QUARTERLY HOUSING UPDATE

Summer 2023

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Foreword

Against the somewhat gloomy backdrop of public announcements from Housing Associations about the forecast slowdown in development activity (a somewhat inevitable consequence of the ongoing uncertainty in the financial markets, the continued scourge of inflation in build costs and repairs and maintenance expenditure as well as the renewed focus on investment in existing stock) it has been a genuine pleasure this week to start judging this year's Inside Housing development awards.

What the award submissions demonstrate- above everything else – is the immensely high quality of residential development that this country is capable of bringing forward and that Housing Associations, institutional investors and local authorities can bring forward development across all tenures that is genuinely place shaping and that can be a catalyst for economic regeneration.

Against such exceptional delivery (and no spoilers as to the winners!) it seems to me that the sector must do everything it can to make the case to government about what it can do to boost delivery – and what government can do to play its part.

As we approach the Summer, we are keeping an eye out on the passage of critical legislation that is currently passing through Parliament, including the important Social Housing Regulation Bill – so please do keep an eye on www.trowers.com for the latest developments.

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The Social Housing Regulation Act and the changing landscape of consumer regulation

The past few years have seen some of the most significant events in social housing, with the Grenfell fire tragedy in 2017 bringing conversations around the adequacy of social housing and especially the lack of tenant involvement and empowerment to the fore.

Government published the Social Housing Green Paper: A New Deal for Social Housing in 2018 and subsequently the Social Housing White Paper/Tenants Charter in 2020 all with the aim of improving how social housing is regulated.

More recent issues such as Awaab Ishak's death and the Housing ombudsman's regular findings of severe maladministration have kept this conversation at the fore.

The tone of comments, particularly from Michael Gove as the Secretary of State for Levelling Up, Housing and Communities, is very much now that those living in social housing deserve better and that the sector and public will not tolerate RPs who are failing to meet the expected standards. This is particularly the case with RPs being seen as having achieved the best deal possible from the rent cap (i.e. the highest of the options available at 7%).

All of this sets the context for The Social Housing (Regulation) Act 2023 (Act) which, at the time of this article, is due to receive Royal Assent imminently.

The Act is intended to be the catalyst for a new proactive approach to regulating social housing, ensuring standards are met and taking action against failing landlords. The Act itself describes its purpose as being to "reform the regulatory regime to drive significant change in landlord behaviour".

Simply, this is the most important piece of legislation for RPs for many years. Those responsible for managing and operating RPs must be aware of its significance and understand not just what the detail requires, but also the way this fundamentally alters the landscape for social housing, the expectations on social landlords and the rights of tenants going forward.

The Act has three core objectives which are:

1. to facilitate a new, proactive consumer regulation regime;
2. to refine the existing economic regulatory regime; and
3. to strengthen the Regulator of Social Housing's (Regulator) powers to enforce the consumer and economic regimes.

Reform the consumer regulatory regime

The Act will facilitate a new proactive consumer regulatory regime. To achieve this, the Regulator's statutory objectives will now include safety and transparency and it will have new powers to support this.

- We will see the introduction of a new Advisory Panel to the Regulator which is specifically required to include tenants of social housing.
- Significantly, the 'serious detriment' test will be removed paving the way for action to be taken by the Regulator in a greater number of cases of breaches of the consumer standards.
- Of course, alongside this we have already seen the introduction of the tenant satisfaction measures on 1 April which RPs are now required to report on. It is anticipated that the first year of data will be published in Autumn 2024.
- We are also going to see a shakeup of the consumer standards themselves with several new consumer standards being introduced.
- This will include a new standard regarding the competence and conduct of individuals involved in relation to "professionalism", requiring senior housing managers and senior housing executives to obtain qualifications in housing management. We also expect a new standard regarding information and transparency, setting expectations on RPs to make information available to tenants and the Regulator.

We expect to see new draft standards out for consultation in the summer of 2023.

Refine the economic regulatory regime

Whilst the emphasis is on improving consumer regulation, it is clear that this is not to be at the detriment of the economic standards. The Act also seeks to maintain and refine the Regulator's current economic regulatory role. Ensuring that providers are well governed and financially viable remains a core priority for the Regulator.

Strengthen the Regulator's enforcement powers

The Act will strengthen the Regulator by giving it new enforcement powers, seeking to ensure it can effectively intervene when required. This is particularly the case in relation to the consumer standards in order to underpin the importance of these and bring them to the same level as the economic standards.

New powers include an ability for the Regulator to arrange surveys of the condition of properties more quickly, and a new power to require an RP to prepare and implement a performance improvement plan. This is intended to move the Regulator away from reliance on voluntary undertakings by RPs and towards more proactive regulation.

Other powers include a power for the Regulator to authorise persons to enter an RP's premises to undertake emergency remedial action to remedy failures by an RP and the ability to issue financial penalties on RPs of an unlimited amount (having previously been limited to £5,000).

There is much more detail in the Act we cannot cover here that RPs need to be aware of. Please refer to our Essential Guide to the Act and further information regarding the revised consumer standards which will be published this summer.

