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Publications —— Winter 2016/17

Quarterly Housing Update

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Foreword

Happy new year! I suspect many of us are looking back at 2016 wondering what on earth hit us. We are now waking up to the realities of Brexit and President Trump. I'm not proposing to comment on that here beyond making the obvious point that we are in a time of uncertainty which may ultimately impact on housing one way or another.

I had thought that by now we'd all be digesting the contents of the Government's Housing White Paper. Various dates for publication have come and gone. I am no longer speculating on when it might appear. The press has been covering concerns about the possible implications for the Green Belt of future housing development. As such concerns are often voiced by Conservative MPs, one can imagine there may be some difficult conversations going on in the corridors of power. Perhaps that's one reason why the White Paper has been delayed.

I was surprised by the tone of Government announcements earlier this month which were the first to mention starter homes for some time. I had thought they might be seen as less important with the message being that housing of all tenures is what the country needs. It could still be the case that starter homes are to be less significant under the current administration than they were when Mr Osborne was Chancellor. What have resurfaced though are the same concerns that were expressed after the 2015 Autumn statement regarding the affordability of starter homes and their potential to distort the market.

A subject of much debate in our office has been how to achieve a better outcome across health, social care and housing through joint working between the NHS, local authorities, housing associations and others. There's nothing new here. So why doesn't more happen? With the pressure on the NHS seemingly increasing by the day and continuing problems over the cost of social care, perhaps now is the time when the jigsaw pieces will finally fall into place. We are looking to put clients and contacts in touch to see what can be achieved, perhaps through land release into joint ventures which will provide much needed accommodation of various types and an income stream for the participants.

Joint ventures are very much flavour of the month. Historically the majority were between housing associations and developers/house builders; often scheme specific; and geared to generating cross subsidy to plough into more affordable homes. They will continue I'm sure. We are, however, now seeing far more interest from local authorities in such ventures with their contributions ranging from land to on lending funds drawn from PWLB. The ability to generate an income stream from rented or shared ownership homes as well as address local housing need is highly attractive to many.

Ian Graham

Partner —— Housing and Regeneration

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

Cybercrime – minimising the risk

The continuing evolution of technology has enabled fraudsters to adapt, at an alarming pace, to take advantage of new and emerging cyber risks. Action Fraud estimates that 70% of fraud is now "cyber enabled" and that the City of London Police is currently investigating "an estimated £600m in financial losses."

A cybercrime event has the potential to grind an operating business to a complete halt. A social landlord could lose data and, for those registered with the Home and Communities Agency, face the risk of regulatory downgrade. Given the intrusive nature of a cybercrime attack, it is understandable that the reputational consequences should be at the forefront of a social landlord's mind. Of course, the reputational impact is usually closely followed by some kind of financial consequence (in the form of business interruption costs, the cost of seeking professional advice and the payment of fines to regulators – to name a few). As the holders and distributors of public money, social landlords also often have an obligation to seek recovery of their financial losses, meaning that these additional costs may be unavoidable.

Social landlords are a particular target for cybercriminals because they hold large amounts of personal data which can be sold on and then used for fraudulent purposes. There is, therefore, often another class of victim to a cybercrime incident; the businesses and individuals who are impacted by the leaking of the data (see, for example, the fallout of the Mossack Fonesca data leak). This heightens the risk of potential litigation against social landlords as those businesses and individuals often seek to recover their own financial losses, which in turn increases a social landlord's potential cost of responding to an incident.

A social landlord is also at risk of breaching the Data Protection Act 1998. Whilst the current provisions allow the Information Commissioner's Office to impose a financial penalty (for example Talk Talk were fined £400,000 in October 2016 for failing to prevent a cyber attack), the General Data Protection Regulation will go even further. Once implemented, a social landlord could be the subject of a maximum fine of €20 million or 4% of annual worldwide turnover (whichever is higher).

To minimise the risk of cybercrime, social landlords should consider:

1. ensuring that they have sufficient insurance cover in place (with a view to minimising financial loss);
2. reviewing and updating their internal IT and security measures;
3. providing appropriate training to staff members on the risk of cybercrime; and
4. preparing an emergency response plan to counteract a cyber attack.

Whilst external cybercrime is prevalent, social landlords are also at risk of internal cybercrime and fraud. As part of the battle against cybercrime, the Ministry of Justice is considering introducing a new corporate offence of "failing to prevent economic crime", which is likely to cover a range of offences, including fraud. If introduced, these changes will represent a significant expansion in corporate criminal liability and impose additional compliance burdens on social landlords.

Currently, corporate bodies can only be found liable for fraud in the UK if it can be proved that persons at executive or board level were "complicit" in the criminality - in this case, the fraud. Many commentators believe, however, that the current proposals on failing to prevent economic crime will be modelled on Section 7 of the Bribery Act 2010. The Bribery Act provides that a corporate body will be guilty of a criminal offence if an associated person commits

bribery, unless the corporate body can prove that it had "adequate procedures" in place to prevent such conduct. Under the Bribery Act "associated persons" are widely defined and would include employees, group entities and suppliers.

In terms of "adequate procedures", these are not defined but the Ministry of Justice has published guidance on what adequate procedures might involve. Again, we would expect a similar approach to be adopted in relation to any new offence of failing to prevent economic crime. The guidance sets out the following six guiding principles that corporate bodies should have in mind when shaping and implementing an appropriate compliance programme:

- a detailed risk assessment;
- policies and procedures that are appropriate to the risks identified;
- demonstrable board level commitment and "tone from the top";
- the need for due diligence in relation to third parties;
- communication and training; and
- monitoring and review.

