies and often charitable, to develop and provide social housing.

If the body is a charity it must be independent from the State and therefore the local authority will not have a controlling interest in the charitable CBS. This allows RTB receipts to be passed directly to the independent body. The local authority could also loan the body the remaining 70% of the development costs.

Whilst the local authority will not be able to exercise constitutional control, control/influence over the body's activities can be achieved in other ways – for example within loan covenants and/or land transfer arrangements.

"Gifts" to a housing association

As a local authority will not own a controlling interest in a housing association, RTB receipts could be gifted to a housing association on the same basis as the money could be gifted to an independent body described above.

The local authority can provide the RTB receipts to a housing association by way of grant, with specific conditions to satisfy the terms of the RTB Retention Agreement, including the receipt of nomination rights.

Housing Delivery Partnerships

Partnerships between local authorities and housing association and/or the private sector are becoming increasingly common in the sector, with the aim of increasing the supply of new homes of all types and tenures.

Partnerships can take many forms including co-operative alliances, contractual partnerships and corporate partnerships (often 50/50 Limited Liability Partnerships (LLP)).

Partnerships are attractive due to the flexibility they can provide to both local authorities and the private sector partner and, like the models described above, RTB receipts could be freely passed to a 50/50 partnership, as the council would not own a controlling interest in such a body.

What next?

The three year time limit to spend the RTB receipts and the other constraints in the RTB Retention Agreement mean that, for some local authorities, spending the RTB receipts is often easier said than done. A number of local authorities have been required to pay back RTB receipts to government with compound interest.

Use the RTB receipts or lose them – we can help you work through the options.

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Looking after your supply chain

It's more important than ever for housing providers to engage with all tiers of their main contractors' supply chains. Here are some key issues for housing providers to consider.

Traditionally, housing providers haven't engaged with their supply chains, preferring to rely on their contractors to manage and pay sub-contractors.

A number of recent legislative changes now require housing providers to ensure their supply chains are being paid on time and complying with various regulatory laws. The pressures of cost cutting within the public sector, and the anticipated impact of Brexit on the cost and availability of labour and materials, places a further onus on housing providers to engage with their supply chains and explore opportunities for cost savings and improved delivery.

Legislation affecting supply chains

Some of the legislation affecting treatment of the supply chain includes:

- Public Contracts Regulations 2015 – These requirements have been around since early 2015 but still aren't widely known or adhered to. Contracting authorities are required to ensure all "public contracts" procured in line with the Regulations contain terms to pay contractors within 30 days of an undisputed invoice. In addition, contracting authorities must also ensure that their main contractors pay their sub-contractors within 30 days, and that the sub-contractors have equivalent terms in their contracts with sub-sub-contractors.
- Modern Slavery Act 2015 – This Act imposes obligations on housing providers as employers to ensure that their supply chain is compliant with Section 54. This is the requirement to publish a statement which documents the steps the organisation has taken to ensure that slavery and human trafficking is not taking place within any of its supply chains.
- General Data Protection Regulations – These regulations come into force on 25 May 2018, and impose greater restrictions on processing data in the EU. Housing providers must now ensure that any Personal Data held by their contractors and their supply chains is protected and not unnecessarily disclosed.

To comply with these rules, housing providers must now take greater steps to ensure that their main contractor and supply chain contracts are compliant. Standard form contracts (JCT, PPC/TAC, NEC) contain terms covering prompt payment of the main contractor, but further drafting will be required to cover payment to the supply chain, and the modern slavery and data protection amendments.

Housing providers should ensure that all forms of contract used, whether bespoke or standard forms, contain these terms. Alternatively, housing providers should be asking to review and approve forms of sub-contract, to ensure that these obligations are covered. For existing contracts and frameworks, housing providers should be looking to vary the contract terms with their contractors and service providers.