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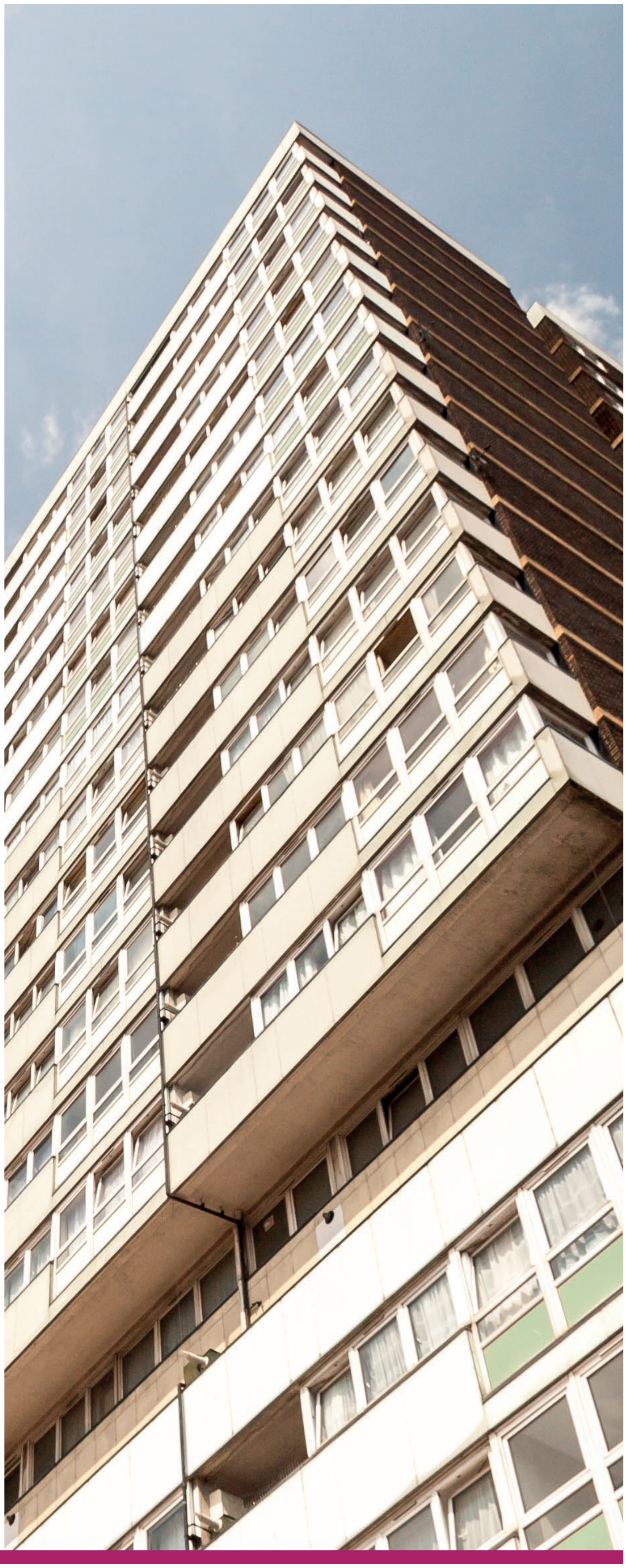

Second staircase regulations – changes and uncertainty in the affordable housing sector

What is the second staircase rule?

Following the Grenfell tragedy, the Government unveiled a consultation in December 2020 on introducing new rules to require two staircases in high-rise residential buildings exceeding 30m in height, approximately ten storeys. This was considered because a minimum of two protected staircases provides additional escape routes for residents and additional access routes for firefighters in the event of a fire and would close the slightly odd gap between the rules for commercial buildings, which already need a second staircase if over 11m tall, and residential buildings, which do not. It would also bring England and Wales into line with virtually every other comparable country. The consultation closed in March 2023, and we await the final proposals. However, this rule was implemented with immediate effect in London by the Mayor of London.

What will be the impact on the affordable housing sector?

The introduction of the second staircase rule has been widely anticipated, and the sector has worked hard to adapt current plans to it, but there are some justifiable concerns around how it will work practically. Several major regeneration schemes we are acting on have been put on hold immediately until developers have re-designed schemes to factor in a second staircase, and there are reports that this rule could delay up to 125,000 planned homes in London alone, with over 200 schemes delayed.

Across the sector, there are several key concerns:

- Uncertainty with schemes currently being designed or going through planning. The technical requirements for a second staircase remain unconfirmed, e.g., must it be internal, or could it be external? Must it be above a certain distance from the first stairwell? Is it for day-to-day use, or emergency use only?
- lettable floor space being reduced to accommodate an extra staircase. One estimate puts the loss of residential floorspace at around 6%, with a knock-on effect on unit numbers and hence rent and sales levels;
- additional cost, both of redesign and implementation, and possible impact on the affordability of other safety systems, such as sprinklers;
- whether housing numbers and targets can be met and delivered in timeframes set within development agreements, grant programmes, and RPs' own development programmes, at a time when funding is already under pressure with retrofit costs.

Schemes in the process of being developed may be completed as they stand, but the Government does not want to permit development schemes to get off the ground ahead of the new requirements coming into effect.

Some industry groups are calling for more than what has been introduced by the Government. The Royal Institute of British Architects feels that the appropriate two staircase threshold for new residential buildings should be 18m as opposed to 30m. This would align with Scotland, and also the wider Building Safety Act reforms. These industry groups have also suggested that the Government require existing buildings over 18m without two staircases to compensate with evacuation lifts, sprinklers and centrally addressable fire alarm systems.

What impact has this had on GLA/grant funded schemes?

A large number of affordable housing schemes are grant funded and will need to meet grant funding criteria. In terms of housing development in London, as mentioned above, RPs will now have to factor in the second staircase rule to ensure they are eligible for grant funding, as the GLA announced, with immediate effect, that all planning applications for residential buildings over 30 metres must include at least two staircases to be considered by the Mayor of London for final approval. However, buildings with only one staircase approved before 23 December 2022 are still eligible for GLA affordable housing grants.

Do the new regulations apply to London only or other regions around the UK?

The second staircase rule has come into immediate effect in London but has not currently been implemented in other parts of the country. However, it is surely only a matter of time for the rest of England.

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Five easy ways to breach your loan agreement

While your attentions are likely focused on meeting the main obligations under your loan agreements – making payments, meeting financial covenants, managing your security portfolio – there are plenty of other obligations throughout the agreements that can be easy to miss. Below, we set out five easy ways in which you can breach your loan agreement.

1. Changing your rules without telling (or getting consent from) your lender

Checking your loan agreements might not immediately spring to mind when you are planning to change your rules or articles of association, but you may need to notify your lenders of any change or even seek consent before you do so. We recommend checking your loan agreements before you pass any rule/article change at board as some lenders may need to sign off on the wording before giving consent.

2. Your insurance cover doesn't meet all the requirements

Loan agreements often require borrowers to have insurance policies covering several specific risks and liabilities. Many banks are now requiring more extensive insurance cover to be taken out, so it is important to speak to your insurance broker each time you come up for renewal to make sure everything is covered, and you do not inadvertently breach this obligation.

3. Lending money to your employees

Many loan agreements restrict the amount of financial support a borrower can provide to others, including loans to employees. There may be terms and conditions in your employment contracts that allow for employees to request loans, which could include season-ticket loans, loans in relation to other transport (bikes or cars) or IT equipment loans. These may be considered and granted on a case-by-case basis. However, it is important to monitor how much is being lent to your employees in total, as your loan agreements may set a limit on how much you are allowed to lend.