In addition, board members can also be held to be personally liable under the Bribery Act in circumstances where they "consented" or "connived" to an act of bribery. Neither "consented" nor "connived" are defined, but it is thought that there is a good chance that board members will be liable if they are aware that bribery is going on and do nothing to investigate or put a stop to it. It is important to bear in mind, therefore, that the introduction of the new offence could lead to a board member facing prison time if they failed to prevent fraud.

Should a fraud actually occur, in order to evidence the existence of robust systems and procedures and reduce/avoid liability, social landlords will need to proactively undertake detailed risk assessments, prepare comprehensive policies and procedures and implement a tailored compliance programme which covers both fraud prevention and fraud response. Such a programme will inevitably need to include demonstrable board level engagement, training, due diligence and monitoring.

In summary, therefore, it is vital that organisations in the housing sector take the time to reflect on and address, their potential economic crime (including cybercrime) exposure in order to facilitate the implementation of robust systems and controls, where possible, to minimise their potential economic, reputational and criminal liability.

Richard St John Williams
Partner —— Housing and Regeneration

t +44 (0)161 838 2097
e rstjohnwilliams@trowers.com

Mark Kenkre
Partner —— Commercial Litigation

t +44 (0)121 214 8863
e mkenkre@trowers.com

Deregulation of the sector

Our summer edition was devoted to the Housing and Planning Act 2016. Several articles heralded new provisions which, when implemented, would reduce regulation for the affordable housing sector. The HCA has now confirmed that the "deregulatory" provisions of the Act will come into force on 6 April 2017. Here is a reminder of the changes that will take place:

Removal of the disposals consent regime – Before disposing of its social housing dwellings, an RP will no longer need to get consent from the Regulator under section 172 of Housing and Regeneration Act 2008 and section 133 of Housing Act 1988. Whilst much has been made of the new freedom to dispose, boards will be aware of the need to maintain proper decision-making processes and correct valuations. Charitable RPs will also continue to be bound by charity law and for registered charities this includes the more cumbersome disposals regime in the Charities Act 2011 and the Charity Commission's requirements.

Removal of the constitutional consents regime – HCA consent will not be required for changes to articles of association or rules. This will range from simple administrative changes to the rule changes required to become a subsidiary, conversion of a company into a registered society or from a registered society into a company, transfers of engagement by an RP (whether to another RP or to a non RP) and amalgamations of registered societies.

Introduction of a notifications regime – Whilst the statutory consents regimes for both disposals and constitutional changes will have been abolished, there will be a system of notification to the HCA for disposals and various constitutional changes. Final guidance has not yet been published.

RIP Disposal Proceeds Funds – Disposal Proceeds Funds (DPFs) are being abolished, which means that the use of proceeds from disposals from April onwards will be at the board's discretion. Money which is already in the DPF will, however, continue to be subject to current rules and restrictions through transitional provisions which are awaited.

Board member and manager appointments by the Regulator – The Regulator will be able to appoint a manager in narrower circumstances where an RP has mismanaged social housing. The change is to recognise that "mismanagement" for these purposes is restricted to management in breach of any legal requirements.

Registration decisions – A simplified registration process for "restructured bodies" will be introduced for bodies resulting from restructures such as amalgamations or conversions from a company to a registered society or vice versa. Transfers of engagements between RPs will not require any such new registration.

Local authority controls in or over RP constitutions – In addition to the above, we anticipate that the regulations bringing into force section 93 of the Act will be published early this year. These will reduce or remove local authority voting rights at general meetings and/or appointments to the board. They are also likely to cover contractual provisions that have a similar effect such as covenants not to amend rules without the consent of the local authority. These provisions may or may not come into effect at the same time as the other deregulation provisions.

Ian Davis
Partner —— Housing and Regeneration

t +44 (0)20 7423 8412
e idavis@trowers.com

FCA compliance – how it affects the housing sector

It is a common assumption that compliance with financial regulation is not something which is relevant to the housing sector. An increasing number of housing associations and local authorities, however, are authorised by the Financial Conduct Authority (FCA) for consumer credit activities. Whilst it is true that many of the activities being carried out in the housing sector remain on the periphery of what the FCA regulates, it is vital that authorised firms comply in full with the relevant FCA Handbook requirements and legislative obligations.

This is particularly pertinent in the context of shared equity products. Many housing associations and local authorities currently offer, or historically offered, shared equity loan products to assist individuals access home ownership. These products involve the grant of an equity loan and, in many situations, the equity loan is a consumer credit regulated agreement, requiring the lender association or authority to be FCA authorised and, therefore, comply with the relevant obligations.

The FCA has recently updated its requirements in relation to default notices, so we are taking this opportunity to remind anybody operating within the housing sector who is FCA authorised for consumer credit purposes, of the importance of compliance issues.

The compliance requirements are complex and detailed, but they include:

1. Sending FCA published information sheets to individuals where regulated consumer credit agreements are being enforced. It is these information sheets which have been recently updated. From 18 January 2018, all arrears and default notices relating to regulated agreements must include the new updated information sheets or the notices will be invalid.
2. Sending individual borrowers under regulated agreements annual interest statements in a prescribed form. Failure to do so may mean the authorised firm is unable to recover payments due to them under regulated agreements.
3. Complying with the FCA reporting requirements, which includes uploading accounts, complaints data and customer default data.
4. Incorporating prescribed wording into authorised firm's letterheads as well as ensuring that all regulated documentation includes the necessary prescribed wording.

It is important that regulated firms meet all the ongoing compliance requirements or there is a risk of FCA fines, reputational damage and inability to enforce the regulated documents. Organisations may wish to obtain professional advice as to their ongoing regulatory obligations and in drafting compliant annual interest statements. It would also be prudent to take advice in relation to the enforcement of regulated loans.