Using procurement to understand your supply chain

As well as legal compliance, there are a number of commercial benefits that can be generated from engaging with the supply chain. Understanding where your supply chain sources their labour and materials from will be increasingly important in a post-Brexit economy, which is already experiencing increases in material costs and a shortage

in skilled labour. Housing providers can engage with their supply chains or indirectly via their main contractors, and agree volume supply agreements to ensure a consistent supply of labour and materials for long-term projects. Providing the supply chain with some assurances as to workflow can also be useful in negotiating extended and improved warranties and guarantees on materials and service delivery.

Engaging with the supply chain often holds the key to achieving social value objectives. Many contractors do not engage labour directly and are less able to provide apprenticeships and work experience opportunities. Engaging with your existing supply chain, or requiring contractors to pass social value obligations down to the supply chain, can be a more effective means of achieving these objectives.

Housing providers who opt to engage directly with the supply chain have the advantage of being able to negotiate directly, and exercise more control over selection. However, this will usually require housing providers to run a procurement process under the Public Contracts Regulations. For this reason, many housing providers prefer to engage with their supply chain via their main contractors. While this does not give as much control over selection, housing providers can benefit from the management experience of the main contractor.

Housing providers can use the procurement process as a due diligence exercise, to ensure that their contractors and supply chains are suitably qualified and compliant. The Crown Commercial Service's Standard Selection Questionnaire includes a number of questions focusing on supply chains. Question 6.2 can be utilised to obtain evidence of bidders' experience of maintaining healthy supply chains. Similarly, Question 8.2(c) can be used to demonstrate that the bidders support skills development and apprenticeships in their supply chains. Housing providers can also supplement these questions as required.

Procurement exercises can also be used to gather information about how bidders will utilise their supply chain to deliver the contract, and their willingness to offer volume supply deals and offer social value opportunities. The HACT Toolkit on Social Value and Procurement can be used to set suitable correct criteria to evaluate social value and embody any social value objectives in the delivery contract.

Operational benefits

Regardless of the procurement model used, there are a number of operational benefits to engaging with the supply chain. Disputes and differences, especially around timescales and complaints around service delivery, can be resolved more easily when you have direct communication with the supply chain. Inviting the supply chain to attend key strategy meetings and participate in cost review exercises will also benefit from the supply chain's operational understanding of the contract. Having a direct link with the supply chain also provides an in-built safety mechanism for clients in the event of main contractor insolvency.

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Housing Delivery Partnerships – key themes

Trowers & Hamlins launched our latest thought leadership piece at the end of last year – Housing Delivery Partnerships – removing barriers through collaboration. Housing Delivery Partnerships (HDPs) are certainly a hot topic and our report is part of a range of literature currently circulating, including the Building Bridges produced by CIH and Vivid (amongst others) and the Future of London briefing – Making Housing Delivery Models Work for London.

HDPs are not new; partnerships of one form or another have been around for years, but whilst individual projects have enjoyed success, HDPs have failed to deliver the numbers of homes that potentially they could. In our report we have sought to identify some of the barriers to HDPs delivering on a large scale, and how the public and private sectors can work together in partnership to deliver housing and related community assets. We have hosted round table discussions attended by a mix of local authorities, private developers, housing associations and investors. We have also carried out a series of research interviews with participants in successful partnering projects to assess what worked well and what they would look to change in the future.

It's interesting to note that some of the same themes came over time and time again – seemingly participants from all sectors agreeing on the 'hurdles' if not always the solutions!

A number of the key themes emerging were as follows:

- Choose the right form of partnership; a HDP does not have to be a full blown corporate vehicle, and choice of model should not be driven by what is fashionable. Take time to choose a form of partnership that compliments the specifics of the relationship and product. We have identified in the report a number of key questions which we believe potential partners should consider and which will help inform both the choice of partner and choice of delivery model/partnership.
- Shared values and objectives are key to a successful partnership, particularly one which may run for many years. That does not mean that all partners have the same drivers and return requirements, but that there is commonality of underlying vision and purpose.
- Linked to this is the importance of trust and selecting a compatible partner. Legal agreements can only take you so far. Where two or more parties come together to deliver a long term plan – whether as a corporate joint venture or a contractual collaboration – it is easy to focus on getting to the start of the process – getting the initial funding and legal structures in place. This is important but the real delivery challenge comes during the operational phase where contrasting cultural approaches and a lack of trust can lead to discord. A collaborative approach from all parties will be key to working through the varying challenges which arise over a sustained time period.
- The most consistent message from all sectors we spoke to was flexibility in approach. In long term HDPs the ability to work together to deal with changes in the wider economic environment as well as the local market are essential. A clear plan at the outset is important but combined with a recognition from all parties that there are circumstances which may trigger the need look afresh at approach – which can particularly be a challenge in procurement terms.
- The importance of open and regular dialogue should not be underestimated. There will be challenges in the life of any HDP and strong relationships are built on open discussion. Partners

should not seek to exercise control, and decision should be reached through dialogue and open discussion.

- A further consistent theme was the challenge of the procurement regulations, and the acknowledgement that a lengthy and competitive procurement process will not necessarily result in the best partnership. If a formal procurement process is required, it is important that this is as efficient as possible and as an "eye" on the wider and long term objective, so that the selected partner is not left disheartened and is still minded to work in partnership. HDPs are increasingly looking for "procurement light" models.
- Any true partnership sees the partners sharing in the risk and reward. It is an obvious point, but participants must play their fair part in the partnership. A partnership is not a 'partnership' where one party carries all the risk. Each party should play to their own strengths and rely upon and utilise the strengths and skills of their partners.
- The end product must fit for purpose and sight of that must not be lost through any partnership relationship. It is the end product which ultimately drives return and so the partners must get that right, approaching with an open mind, the suggestions made by partners who may have greater experience in a particular field.

The case studies in our Report highlight how some of these themes have played out in practice. They are proof the challenges can be overcome and when they are, much needed homes are delivered.

Whilst there are certainly challenges, what has come out of the research is the interest, from all sectors, in 'partnership working', particularly drawing in the public sectors, for example local authorities, the devolved administrations, and increasingly the likes of the NHS. There is huge potential for delivery if organisations can successfully combine skills and resources with these public bodies.

To read the report in full go to www.trowers.com/HDP

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Getting the most out of IT procurements

Procuring IT systems and servicing contracts can be difficult and expensive. Here are some top tips for running a procurement that meets your commercial objectives.

Having a functional and up-to-date IT system is a critical requirement of any social housing provider's day-to-day practice. Key responsibilities such as asset management are highly dependent on IT systems to identify relevant properties, identify non-compliance and record the service provider's performance data. Given the rapid change in technology, tendering exercises for IT systems and services are a regular feature of most social housing providers' procurement strategies.

IT contracts present a number of challenges for social housing providers. They are, by their nature, highly technical, requiring a close degree of working between procurement officers, in-house IT support staff, and the relevant departments who are commissioning the contract. The tender process and contract negotiation and mobilisation stages can be long and resource-heavy, often requiring external support if there is not sufficient in-house expertise.

Most IT-related contracts will be required to be advertised under one of the procedures in the Public Contracts Regulations 2015 if the contract value exceeds the relevant financial thresholds. The number of IT providers in the UK is relatively small compared to other industries, making a fiercely competitive marketplace. Bidders in the IT industry tend to be well-informed about the procurement rules, and aren't afraid to challenge irregular tender processes, requiring clients to be vigilant about maintaining compliance.

Many IT solutions are bespoke to the individual client, and clients are often unsure as to the precise scope or features of a particular solution. This can make it difficult for clients to use the Open or Restricted Procedures, which assume that all contract requirements can be defined in advance and don't allow for negotiation with bidders. By contrast, the Competitive Dialogue Procedure allows clients to enter into structured dialogue with shortlisted bidders, to help identify the solution that best meets its requirements. For projects requiring a bespoke product not currently available in the marketplace, clients can use the Innovation Partnerships Procedure, which allows bidders to develop and present prototype solutions as part of the tender process. If run in a lean and efficient way, these procedures shouldn't add significantly to a procurement timetable, and result in a more informed award decision based on close engagement with the bidders. Both procedures can be structured to reduce the number of bidders, to avoid spending resources on three separate bids.