4. Failing to deliver information

Loan agreements tend to have stringent information requirements. Not only do lenders ask for accounts, business plans and financial forecasts, you may also need to provide reports to tenants, communication received from the Regulator of Social Housing, the FCA or Charity Commission, or even documents circulated to members. To add to this huge administrative task, often the deadlines to provide each type of information is different (e.g., 5, 10 or 30 business days). Without a clear understanding of what needs to be provided and when, it could be very easy to miss something. As such it is important to keep an internal record of what needs to be provided to your funders and when.

5. Not telling your lender about a change of key personnel

If there is a change to your Chief Executive, Chair of the board or any other key personnel, there can be lots to do in terms of administration, handovers, press releases etc. You might not consider that your lenders need to be notified of the change as well, but some loan agreements do contain an obligation to notify the lender, even if it has been publicly announced.

While it is unlikely that a lender would default your loan for breaching the types of obligations listed above, it is important to ensure that you are familiar with all your obligations under your loan agreements to avoid any issues down the line.

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Open spaces – developers beware!

Open spaces might appear to be a relatively straightforward option when it comes to housing development. However, the case of R (on the application of Day) v Shropshire Council serves as a reminder that thorough due diligence is essential.

In a judgment handed down on 1 March 2023, the Supreme Court has overturned lower court decisions with regard to the development of public land.

Local residents who objected to the development judicially reviewed Shropshire Council (SCC)'s decision to grant planning permission for housing development on land owned by Shrewsbury Town Council (STC). The land was subject to a statutory trust as part of a recreation ground. SCC's Plan identified Shrewsbury as the primary focus for residential development in the county. This judgment will be of particular interest to developers buying land from public bodies.

The Public Health Act 1875 and the Open Spaces Act 1906 empower local authorities to acquire and provide recreation or open space to the public. If they do so, then the land concerned is subject to a statutory trust under either Act.

Disposing of land subject to a statutory trust

A predecessor of STC had bought the land in question in 1926 to meet local demand for playing fields. In 1942, part of the land was converted into allotments, but these subsequently fell into disuse and the land was used as a tree nursery until around 2000 when the land became overgrown and unmaintained fencing enabled the public to obtain access. STC, in the mistaken belief that the disused land was not part of the adjacent recreation ground, sold the land in 2017. SCC granted planning permission for residential development in 2018. Subsequently, research established that the land was bought as public land and subject to a statutory trust.

Under section 123(2A) Local Government Act 1972 (LGA 1972), before disposing of land subject to a statutory trust, the local council must first advertise its intentions in a local newspaper for two consecutive weeks and consider any objections which may be made. Not being aware of the statutory trust, STC did not do so. STC put forward an argument that section 128(2) LGA 1972 meant that failure to advertise was not fatal and a buyer need not concern itself whether the advertising requirement had been complied with.

The need for enhanced due dilligence with open spaces

The Supreme Court held that the sale did not extinguish public access and recreation rights over the land granted under the statutory trust where STC had failed to comply with statutory consultation requirements prior to the sale. This was even though the developer had bought the land in good faith with no notice of these rights.

The Supreme Court held that:

1.1 The local authority held the open space in trust for the enjoyment of the public. Section 128(2) LGA 1972 could not be intended to extinguish such important public rights: hence they survived the transfer into private ownership.

1.2 SCC ought to have taken the trust into account as a "material consideration" when making its planning decision. Having failed to do so, the grant of planning permission was quashed. The lower courts had invoked the Senior Courts Act 1981, concluding that it was highly likely that if the Council had correctly consulted then the outcome of the planning application would have been substantially the same. The Supreme Court disagreed and held this was not a given.

The Shropshire case is a reminder that developers need to carry out enhanced due diligence when purchasing from local authorities and consider:

1. Raising specific pre-contract open space enquiries;
2. Asking for evidence of necessary compliance with the LGA 1972;
3. Seeking an indemnity and other contractual remedies; and
4. Examining historic maps and records as to land use.

Considering town and village green registration with open spaces

Open space also carries with it the potential risk of town and village green (TVG) registration. Land which has been used by local inhabitants for a period of 20 years can be vulnerable to TVG registration, provided that use is "as of right". The term "as of right", has been held to mean, not that land had been used by permission of the landowner, but used without permission and as if such permission had existed. Local authority ownership may be particularly relevant to this test.

The distinction between use “as of right” and “by right” was considered in the 2014 case of R (on the application of Barkas) v North Yorkshire County Council. The Supreme Court ruled that land held by a local authority for recreational purposes would not be subject to TVG registration. The local authority had laid out and maintained the land for recreational purposes pursuant to statutory powers. The land was held to be used by the public “by right”, that is by consent, rather than “as of right”. Therefore, this use did not satisfy the registration requirements of s15(2) Commons Act 2006.

These cases show that it is important for any potential purchaser to understand exactly how land is held by a local authority before proceeding.

For further information please refer to Emma Salvatore or Cecilia Busby.