Suzanne Benson
Partner — Housing and Regeneration

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

Tom Wainwright
Senior Associate — Housing and Regeneration

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

Cost sharing vehicles – four years on

In 2013 the government introduced legislation to allow cost sharing vehicles (CSVs) to be established. There was a lot of talk at the time as to whether CSVs would become a staple in RP group structures. Now, four years on, we can assess just how popular and successful they have been.

What is a CSV?

A CSV is a vehicle that is used to provide services to its members. In short, the legislation provides that where a CSV provides services to its members that provision is exempt from VAT. The CSV must operate on a "direct reimbursement of cost" basis, meaning that it cannot charge a profit element on the fee to its members for those services. This means that RPs are able to save the VAT that would otherwise be payable on the services and the profit that they would otherwise pay to a third party contractor. In addition they can benefit from any additional savings from being able to pool resources or streamline services between members in the cost-sharing group.

CSVs are also able to provide services to non-members at a profit (and with VAT payable), giving a further way for the members to generate funds.

Where are we now?

CSVs are no longer a novelty and have been implemented by a number of associations since they were introduced. Examples include Isos, Two Castles and Byker, whose CSV provides gas servicing and complete housing management services; Guinness, Westward and Teign whose CSV provides gas servicing; East Thames and Triathlon whose CSV provides housing management services; and Fortis, Rooftop and Worcester whose CSV provides repairs and maintenance services. There are now over fifteen cost sharing groups in existence, in total providing cost sharing arrangements to in excess of 30 associations up and down the country.

Generally, CSVs have so far been used for higher cost services such as repairs and maintenance and housing management, but there are those that are now looking at the cost sharing model to share a wider range of back office services, including executive and management teams.

Has it been a success?

The key question is of course "are CSVs delivering the cost savings that people hoped they would?".

Paul Fiddaman, chief executive of Isos, says that Isos' CSV has been very successful and "is now delivering a wider range of services and producing a significant increase in the quality of the service that our customers receive and also ensuring a greater level of cost control and predictability". Isos see lots of potential in developing their CSV in the future, both with expanding their services and increasing the number of members in the CSV.

Paul does though flag an important point, namely that a CSV must be founded on a relationship of trust between organisations. Creating a CSV does not automatically mean that costs will be lowered and service quality increased and there will be work in establishing a good working relationship between RPs in order to make the service successful. The potential is clearly there, however, for RPs to deliver some quite substantial savings if they are willing to commit fully to a CSV.

Two Castles was one of the original members of the Isos CSV and has already replicated the arrangements elsewhere establishing another CSV with South Lakes Housing. This further extends Two Castles' determination to deliver value for money services. Cath Purdy, chief executive of South Lakes Housing, the other member the South Lakes CSV, says she sees real benefits coming from the CSV for maintenance in the South Cumbria area, both in terms of value for money and quality of service. This is also a much more efficient use of their in-house contractor and reduces the unit costs of management and maintenance. She feels the partnership will also bring wider benefits including sharing good practice and that other services may be brought into the partnership over time.

Shortly after the establishment of its CSV, Fortis Property Care, Guy Weston, chief executive of Fortis Group, cited increased turnover and greater efficiencies, a spread of overheads across a wider business base, an increase in the number of trades', staff and apprentices within their growing workforce, a sharing of knowledge and expertise through a long term partnership and improved maintenance services to their customers. The CSV took business growth from £15-18m in 18 months and the arrangement contributes £1m of £3m of their planned efficiency savings. The benefits are clear to see.

What next?

Public commentary on CSVs has quietened down, but this does not mean that the rate of CSV establishment has diminished, simply that people are now getting on with it with little or no fuss. We will continue to see CSVs being created for as long as the legislation permits. It is true to say that there is still a learning exercise for some associations in terms of their understanding of the benefits of CSVs and of their knowledge of the structure as an option for service delivery. However, that knowledge continues to increase across the sector.

CSVs are not restricted in the services that they can provide and we have now moved into "second generation" vehicles which have already admitted, or are in the process of admitting, additional members and/ or which have extended the services they offer. It is clear that people are tapping into existing structures in order to access cost efficient services.

It is worth noting that the UK tax exemption is underpinned by EU legislation and it is not clear whether Brexit will have an impact on that. The timeline for any changes however, is unlikely to be immediate, meaning the scope remains for sharing services on a tax efficient basis.

Sharron Webster
Partner —— Housing and Regeneration

t +44 (0)20 7423 8479
e swebster@trowers.com

Darren Hooker
Associate —— Housing and Regeneration

t +44 (0)20 7423 8360
e dhooker@trowers.com

Old dog, new tricks – the JCT 2016 contract suite

The Joint Contracts Tribunal (JCT) is updating its suite of construction contracts. To date, the Minor Works Building Contract, the Standard Building Contract and the Design and Build Contract have been released together with the compatible forms of collateral warranty. The other forms are to be released over the next few months.

The JCT have focused on amendments to the Design and Build Contract form (JCT DB 2016) which is widely used in the construction industry. The new features of this form include:

- Payment provisions have been revised to offer 21 day payment cycles (the 2011 edition had 14 day payment terms). This change results from the introduction of "Interim Valuation Dates" on which the Contractor submits its payment application to the Employer. The due date for payment is now 7 days from the relevant Interim Valuation Date (assuming the Contractor has made an interim payment application by that date) and the final date for payment is 14 days after the due date.

  The JCT has stressed that, in certain circumstances, Interim Valuation Dates may be altered to the nearest business day in a particular month (for example, to avoid the date falling on a weekend or bank holiday). Changing these dates will have a knock-on effect on the due date and subsequent dates in the payment cycle. Employers, therefore, should not rely on payment dates being the same each month and should take appropriate steps to prevent important dates being missed.

  The Interim Valuation Date is fed down into the contractual supply chain with the aim of improving the speed at which Sub-contractors and Sub-sub-contractors get paid. Under the previous edition, Sub-contractors' invoices would be swept up into the valuation of the main contract, often leaving Sub-contractors with cash flow issues; the new provisions mean that everything in the supply chain is now assessed on the monthly Interim Valuation Date.