Clients should take care to specify their minimum requirements for the project, so bidders are clear about the limits of any negotiations. Setting minimum requirements allows clients to remove bidders from competition who are unwilling or unable to meet the requirements. Tenders can be structured with a series of gateways at key stages, in which bidders must provide information about their proposed solution before proceeding to the next assessment stage. Gateways form formal structured "sign-off" stages and allow clients to ensure at key stages in the procurement process that all proposed solutions deliver what is required, rather than ending up with an unworkable solution.

In any tender exercise, clients must ensure that promises being made by bidders about the proposed solution are formalised in contractually binding terms. Clients who rely on informal processes such as heads of terms can run into problems later in the procurement, if there is a dispute about whether the heads of terms are binding or what exactly has been agreed. Contract negotiations should be included early in the tender exercise, with

a view to agreeing terms as far as possible before the award decision is made. This allows the client a commercial advantage, as bidders will be more willing to concede commercial points with a view to winning the contract.

The key commercial points that should be addressed in any contract negotiation are:

- Is it a fixed price agreement? What should happen if any assumptions about the fixed price prove to be incorrect? If it is not a fixed price consider how to maintain control over the project expenditure, e.g. by use of milestone payments
- Payments should be linked to deliverables to motivate the supplier and ensure that the client only pays when something tangible and usable is delivered
- Consider who will undertake the testing and acceptance of deliverables, what it will involve and what should happen when something fails. How far will the supplier stand behind what they are to deliver? Warranties are usually heavily negotiated, particularly if the supplier is configuring or incorporating third party software
- Consider whether liability caps should vary depending on the issue or whether there are some matters that should be un-capped (eg indemnities against the supplier's software infringing a third party's rights
- Consider what service levels will apply and the consequences of any failure to maintain these
- Consider whether any supplier personnel could transfer by operation of TUPE on termination of the support services

Given the small and competitive nature of the IT marketplace, it's essential that clients adhere strictly to the feedback requirements at contract award stage. Award notification letters and feedback to unsuccessful bidders must include all information required by the Regulations, and clients may consider giving enhanced feedback where a competition has been particularly close. Clients should take prompt advice in respect of any complaint or threatened challenge to an IT tender process.

IT procurements should be scheduled to allow sufficient time for any mobilisation and test-run activities, prior to the project going live. Sufficient time should also be built in to allow consultation with key stakeholders and end users of the proposed solution.

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Managing contracts and underperforming suppliers

More and more frequently we are being asked to advise on how to manage underperforming suppliers contracted under framework agreements. This is becoming a key problem for many of our clients and understanding the mechanisms available to contracting authorities (usually our housing association or local authority clients), is crucial to ensuring that public contracts are carried out effectively and efficiently.

The High Court case of BT Cornwall Limited v Cornwall Council and others highlighted the importance of ensuring that the contractual mechanisms for termination are clear and succinct. The reasoning in the case of Sutton Housing Partnership v Rydon Maintenance also suggests that where a contract is unclear common sense shall be taken into account when considering interpretation of contractual provisions.

In BT Cornwall, BT had contracted with Cornwall Council, Cornwall Partnership NHS Foundation Trust and Peninsula Community Health CIC by entering into a Service Delivery Agreement worth approximately £160 million relating to the provision of health, transport, communications and public safety throughout Cornwall. BT sought an injunction to prevent termination of the contract by the Council due to its failure to meet a number of KPIs under the contract. Ultimately the High Court found that the Council had been entitled to terminate the contract because BT had not provided the service to the required standard set out in the contract.