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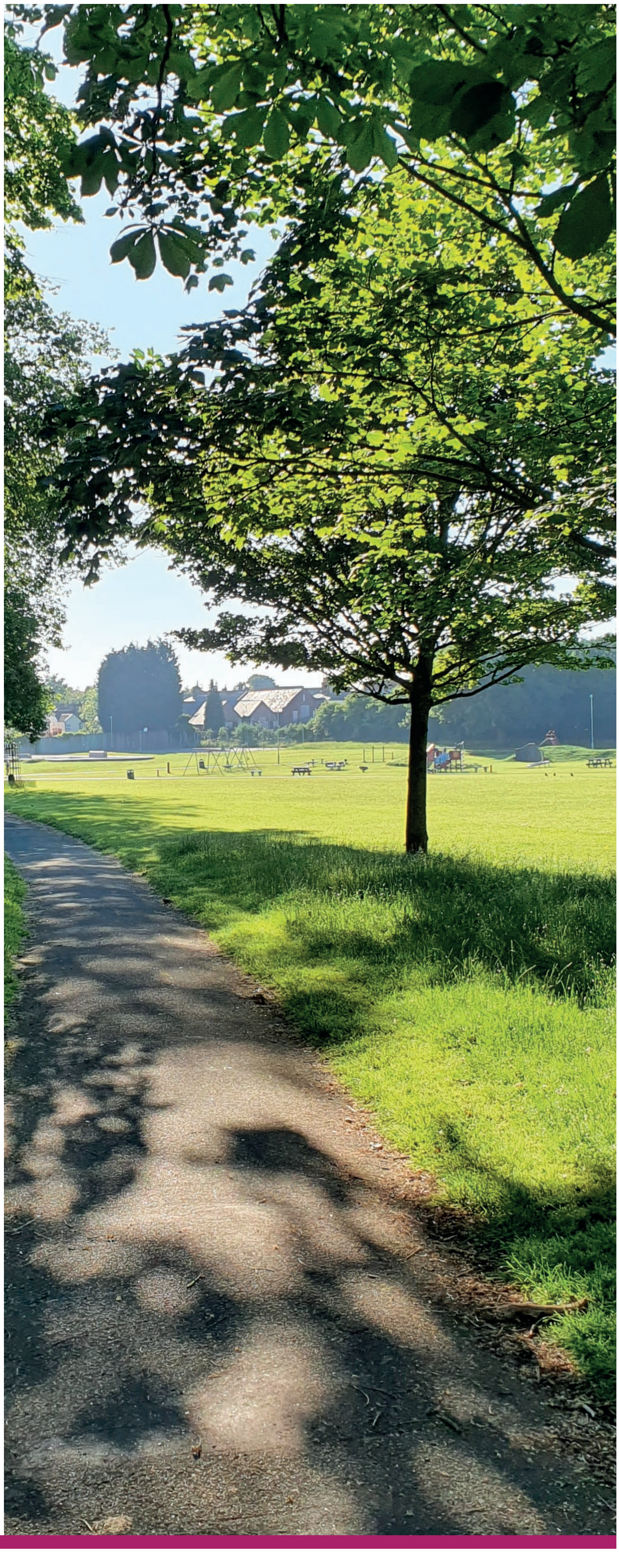

"Awaab's Law"– changes to the Social Housing (Regulation) Bill

What is Awaab's Law?

The Social Housing (Regulation) Bill will require social landlords to investigate and fix reported hazards in their homes within a specified time frame or rehouse tenants where a home cannot be made safe. The Bill provides that there will be penalties for social landlords if they fail to comply with the new rules. This new amendment will be another standard on which housing providers are assessed by the Regulator.

What prompted Awaab's Law?

This amendment to the Social Housing (Regulation) Bill was prompted by the death of Awaab Ishak. Awaab Ishak was a two-year-old boy living in a social housing property who died on 21 December 2020 from inhaling toxic damp and mould. The inquest specifically blamed his housing conditions as contributing to his death. Awaab's death drew a lot of media attention and public concern, which resulted in the Government declaring a 'crackdown' on damp and mould and other health hazards in social housing properties.

What will be the impact on the social housing sector?

The response to Awaab's Law has been positive, and the amendment has received broad support across the sector.

The law will not just be limited to damp and mould but will also cover other health hazards such as cold temperatures, excessive noise and so on. RPs will also need to be aware of the likely timescales to act upon complaints received from residents. These will be set out later in secondary legislation, but 14 days to investigate and a further seven days to carry out the necessary repairs has been mooted.

We already know that increased claims are being brought by social housing tenants against their landlords for damages (for alleged breach of the landlord's repairing obligations) and private prosecutions are being brought in Magistrates' courts, where tenants are alleging the conditions in their home constitute a statutory nuisance/ are prejudicial to the health of the occupants.

Will the private housing sector be affected?

At present, the Bill only affects social housing landlords and tenants, but charities such as Citizens' Advice have urged that the private rented sector should be covered. It is not yet clear if this might be introduced as part of the Government's wider reforms of the private rented sector.

What impact will this have on tenancy agreements?

With the introduction of Awaab's Law, tenancy agreements will automatically be updated to include covenants on the part of the landlord to carry out repairs and/or rehouse tenants whilst the repair works are ongoing. This would mean that a landlord would be liable for breach of tenancy if they fail to meet the standards.

Landlords will need to monitor their own compliance to satisfy the Regulator and the Ombudsman, which will both naturally be focussing on this as a compliance issue.

Similarly, landlords will need to consider these obligations in wider contexts such as portfolio stock swaps, stock acquisitions and disposals to ensure that liability for any existing health hazards such as damp and mould is accounted for.

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Sustainability linked loans – Will recent LMA changes affect their popularity?

The social housing sector has enthusiastically embraced green, social and sustainable financing. Over the past few years sustainable financing has gone from being a niche area of funding to one of the most prevalent sources of funding for housing providers.

Banks, eager to showcase their ESG credentials to their stakeholders, have been keen to build up a portfolio of green, social and sustainability linked loans (SLLs) in the sector. Of the ESG finance products available to registered providers SLLs have, to date, proven to be the most popular.

Why have sustainability linked loans proved popular?

Under a sustainability linked loan the proceeds of the loan may be used by the borrower for any purpose (contrasting to a green loan where the proceeds must be used for a green purpose) and the margin under the SLL is linked to ESG metrics and sustainability performance targets (SPTs) set by the borrower. If the borrower meets the required metrics/SPTs for the year the margin under their SLL will reduce. In the sector one way margin ratchets are usual as banks have indicated an unwillingness to be seen to be profiting off housing providers failing to meet their targets by introducing two-way margin ratchets (where if the metrics under the facility are not met the margin would increase). SLLs must be drafted in accordance with the Loan Market Association Sustainability-Linked Loan Principles (SLLPs).

What is changing?

SLLs were very popular (to the extent that the vast majority of new 5-7 year money in the sector was sustainability linked) as the borrower could set its own targets and the banks were happy to sign up to SLLs and allow borrowers time to come up with the best set of metrics for them. However, at the beginning of March the LMA revised the SLLPs to make them much more stringent.

Under the new SLLPs any ESG metrics set by a borrower under an SLL must now be (a) material to the borrower's core sustainability/business strategy, (b) measurable on a consistent methodological basis, (c) be able to be benchmarked and (d) have high strategic significance to the borrower's current/future operations as well as address the relevant ESG challenges of the borrower's sector. The ESG metrics must be seen to be "credible" so as not to undermine investor confidence in the product.