- Two new Supplemental Provisions (numbers 11 and 12) add provisions requiring Contractors to comply with the Freedom of Information Act 2000 (FOIA) and the Public Contracts Regulations 2015 (PCR).These optional provisions apply where the Employer is a Local or Public Authority body (including Registered Providers) or otherwise subject to the provisions of the FOIA or PCR.

  New provisions required by the PCR allow the contract to be terminated by the Employer for serious breaches of the PCR. Any such termination is treated as an Employer Default event, regardless of the cause of the breach.

- Also in line with the PCR, new Supplemental Provisions provide that Employers must pay within 30 days of receipt of an undisputed invoice. Employers must also ensure that the same payment terms are stepped down into forms of sub-contract, and to the Sub-contractors' contracts with their supply chain.

- The CDM provisions have been reworded to comply with the Construction (Design and Management) Regulations 2015. The CDM Co-ordinator role is abolished and replaced with a "Principal Designer." The changes reflect the approach of Amendment 1 to the previous edition of the JCT Design and Build Contract issued in April 2015. General health and safety

provisions are added by the inclusion of optional Supplemental Provision 6.

- Insurance Option C (joint names insurance by the Employer of existing structures and the works) has been amended to allow for the inclusion of a "C.1 Replacement Schedule". These provide Employers with flexibility, particularly where they are tenants of a building in multiple occupancy, by allowing them to procure insurance for existing structures through their landlord. Employers who are not familiar with Insurance Option C should take specialist insurance advice where works are being carried out within existing structures.
- JCT has taken a light touch approach to Building Information Modelling (BIM). The Contract Particulars include a section where the BIM Protocol is identified. JCT does not suggest a form of protocol to use, so parties are free to agree their own form. Where a BIM Protocol is included, it is separate to the Employer's Requirements and Contractor's Proposals, but is subordinate to those documents. The BIM Protocol should also include the design submission procedure for the works, unless other provisions are made.
- The JCT have followed established market practice and included provisions 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 parties are free to agree their own terms.
- Perhaps the most controversial amendment is the inclusion of a net contribution clause in the third party rights schedule (Schedule 5). In the JCT DB 2016, third party rights are intended to flow down the supply chain so that Sub-contractors and Sub-sub-contractors grant the Employer, funders and other interested parties the third party rights as set out in Schedule 5. For some, this will be a welcome alternative to collateral warranties, particularly on larger projects, where there are lots of potential beneficiaries.

  Net contribution clauses are, fundamentally, a limit on liability by restricting the Contractor's liability to the amount which is just and equitable for a court to apportion against it. This reverses the common law position where a party suffering loss can bring an action against any party responsible for breaching the terms of its contract for the full amount of its loss.

  The JCT has previously stated that net contribution clauses are inappropriate in design and build contracts. The net contribution clause should be deleted where the Employer under the JCT DB 2016 requires the Contractor to take full design responsibility (including in relation to the design contained in the Employer's Requirements).

Overall, the revisions to JCT DB 2016 simplify and consolidate the contract, focussing on provisions of the previous version which, at times, were found to be confusing to end users. Once users get to grips with the changes and new provisions, they should find the JCT DB 2016 easier to put in place and administer.

Mark Pantry

Associate —— Projects and Construction

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

Top tips – end of lease issues

Whether you are a landlord or a tenant of commercial premises, it is important to consider the issues arising at the end of the lease term.

Where a tenant has statutory security of tenure under the Landlord and Tenant Act 1954 (the Act), the parties should consider their preferred outcome and tactics at an early stage. Under the Act, either the landlord or (unless the landlord has already served notice) the tenant can serve notice not more than 12 nor less than 6 months before the expiry date specified in the notice. That expiry date cannot be earlier than the contractual expiry date of the lease.

If the landlord wants to oppose a new tenancy, it must set out its ground/s of opposition in the notice and establish its case at court if challenged by the tenant. A tenant does not have to serve a counter-notice, but must apply to court for a new tenancy before the expiry of the landlord's notice. Intention to re-develop is a common ground of opposition and, as one of the "no fault" grounds a tenant is entitled to compensation. To be successful under this ground, a landlord must have a firm and settled intention to carry out the works and a reasonable prospect of implementation; commonly shown by planning permission, a building contract and funding arrangements. The landlord must also show that it cannot reasonably carry out the work without obtaining possession of the premises. A tenant who is keen to remain might consider whether it can counter by suggesting a new lease of whole (with a landlord right to enter and carry out the works) or a new lease of part.

If the landlord has not already served a statutory notice, tactically a tenant can start the renewal process and the landlord would need to serve a counter-notice within two months if it wanted to oppose the new lease - referring to the same grounds as above.

If there is no agreement on terms for an unopposed renewal, the court has discretion to order a new term of up to 15 years and decide the new rent according to an 'open market' valuation formula.

If parties are discussing the terms of a renewal or a negotiated surrender, it is still essential to protect yourself by complying with the requirements and deadlines in the Act and at court.

Anna Metham
Senior Associate —— Commercial Property

t +44 (0)161 838 2059
e ametham@trowers.com

Jenny Standfast
Senior Associate —— Property Litigation

t +44 (0)1392 612352
e jstandfast@trowers.com

Retirement living event fees

In October this year, the Law Commission issued a consultation on a draft Code of Practice in respect of event fees. Event fees are also known as exit or deferred management fees and are payable on a change of ownership or occupancy in retirement housing leases.

Since 2013, when the Office of Fair Trading report cast doubt on the validity of charging these fees, there has been significant sector debate, culminating in the current consultation. The Law Commission found a key problem to be compliance with existing consumer protection law.