A number of key lessons can be taken from this case, particularly in respect of a Contracting Authority's rights in relation to underperforming suppliers. Firstly, the willingness of a Contracting Authority to co-operate with a contractor to resolve performance issues does not necessarily amount to a waiver of the KPIs under the contract. In the BT Cornwall case, BT acknowledged that there were significant problems with their service provision however tried to argue that the Council had waived their right to termination as they had affirmed the breaches.

Under the contract, the Council had an express right to waive KPI scores caused by performance failures 'at their sole discretion' if they were satisfied that a suitable remedial plan to prevent future failures had been put in place. In this instance, the Court did not accept that the Council's conduct in working to resolve the issues amounted to such a waiver.

To the extent that the contract does not say otherwise, Contracting Authorities can therefore be reassured that in acting co-operatively to resolve performance issues and ensuring efficiency of the contract, they may not be taken to have impliedly waived any rights to terminate in the future. Clear and precise drafting of KPI management clauses is therefore essential to protect the ability to terminate a contract should it become necessary thereafter.

Further, care should be taken to ensure that any variation to the Framework Agreement, Call-off Contract or any other contractual documentation is in writing. In BT Cornwall, BT had argued that the agreement had been varied by an implied KPI Backlog Agreement to relax the enforcement of KPIs whilst BT was attempting to resolve the performance issues. The Court found that no amendment to the agreement or creation of a new agreement had occurred. There was no written evidence to support such a position and one of the parties to the contract was not present at the relevant meeting.

Importantly then, if any amendments are agreed between the parties these should be fully recorded in writing to avoid any ambiguity. One of the benefits of using Framework Agreements is the certainty and continuous improvement which can be achieved through long-term relationships. Contracting Authorities should therefore not be afraid to amend the contract or service levels to achieve these benefits, provided that such variations are clearly recorded.

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Managing the suspension process

If serious misconduct has taken place an employer may wish to consider suspending the employee who is being investigated. Suspension should be considered as an option where there is a potential threat to the employer's business or to other employees. It may also be appropriate where it is not possible to properly investigate the allegation if the employee remains at work, or where relationships at work have broken down.

An employer must have reasonable and proper cause for any suspension. If not then it risks breaching the implied term of mutual trust and confidence. Any period of suspension should be kept as short as possible and should be regularly reviewed.

Sometimes it will be necessary to suspend board members from their duties for misconduct. The process will be similar to that being followed for an employee, except that it will be managed by the Chair of the Board and the Chief Executive of the organisation.

Suspension was found to be a breach of contract

The High Court recently held in Agoreyo v London Borough of Lambeth that the suspension of a teacher to enable a misconduct investigation to be carried out fairly constituted a repudiatory breach of the implied term of trust and confidence.

The teacher was hired to teach a class of children, two of whom were particularly challenging and had behavioural problems. She was not told that she would be teaching children who had such severe behavioural, emotional and social difficulties and did not have any training in how to deal with them. She was suspended because of the force she used in three incidents involving the two children.

Prior to the last incident the teacher sent an email which the judge found to have "all the hallmarks of a genuine plea for help". Following this it was agreed that support would be put in place, yet the suspension occurred almost straight away.

In the judge's opinion the suspension breached the implied term relating to trust and confidence, particularly given that the teacher's line manager had investigated two of the incidents and not considered them worthy of disciplinary action. He was also critical of the fact that the suspension occurred within a few days of a support plan being put in motion. He emphasised "the need to avoid a "knee jerk" reaction, with suspension as the default position without a consideration of the alternatives.

Best practice

Before suspending an employee:

- Consider alternatives to suspension.
- Consider putting an express right to suspend in your contracts of employment in the event of serious misconduct.
- Ensure you have thought the suspension through and have reasonable grounds to suspend.
- Operate any suspension policy consistently to avoid potential discrimination claims.