The SPTs under an SLL must be set in good faith and remain both relevant and ambitious throughout the life of the loan. Annual SPTs should be set and should represent a material improvement in the ESG metrics chosen by the borrower. The borrower must aim for stretching targets which are beyond mere "business as usual". Again, the SPTs need to be capable of being benchmarked and need to be core to the borrower's sustainability strategy. Science based SPTs are recommended.

The SLLPs now recommend that borrowers seek a second party opinion (from an ESG rating agency or second party opinion provider) or an assessment of their chosen metrics/SPTs before signing up to an SLL. Post signing verification is also required. External reviewers will be asked to assess the relevance, robustness, and reliability of the chosen ESG metrics, the rationale and level of ambition of the proposed SPTs, the relevance and reliability of the selected benchmarks, and the credibility of the organisation's ESG strategy.

How might this impact on their popularity in the future?

This is all a far cry from the more relaxed SLLs housing providers initially entered into in the sector. Those loans required ESG metrics and SPTs but were much more flexible as funders understood that the sector's approach to ESG was evolving and that not everyone had an ESG strategy in place yet. The recent change in the SLLPs will result in funders needing to include much more stringent provisions in their sustainability linked arrangements so as not to fall foul of the new guidelines. The requirement for both pre signing and post signing verification by an external third party of the metrics/SPTs also potentially significantly increases the cost of the product.

This is likely to affect the popularity of SLLs in the sector. While they come with a pricing benefit in terms of annual margin reduction that pricing benefit is very small. It may be that funders in the sector will need to offer a "Greenium" - a much higher margin reduction or pricing benefit in order to maintain borrower interest in sustainability linked loan arrangements in the future.

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Consumer credit: The FCA's Consumer Duty – what's happening?

The FCA's new Consumer Duty will be coming into effect on 31st July. The Duty will introduce new FCA regulation designed to ensure that customer experience and outcomes are central to the activities of FCA regulated firms.

As is usually the case, the Duty's regulation and guidance is drafted very much with profit-making specialist financial services providers rather than charitable housing associations in mind. However, if your RP has FCA permissions – whether relating to debt advice, hire of telecare equipment, leaseholder loans, shared equity mortgages or any other aspect of consumer credit - the Duty will apply to your organisation.

Key features of the Duty

Under its existing regulatory framework, the FCA requires that regulated firms operate in accordance with 11 key overarching principles. The Duty introduces a new principle ("PRIN 12") which requires that firms "act to deliver good outcomes for retail customers". To determine whether firms are complying with PRIN 12, the FCA's guidance suggests that firms should ask themselves questions such as: "Am I treating my customers as I would expect to be treated in their circumstances?"; and "Are my customers getting the outcomes from my products and services that they would expect?".

The Duty introduces three new "cross-cutting rules". These require that firms:

- act in good faith towards retail customers ("retail customers" here meaning the recipients of the firm's FCA regulated products and/or services);
- avoid causing foreseeable harm to retail customers. Firms should proactively consider how their products or services might cause foreseeable harm; and
- enable and support retail customers to pursue their financial objectives. Firms are required to focus on putting customers in a better position to make decisions that align with their needs and financial objectives.

The Duty prescribes four outcomes that firms must deliver for customers. These are:

- the Products and Services Outcome. This requires that firms ensure that the design of the product or service and the way in which it is distributed is appropriate for its identified target market;
- the Price and Value Outcome. The price the customer pays for a product or service must be reasonable compared to the overall benefits the customer will experience;
- the Consumer Understanding Outcome. Firms must ensure that communications meet the information needs of customers, are likely to be understood by customers and equip them to make decisions that are effective, timely and properly informed; and
- the Consumer Support Outcome. Firms must design and deliver support that meets the needs of customers, ensuring that customers can use their products as reasonably anticipated and do not face unreasonable barriers during the lifecycle of a product or service.

Lastly the Duty introduces a new conduct rule to supplement those conduct rules introduced as part of the Senior Managers and Certification Regime. This requires that all staff subject to the conduct rules "act to deliver good outcomes for retail customers".

So what should RPs actually do?

It should be noted that the Duty applies to a firm's FCA regulated activities and activities that are ancillary to those regulated activities. It does not apply to an RP's wider business, so RPs will not be required to embed the requirements of the Duty throughout their entire operation.

RPs must though do what would reasonably be expected of a prudent firm to ensure that their strategies, governance, leadership, and people policies lead to good outcomes for their users of FCA regulated products and services. Boards must review and approve assessments of whether the organisation is delivering good outcomes that are consistent with the Duty at least annually. Firms are also expected to firms to have a "champion" at board level who, along with the chair and chief executive, ensures that the Duty is being discussed regularly and raised in all discussions relevant to the organisation's FCA regulated work.

RPs should have product approval and review processes to assess whether products meet identified needs, characteristics and objectives of target markets. While RPs are not generally in the habit of devising new FCA regulated "products", they will need to keep these requirements of the Duty in mind if varying their FCA permissions to undertake new regulated activity. Existing regulated products and services should be kept under review to ensure that customer needs are met. In a similar vein, processes should be implemented that consistently and regularly challenge whether good outcomes are being delivered.

RPs will also need to ensure and be able to demonstrate to the FCA that products provide 'fair value'. Many RPs provide their FCA regulated services free of charge, so in many cases satisfying this requirement will be fairly straightforward. Those RPs that generate revenue from regulated activities such as telecare services will need to ensure that their service satisfies this fair value requirement.

All customer customer-facing should be monitored and kept under review to ensure that they meet and continue to meet customers' information needs and are likely to be understood by their target audience. This should not be difficult for RPs who already know their "market" well, typically only make their FCA regulated products and services available to their tenants and leaseholders and are used to tailoring their communications accordingly.

The Duty has a particular focus on ensuring that customers in vulnerable circumstances experience outcomes that are as good as those for other customers. This is of particular relevance for RPs because many of the recipients of their FCA products or services will be in some form of financial distress, and when designing or reviewing products or services RPs will need to bear this in mind.