The Law Commission is not in favour of banning the charging of these fees, but wants to see them charged only where leaseholders are fully informed before purchase of the nature of the charges. Used fairly, they can provide a means for people to access retirement housing (with the health and wellbeing benefits such housing brings) on a "buy now, pay later" model. There is a huge amount of interest in this sector from investors, funders, developers and others and clarifying the ability to use event fee structures to support financial models is seen as an important step in allowing the sector to grow.

The proposed Code of Practice is intended to link compliance with the Code to consumer rights law, with the effect that not complying with the Code will render an event fee unenforceable against the leaseholder. These proposals can be achieved without primary legislation.

The principles behind the Code are two fold – first, to provide protection to consumers to prevent any unfair or misleading practices around how event fees are calculated or charged and secondly, to ensure operators within the sector have certainty and confidence in the enforceability of their event fee provisions. Many operators within the sector already uphold these principles (for example through compliance with the ARCO Consumer Code) but a binding Code of Practice will entrench these goals and create a level playing field. The information disclosure requirements of the Code will have to be complied with on the initial sale (and later assignments) of new leases and the assignment of leases.

Although we commend the aims of the Code of Practice there are some legal intricacies which we have raised in our response to the Law Commission's consultation. These centre on:

1. ensuring that the Code can in practice be complied with on assignments of existing leases. These leases inevitably have not anticipated the requirements of the Code but this should not inadvertently prevent event fees from being charged if they are properly disclosed.
2. the circumstances in which compliance with the Code would need to be evidenced for due diligence where portfolios of units are being sold;
3. ensuring the Code cannot be avoided by operators through any technical structuring mechanism.

We expect to see the final Code published shortly, with the relevant legal changes in force from April 2017. It is hoped that the changes will bring clarity to the sector as to how and when event fees can lawfully be charged - both to protect consumers and to ensure certainty of enforceability for operators.

Kyle Holling
Partner —— Housing and Regeneration

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

Homelessness Reduction Bill

After years of decline, the number of homeless people is now increasing, with many housing charities reporting sharp increases in all forms of homelessness. Last summer, the Communities and Local Government Committee (the Committee) launched an inquiry and published a report on homelessness.

One of the Committee members, Conservative MP, Bob Blackman, introduced a Private Members' Bill in response to the serious rise of homelessness across the country. On 28 October 2016, the Homelessness Reduction Bill (the Bill) had its second reading in the House of Commons where it gained complete cross party support. The Bill has begun its Parliamentary journey and is now in committee stage where it will be scrutinised line by line.

The Bill proposes to amend Part 7 of the Housing Act 1996, introducing measures to facilitate early intervention to assist at risk households and imposing new duties on local authorities. It is clear that some of the inspiration for the Bill has come from the legislation introduced in Wales in 2015 to help to prevent homelessness.

Early intervention

The report on the Bill by the Committee commented that authorities often advised applicants to sit tight in their homes once a notice to quit had been served and wait to be evicted before applying for help. This is notwithstanding an existing duty to assist the homeless or those threatened with homelessness within 28 days.

The Bill amends this 28 day period to 56 days, a move which has been welcomed by housing charities as a significant shift from crisis management to early intervention and prevention.

The Bill also extends the definition of "homeless" by including tenants who have received statutory notices to quit (under Section 8 or Section 21 Housing Act 1988), but only where the local housing authority considers that possession proceedings are a real prospect. By including those who have received notices but have not yet been evicted, local housing authorities will be under duties to intervene at a much earlier stage.

Local authority duties

The Housing Act 1996 currently contains the main local authority homelessness duties. Most significant is the duty to provide accommodation to those in priority need (defined under that Act to include pregnant women, those with dependent children, the elderly, mentally ill, those with physical disabilities and those homeless as a result of an emergency).

The Bill supplements these duties by increasing assessment obligations and includes new duties to seek to prevent homelessness and to support the homeless.

Duty to assess

Local housing authorities are already under an obligation to inquire into an applicant's homelessness. The Bill would extend this to an assessment of the circumstances of the applicant's homelessness, their housing needs and support requirements.

The assessment must be in writing and a housing plan drawn up to identify steps to be taken by the applicant and the authority to obtain suitable accommodation. This is intended to ensure that applicants receive a meaningful level of advice and support.

The Committee reported that the Bill would require almost thirty thousand extra assessments a year in London boroughs alone. It is clear that implementation of the Bill will require additional funding and support for local housing authorities. Inside Housing recently cited research carried out

by non-profit organisation The Association of Housing Advice Services (AHAS) which took a sample of five London authorities and calculated that the combined cost of the additional duties to the capital's 32 town halls could be upwards of £160m.

Prevention and support

Clause 4 of the Bill introduces a new obligation to take reasonable steps to help to ensure that those under threat of homelessness do not lose their existing accommodation, having regard to the assessment and housing plan. The obligation will last for a period of 56 days, but may be shorter in certain circumstances.

In addition, there is a new duty under clause 5 of the Bill to support those who are actually homeless, again by helping to secure suitable accommodation. This duty will also last for a period of 56 days. Any accommodation provided under this duty may be withdrawn in certain circumstances.

Services

The Bill would extend the services that authorities must offer by ensuring that they meet the needs of particularly vulnerable groups, such as ex-offenders, young people leaving care, former members of the armed forces, those with a disability and victims of domestic abuse. The services must be capable of providing advice on preventing homelessness, securing accommodation and signposting other help that might be available.

Code of Practice

Clause 11 of the Bill includes provisions for a statutory code of practice to address matters such as staff training and monitoring of service provision. This aims to secure a minimum standard of service and duty of care. The approach has already been introduced in Wales and anecdotal evidence presented to the Committee would suggest that it has been effective in raising standards.