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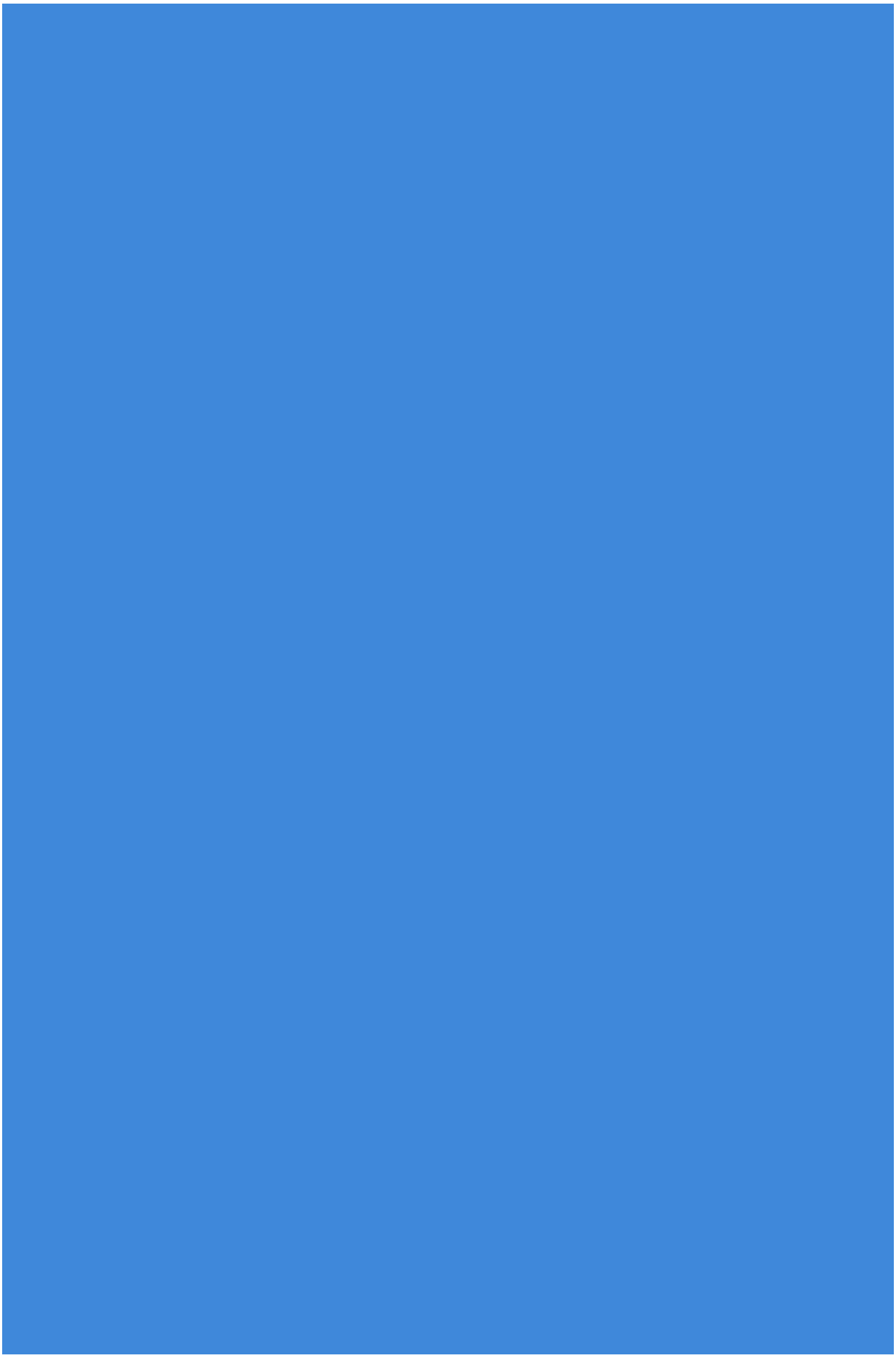

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Produced by Trowers & Hamlins LLP, 3 Bunhill Row, London, EC1Y 8YZ.

Front cover image: Shutterstock