Note that the 31 July deadline applies to new and existing products or services that are open to sale or renewal. For closed products that are no longer offered (such as back books of historical shared equity mortgages), the Duty will come into force on 31 July 2024. Clearly those aspects of the Duty that relate to marketing will not apply to closed products, but firms are still expected to keep those products under review under the cross-cutting rules and to ensure that they meet the consumer understanding requirements.

Conclusion

As (usually) charitable organisations that operate for a social purpose and are already subject to a considerable amount of customer-focused regulation, implementation of the Consumer Duty ought not to involve a particularly large shift in mindset and approach for RPs. RPs are well used to both operating in a highly regulated environment and to acting in good faith towards customers, communicating with them effectively and avoiding causing them foreseeable harm.

That said, RPs should not be complacent. While the ethos of RPs already aligns with what the Duty requires, there will still be some work to do to ensure and demonstrate compliance.

The FCA's full non-Handbook guidance on the Consumer Duty can be accessed here: [PS22/9: A new Consumer Duty | FCA]

Sector-specific guidance letters for different activities (including debt advice firms and consumer credit lenders) can be accessed here: [FCA supports firms through the transition to implementing the Consumer Duty | FCA]

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Returning to the workforce

You might remember earlier this year when the Chancellor, Jeremy Hunt, encouraged those who have taken early retirement in recent years, but asking them to get "off the golf course and back to work!". Since then we've had the "back to work budget" and detailed employer guidance has been published by the Equality Hub and the Government Equalities Office on helping individuals return to work.

This is fuelled by the fact that even this week there are still over 1,000,000 vacancies in the UK workforce and employers including housing providers are finding it difficult to recruit.

What do older workers want?

The CIPD put together a report last year, 'Understanding older workers'. According to this over 10.4 million older workers (those aged 50 and over) account for close to a third (32.6%) of the workforce. The report made a series of recommendations based on the key issues that employers and policy-makers should understand when considering how to recruit and retain older workers.

The recommendations include enhancing the flexible working offering and providing early and ongoing support for health and wellbeing. The report points out that more than half of workers have a long-term health condition by the time they reach 60 which highlights the importance of supporting the health of workers throughout their working lives, to maximise their chances of enjoying a healthy and active life as they get older. Finally, employers should improve skills and training and guard against assumptions that older workers are less likely to be interested in training or career progression.

Returner programmes

The guidance focuses on returner programmes involving paid work, on a temporary or permanent basis, that give a supported route back to permanent employment. The guidance notes that returners can be people returning from any type of career break, so it will include those who are parents or carers, those who have taken a career break, or those who have decided against early retirement in favour of a return to work.

As the guidance points out, running a successful returner programme can have a positive impact on an employer's reputation. The employer will be able to access a high-calibre talent pool of experienced and mature people, tackle skills shortages, and create a more inclusive workplace.

Flexibility is now a necessary tool for employers to consider, and, unsurprisingly the guidance notes that it is likely to be high on the list of priorities for returners, especially if they have ongoing caring commitments. Offering a variety of working patterns – part-time work, remote work, compressed hours or job sharing – will be appealing for those looking to balance their professional and personal lives.

How to attract older workers?

In view of the benefits that older employees can bring to the workforce, it is sensible for employers to ensure that they don't dissuade these people from applying for jobs when they advertise them. Job applications can often favour younger applicants so employers should look closely at how they word job specifications and approach the hiring process so that they are as inclusive as possible. This is getting a lot easier with new technology.

Efforts should be made by employers to make workplace cultures more age-inclusive. This will entail understanding that many in the older age group need to provide care for family members and that offering flexible working hours, part-time roles and carer's leave would make work more possible for them.

Having an intergenerational workforce is something that displays a good culture of inclusivity within an organisation. The knowledge that older employees have should be openly acknowledged to have value and can be put to good use via things like mentoring schemes. An example of how this could work would be the younger worker providing tech knowledge, while the older worker would provide business and life experience.

A focus on retention

The ONS also surveyed in September 2022 to find why adults over 50 left the labour market. In the lowest age group (50 – 54), 19% left work due to stress, and 17% because they did not feel supported in their job. So, employers could influence the reasons why 36% of this age group left the workforce by addressing these reasons.

Consider taking positive action

Employers should also use the law to their advantage and consider taking positive action. These provisions can be used to boost the representation of older employees in the workplace.

The provisions apply where people who share a protected characteristic suffer a disadvantage, have particular needs or are disproportionately under-represented. The employer's aim must be to enable or encourage people who share the protected characteristic to overcome or minimise the disadvantage identified, to meet the needs identified, or to enable or encourage people who share the protected characteristic to participate in the activity in which they are under-represented. Employers have the scope to take any action which is a proportionate means of achieving the aim.

Employers can also take a protected characteristic into consideration when deciding who to recruit or promote where people sharing the protected characteristic are at a disadvantage or are under-represented. Such action is allowed if individuals are as qualified for a position as each other, the employer does not have a policy of treating people who share the protected characteristic more favourably in connection with recruitment or promotion than people who do not share it, and the action is a proportionate means of achieving a legitimate aim.

Continuing to have staff working into their 50s and 60s should be viewed as a positive option, a way of harnessing experience and expertise and at the moment a valuable labour resource.

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Grounds for refunds of SDLT

Recent HMRC guidance has clarified the parameters of the SDLT relief for registered providers of social housing (RPs). Relief applies:

- for non-profit RPs and profit-making RPs, where the transaction is funded with the assistance of a specified public subsidy; or
- for non-profit RPs, where the vendor is a "qualifying body" (broadly, a non-profit RP or local authority).

The new guidance confirms some welcome interpretations as to how the relief operates so that more purchases should be exempt from SDLT.

As this is not a change in law, HMRC has not restricted the new guidance to future transactions. RPs (including local authority RPs) should therefore seek to identity land purchases on which SDLT was paid but which could fall within the revised guidance. As there is a time limit for claiming refunds of overpaid SDLT, the sooner the better.

The main clarifications are:

Local authorities

In our experience, a local authority RP was seen as belonging to a third category of RPs (neither a non-profit RP nor a profit-making RP) and therefore unable to access the above reliefs. The new guidance recognises a local authority RP as a non-profit RP and therefore able to claim relief on purchases which use qualifying subsidy and on purchases from a local authority or non-profit RP.