Conclusion

The Bill is an attempt to break the tendency towards a somewhat adversarial approach with local authorities and to instil more of a "partnership" with applicants. The Bill is concerned with the quality of advice and support to a highly vulnerable group. Its success, if enacted, will depend on significant resources (some of which the Government has already promised) and monitoring. What the Bill will not do though, is address problems of undersupply of appropriate affordable accommodation.

Kate Bouchier
Partner —— Housing and Regeneration

t +44 (0)161 838 2025
e kbouchier@trowers.com

Managing conflicting beliefs

The conflict between religious freedom and other rights has recently been captured in the high profile Irish 'gay marriage cake case'. This joins an existing body of case law which demonstrates the uneasy relationship which exists between the protected characteristics of religion or belief and sexual orientation.

The 'gay marriage cake case'

The so-called 'gay marriage cake case' (also known as Lee v McArthur and ors) has garnered extensive press coverage. The Court of Appeal of Northern Ireland held that a bakery directly discriminated against one of its customers on the ground of sexual orientation by refusing to make him a cake with a slogan supporting same-sex marriage.

The argument of the husband and wife running the bakery that their rights to freedom of thought, conscience and religion and freedom of expression had to be taken into account was dismissed. To prohibit the provision of a message on a cake supportive of gay marriage on the basis of religious belief would be to permit direct discrimination. As the court pointed out, the potential for arbitrary abuse would be considerable if businesses were free to choose what services to provide to the gay community on the basis of religious belief.

Tensions between sexual orientation and religious belief

There have been a couple of recent employment cases which have explored the tensions between sexual orientation and religious belief and have come to separate conclusions.

In Mbuyi v Newpark Childcare (Shepherds Bush) Ltd, an employment tribunal held that a Christian nursery nurse was directly and indirectly discriminated against by her employer on the grounds of her religion or belief when it dismissed her for expressing negative views about a colleague's homosexuality. The tribunal concluded that the issues in the case arose out of the manifestation of Ms Mbuyi's belief that homosexuality was a sin.

In contrast, in Wasteney v East London NHS Foundation Trust the Employment Appeal Tribunal (EAT) held that disciplinary action taken against a Christian senior manager for imposing her religious views on a Muslim junior employee was not discriminatory.

At first instance, the tribunal had dismissed Miss Wasteney's claims of direct discrimination and harassment on the grounds of religion or belief. The EAT dismissed the subsequent appeal, pointing out that the tribunal had found that the reason for the disciplinary action against Miss Wasteney was that her colleague had made serious complaints about acts which blurred professional boundaries and not that she had shared her faith with a consenting colleague.

As well as these recent cases, there are a number of other decisions, the most well-known of which are probably Ladele v London Borough of Islington and McFarlane v Relate Avon Ltd. In Ladele a Christian registrar refused to carry out civil partnership duties on the basis that same-sex relationships were against her religious beliefs. She was disciplined and found guilty of gross misconduct as her behaviour breached the council's 'Dignity for All' policy and was discriminatory towards the gay community. The case went all the way to the European Court of Human Rights (ECHR) where Ms Ladele sought to rely on her right to manifest her religious beliefs under Articles 9 (the right to freedom of thought, conscience and religion and to manifest one's religion or beliefs) and 14 (the right to enjoy the Article 9 right without discrimination on any ground). The ECHR rejected her claim noting that differences in treatment based on sexual orientation

require particularly serious reasons by way of justification and that the council's aim of providing a non-discriminatory service was evidently legitimate.

In McFarlane v Relate Avon Ltd [2010] IRLR 196, Mr McFarlane, a Christian relationship counsellor with Relate, was dismissed because he did not feel that he could provide psycho-sexual counselling to same-sex couples as it conflicted with his religious beliefs. The EAT's view was that where an employee refuses to comply with principles that are fundamental to an employer's ethos (in this case, Relate's equal opportunities policy) and which the employer has pledged to the public to maintain, the employer does not have to compromise those principles by making or considering arrangements to accommodate the employee's requests.

Dress codes

"Neutral" workplace dress codes can cause conflict with the manifestations of an employee's religious beliefs. In Bougnaoui v Micropole Univers a company policy requiring an employee to remove her Islamic headscarf when in contact with clients, was held to constitute unlawful direct discrimination. Shortly afterwards in Achbita and another v G4S Secure Solutions it was held that a ban on wearing headscarves was a genuine and determining occupational requirement and the employer's adherence to a neutral dress code was held to be both legitimate and proportionate.

It will now be left to the ECJ to resolve the disparity between Achbita and Bougnaoui. Until a decision is reached, employers should ensure that they avoid dress codes that restrict an employee's right to wear garments associated with their religious beliefs.

Conclusion

Employers need to be aware of the need to avoid discrimination and the tricky balance that has to be achieved between conflicting rights. It will be legitimate to have a policy prohibiting behaviour which could amount to unlawful harassment, even though the behaviour in question merely consists of the expression of a strongly held religious belief. It will, however, have to be proportionate and applied equally to all religious groups.

Rebecca McGuirk
Partner —— Employment

t +44 (0)121 214 8821
e rmcguirk@trowers.com

Commission payments, overtime and holiday pay

The amount of holiday pay an employee is entitled to is an issue which affects every employer. It may come as a surprise that such an intrinsic part of the employment relationship is the subject of significant legal dispute, but recent decisions have fundamentally changed the calculation.

The Court of Appeal has recently held in British Gas Trading Ltd v Lock and anor that the Working Time Regulations 1998 (the WTR) should be interpreted in line with the Working Time Directive (WTD) to include results-based commission in statutory holiday pay.

What does the law say about holiday pay?

Article 7 of the WTD provides that member states must ensure that workers have the right to at least four weeks' paid leave. Although it does not specify how statutory holiday pay should be calculated, the European Court of Justice (ECJ) has held that "paid annual leave" means that workers on holiday should receive their "normal remuneration".

The WTD is implemented into UK law by the WTR. The WTR makes no mention of "normal remuneration" and instead, provides for holiday pay to be calculated with reference to sections 221 to 224 of the Employment Rights Act 1996 which is used to calculate a week's pay for redundancy compensation purposes.

Background to Lock

Mr Lock, a sales consultant for British Gas, was paid commission on a monthly basis. On average, commission made up about 60% of his pay. When he took annual leave, however, he was paid only his basic pay. Mr Lock brought an employment claim for outstanding holiday pay.

The tribunal referred Mr Lock's case to the ECJ asking if the WTD requires commission to be included in holiday pay. The ECJ replied in the affirmative so the matter was remitted back to the employment tribunal which considered that the WTR should be interpreted to conform with the WTD. This followed the EAT's decision in Bear Scotland v Fulton and others, where it was held that the WTR can, and should, be interpreted to conform with the WTD to enable holiday pay to include non-guaranteed overtime.

British Gas appealed, arguing that Bear Scotland was wrongly decided and should not be followed. Although the EAT acknowledged that it is not bound by its own decisions, such decisions are of persuasive authority. It concluded that there was nothing to prevent the EAT in this case from following the decision in Bear Scotland.

Commission payments to be included in holiday pay

The Court of Appeal has now unanimously upheld the decision of the EAT and confirmed the correct approach is to look at "normal remuneration". Despite having lost now at every level, British Gas has indicated that leave will be sought to take this issue to the Supreme Court so we may not have heard the last word on this important issue.

What we can say is that employers who have not been including commission payments in holiday pay calculations will now run the very real risk of having a succession of unlawful deductions from wages claims brought against them. One consolation for employers will be that, under the Deduction from Wages (Limitation) Regulations 2014, there is now a two year backstop on claims for holiday pay which are made on or after 1 July 2015.

Should voluntary overtime be included?

Voluntary overtime is still a grey area. Employers need to be aware that tribunals will deem that it forms part of a worker's normal remuneration if a settled pattern has developed enabling it be to labelled "normal" pay.

Brettle and ors v Dudley Metropolitan Borough Council, a recent employment tribunal case, dealt with purely voluntary overtime. A group of 56 housing repair workers argued that they should have received holiday pay which included additional sums in respect of voluntary overtime, call-out payments and mileage and standby allowances.

The tribunal found in the workers' favour. They were paid with sufficient regularity for the payments to be considered part of their normal remuneration. This is only a tribunal decision so it is non-binding though it does follow the reasoning in Bear Scotland that payments received as part of "normal remuneration" should be included in any holiday pay calculation. We suspect other similar decisions will follow.

How should such payments be calculated?

Ambiguity remains as to the practicalities of how such payments should be calculated. The Advocate General in Lock suggested that when calculating a worker's "normal remuneration" during their holiday, the previous 12 months should be taken as the appropriate reference period. Suggestions of a predetermined fixed period were ignored by the ECJ which ruled that holiday pay must correspond to the worker's "normal remuneration" and that this was a matter for the national courts to work out by taking an average over a reference period that it "considered to be representative". The practicalities of how such payments should be calculated remains to be determined.

Conclusion

Whilst for the moment employers will have to include commission payments in holiday pay calculations, it may be that things will change post-Brexit. Although Theresa May has confirmed that existing workers' rights will be guaranteed, it is likely that this will be an area where we will see employers lobbying for a change in law to revert to the original UK legislative approach.

Helen Cookson
Senior Associate —— Employment

t +44 (0)161 838 2081
e hcookson@trowers.com

New "Selection Questionnaire" for procurement exercises

On 26 September 2016, the Crown Commercial Service (CCS), the body responsible for implementing the Public Contracts Regulations 2015 (the Regulations) on behalf of the UK government, released Procurement Policy Note 08/16 (the Note). The Note mandates the use of a new "Selection Questionnaire" (SQ) which replaces the CCS's template Pre-Qualification Questionnaire. The CCS states that the new SQ should be adopted for all procurements for public services and supplies contracts from the date of the Note onwards.

The SQ is divided into three core sections, called "Parts". Part 1 deals with basic company information about the bidding organisations. Part 2 asks applicants to specify whether any of the mandatory and discretionary exclusion criteria set out in Regulation 57 apply to their organisation. The Note specifies that Parts 1 and 2 of the SQ cannot be amended, so contracting authorities who use their own precedent pre-qualification documents should ensure that these are updated to reflect the wording of the new SQ. Alternatively, applicants may complete the European Single Procurement Document (which is identical to Parts 1 and 2), and submit this in lieu of answering Part 1 and 2 of the SQ.

Part 3 contains a series of questions on financial standing and technical and professional ability. The Note is more flexible on the use of these questions. The Note states that Part 3 can be amended to incorporate "project-specific" questions, although CCS has not defined this term. Project-specific questions do not need to be reported to the CCS, so contracting authorities may wish to take advantage of this rule to import questions reflecting their commercial requirements.

Contracting authorities are still required to report deviations from the wording of Part 3, though CCS has provided clearer guidance on what constitutes a deviation and how it should be reported. Deviations are defined as changes to the wording of any Part of the SQ, but do not include the following:

- project-specific questions;
- simple amendments to make the SQ compatible with an e-procurement system; or
- standard questions that the contracting authority has decided to omit.

Deviation reports should be sent in an email to CCS, explaining the reasons for any deviations and demonstrating that the changes are relevant, proportionate and linked to the requirements of the contract and contract delivery. The report must be signed off by the contracting authority's head of procurement or equivalent role.