This is fertile ground for refunds as many local authorities could have paid SDLT when relief was actually available.

Expected public subsidy

Under the first limb, the land purchase must be funded with the assistance of a public subsidy.

RPs might have been hesitant to claim the relief where the price was paid from their own funds because the subsidy had not been approved or drawn down. HMRC guidance confirms that relief can be claimed where the RP has a reasonable expectation that the subsidy will be made available to them. It will be important to go on and obtain the subsidy and to be able to demonstrate that it was allocated to the relevant land purchase in the records of the RP.

RPs may have (now justifiably) taken a bullish view on this point in the past and claimed relief. However, even those RPs should consider whether refunds could be claimed – most likely based on the reasonable expectation point. We think that there will be some who did not have any approval for grant funding, and paid SDLT, but looking back could say that at the time of purchase they expected to successfully apply for grant.

Transferred subsidy

The guidance confirms that relief may be available where subsidy is assumed by the buyer although this is a relatively complex area. HMRC expect other conditions to be met and say that it is fact dependent.

Whether this will yield refunds is more difficult to say and we think it will mainly turn on how the contract was drafted. With sufficient care it should be possible for future purchases to fall within the terms of the new guidance.

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Procurement Bill – what should housing associations be doing now to prepare for the new regime?

As the Procurement Bill (the Bill) makes its way through Parliament, there is much that housing associations can be doing now to prepare themselves for the upcoming reform to the public procurement regime.

The Bill had its third reading and Report Stage in the House of Commons on 13th June 2023 where it passed with amendments. Following a potential period of "ping pong" debate between the House of Commons and the House of Lords on any finer points of amendment, the Bill is expected to gain Royal Assent in summer 2023.

Housing Associations should note that, whilst the Bill is expected to obtain Royal Assent later this year, the new rules themselves will not come into force immediately. Instead, there will be a six month "go live" period in which to transition into the new regime after some of the necessary secondary legislation has been implemented. Given this, whilst the Bill is not expected to be fully in force until "Spring" (Q2) 2024 at the earliest, there are things that Housing Associations should be doing now in preparation for the new rules:

Understand changes in terminology

Whilst many of the concepts under the Bill remain similar to those that we are already used to, there is a significant shift in language and terminology (with a departure from pretty much all of the European concepts and terms). It is therefore sensible to get to grips with these changes in terminology now. There are some simple updates (for example, "Contract Notices" are now "Tender Notices"), but housing associations will also need to understand new concepts such as "Covered Procurement".

There are also some terms that remain under the Procurement Bill, but which now have different meanings. For example, "Contract Award Notices" remain, but are now notices to be published after the contract has been awarded, whereas a "Contract Details Notice" must be published prior to the contract being entered into.

Some time spent now getting used to the new and updated terminology will pay dividends when the new regime is in force.

Learning & Development programme

Housing associations should also keep themselves apprised of future updates from the Cabinet Office regarding the extensive Learning & Development programme that will be rolled out to facilitate the new regime as part of the "go live" period. The Learning & Development programme will be a government funded programme available to all contracting authorities (including housing associations) with a range of training aimed at different levels within organisations, including:

- Knowledge drops;
- Self-guided e-learning;
- Full day instructor-led advanced learning; and
- Communities of Practice.

The training is intended to help contracting authorities prepare for the new Procurement Act and the changes to the regime, and it is worth identifying now who will benefit from attending the various know-how sessions, and enrolling on the relevant programmes as and when they become available. If you are not already in touch with the housing sector's Single Point of Contact with the Cabinet Office for the learning and development programme and communities of practice, please contact John Wallace, Director of Procurement at Clarion Housing Group.

Assess internal resource and capability

In line with the Learning & Development programme, housing associations should take stock of their internal resources and capability, and identify where there is room for additional resource or skills development. This aligns with the principles already set out in the National Procurement Policy Statement.

Ensure up-to-date contracts register, identify anticipated spend, and plan pipeline of upcoming procurement requirements

Whilst the new regime is designed to provide additional flexibility for contracting authorities, the quid pro quo is an enhanced transparency regime.

In particular, housing associations who anticipate that they will pay more than £100m under public contracts in the next financial year will be required to publish a pipeline notice setting out details of any contracts with an estimated value of more than £2m which they expect to advertise in the next 18 months. There will also be enhanced obligations for contracts above £5m in value, including a requirement to publish redacted copies of those contracts with the Contract Details Notice.

Additionally, for all public contracts, housing associations will need to publish Contract Termination Notices when a contract comes to an end (either due its natural expiry, early termination, or by agreement between the parties).

It is clear from these requirements that housing associations will need to have a detailed understanding of what they expect to procure over the coming years (including their anticipated spend) and when contracts are due for renewal, and it is advisable to spend some time now ensuring that contracts registers and plans for upcoming procurement activity are up to date to ensure that your organisations know what is on the horizon.

Consider internal contract procedure rules

Finally, it is worth revisiting existing Contract Procedure Rules and Standing Orders to identify where updates may be required to align with the new regime. A useful starting point may be the procurement procedures to be adopted for different values of contract opportunity, recognising the increased flexibility afforded to contracting authorities in terms of how they can structure procurements under the new Competitive Flexible Procedure.

Further guidance on the use of the Competitive Flexible Procedure is expected from the Cabinet Office in due course, and housing associations may want to give some thought now as to how they can design their own procedures in a way which will work best for their organisation (for example, will there be certain types of procurement where an element of dialogue / negotiation will be particularly useful?).

Whilst there is still some time under the existing regime, there is much to do to get ready for the Bill, and housing associations should be acquainting themselves now with the new regime to ensure they can hit the ground running when the full force of the Act hits.

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The Building Safety (Responsible Actors Scheme and Prohibitions) Regulations 2023

On 4 July 2023, the Regulations came into force bringing into effect the Responsible Actors Scheme for residential developers (the Scheme) as part of secondary legislation following the Building Safety Act 2022 (the Act).

The aim of the Scheme is to ensure that developers take action to remediate critical safety defects in residential buildings that they developed or refurbished. Michael Gove has emphasised that the Scheme ensures that those developers who fail to commit to remediation "will be out of the house building business in England entirely unless and until they change their course".