As with the 2015 template pre-qualification questionnaire, the SQ does not contain any guidance on the scoring or weighting of questions. Contracting authorities must, therefore, populate the template with their scoring matrix for the relevant contract.

In the Note, the CCS reiterates its earlier guidance that financial assessments should not be made solely with reference to an applicant's minimum turnover. The CCS's Mystery Shopper Service has recently queried contracting authorities who use Pass/Fail criteria to exclude applicants who fail to meet a minimum turnover threshold. The CCS states that while minimum turnover can be used as part of a wider investigation into an applicant's financial standing, it should not be used as a "tripwire" to fail applicants. Contracting authorities which wish to disqualify applicants failing to meet minimum turnover requirements will need to

provide robust commercial justification for doing so.

The CCS also encourages contracting authorities to allow applicants to "self-certify" the SQ requirements and only ask for certifying documents from winning applicants at the contract award stage. This is designed to lessen the administrative burden of submitting SQs. Contracting authorities are still able to ask for documents at selection stage where the proper conduct of the procurement process may require documentation to be seen sooner rather than later. With this in mind, contracting authorities should consider whether they require sight of certain documents before entering the tender stage.

In respect of public works contracts, the CCS states that the PAS 91 template pre-qualification questionnaire should be used, but falls short of mandating its use for such procurements. Contracting authorities therefore need to consider whether to adopt PAS 91 on works contracts or use an amended version of the SQ

Overall, the new SQ should not represent a major departure for social landlords in the selection stage of procurements. They should ensure that the SQ and guidance is adopted as soon as possible and consider carefully how to balance the use of the SQ against the need for a robust selection process.

Rebecca Rees

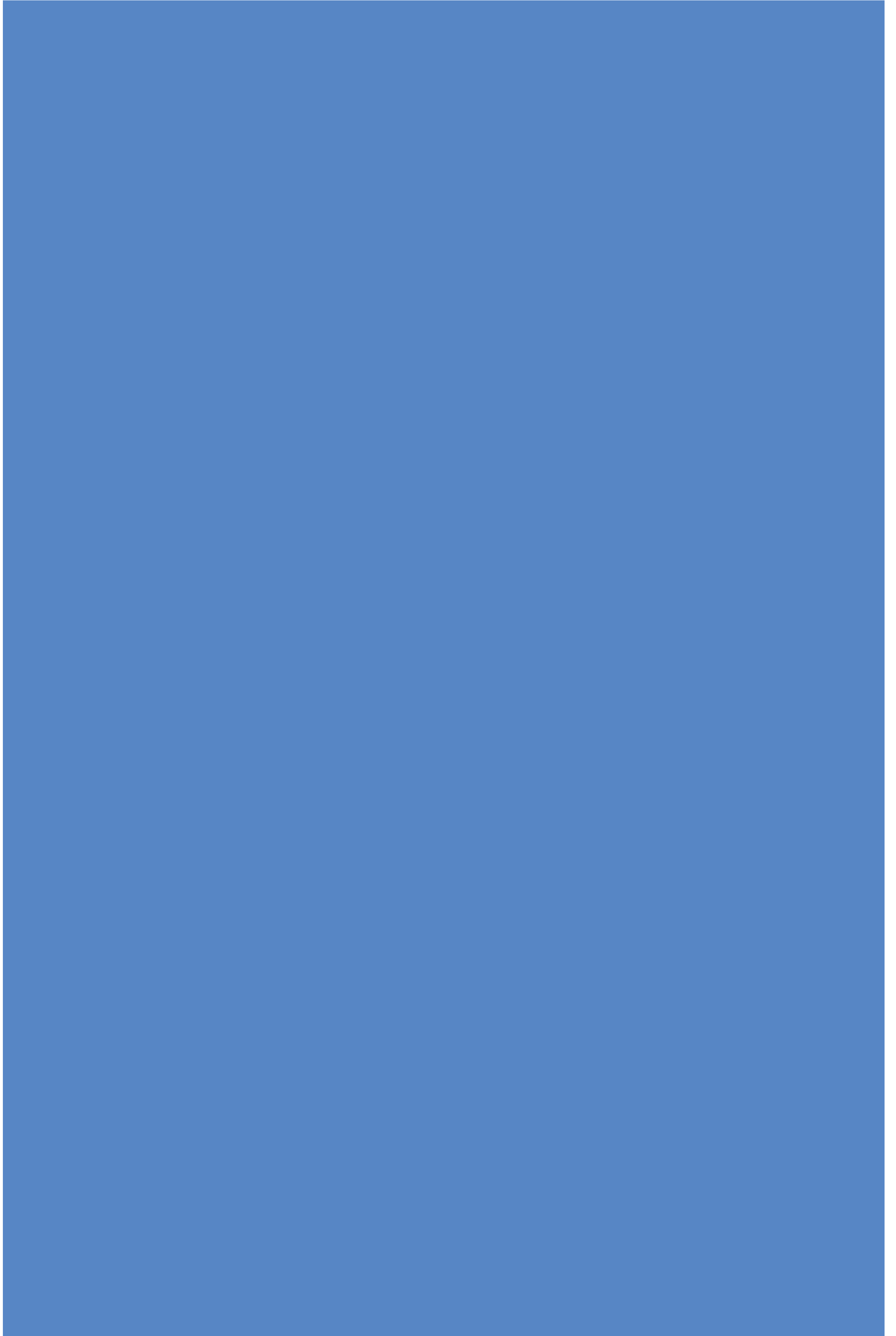
Partner —— Projects and Construction

t +44 (0)20 7423 8021
e rrees@trowers.com

Jack Eustice

Solicitor —— Projects and Construction

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



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

Contact

London

Ian Graham

3 Bunhill Row
London
EC1Y 8YZ

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

Birmingham

Jeremy Hunt

10 Colmore Row
Birmingham
B3 2QD

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

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