The Building Safety Act

The Building Safety Act includes within it explicit provisions that are making the sweeping changes considered to be needed to the construction and real estate sector following the Grenfell disaster. In addition, it has wide-ranging powers for the Secretary of State to issue secondary legislation to bring about that change.

Sections 126 to 129 of the Act established the right for the Secretary of State to create schemes to ensure developers remedy defects in buildings and contribute to the cost of remedying defects. The Scheme imposes prohibitions on development where eligible developers fail to join the scheme or fail to rectify building safety risks for which they are considered to be responsible.

Developer pledge letter

The Scheme follows more than a year of discussion with developers including those in the House Builders Federation. That dialogue was publicised as relating to the "developer pledge" letter – a public pledge from 52 developers (as at 26 June 2023) committing to carrying out and funding fire safety remediation works, which set out what is now the skeleton of the Scheme.

Following the pledge, those who had signed the pledge were invited to sign a further "developer remediation contract" which set out the precise obligations for developers to investigate buildings they had a hand in developing and then remediating those buildings. As at 26 June 2023, 49 developers invited to sign the contract have done so.

Obligations

Where a developer is eligible to be a member of the Scheme, it must join the Scheme. Once a member of the Scheme, the developer is obliged to remediate, or pay for the remediation of, life-critical fire safety defects in residential buildings. The Scheme member must also refund any grant money already spent on remediating fire safety defects in relevant buildings. Members will also be required to enter into the developer remediation contract.

Penalties for not joining the Scheme

Where a developer is eligible to be a member of the Scheme, it will be prohibited from carrying out major development of land. Major development of land includes any of the following:

(1) schemes providing 10 or more residential units;

(2) residential schemes on a site at least 0.5 hectares in size;

(3) commercial development of 1,000m or more floor space; and

(4) development sites over 1 hectare in size.

This prohibition may only be disapplied by application to the Secretary of State if the development relates to critical national infrastructure.

An eligible developer that fails to join the Scheme is also subject to building control prohibitions meaning the developer will not be able to give or receive relevant notices, certificates and applications. There are some limited exceptions to this rule, for example in relation to emergency repair work.

Who is caught?

The Scheme applies to:

- residential developers whose principal business (more than half of its business) is residential development, that have developed one or more residential building of at least 11m height; and that meet the "profits condition" discussed below;
- anyone that meets the "profits condition" and has developed or refurbished two or more residential buildings of at least 11m height that were eligible for any of the cladding remediation grant funding; and
- anyone that has developed or refurbished at least one residential buildings of at least 11m height and volunteers to join the scheme.

The “profits condition” is a page-worth of legislation (which would need detailed review in borderline cases) that boils down to an average annual operating profit over a 3-year period of £10 million or higher.

The Scheme does not apply to registered providers of social housing (or any of their wholly-owned subsidiaries). This does mean that where registered providers have entered into joint-ventures with developers, they might be caught.

It also appears that local authorities’ subsidiary local housing companies may be caught by the Scheme.

What now?

Over the coming months we should expect to hear DLUHC using the weight of the Regulations to enforce the requirements on developers to take responsibility for defects and repay grant funding.

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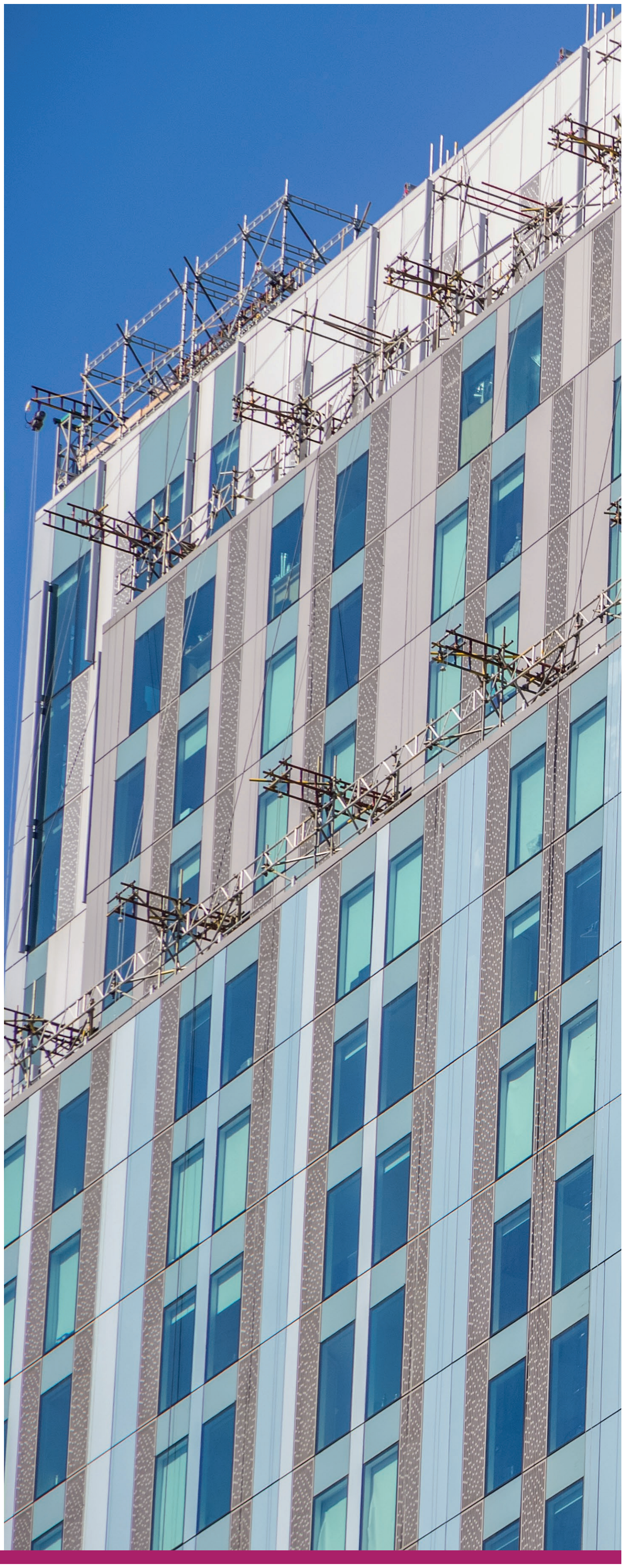

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