trowers & hamlins

QUARTERLY HOUSING UPDATE

Winter 2023/24

Contents

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Foreword

It was a pleasure to meet so many clients and contacts at the Social Hosing annual conference. What struck me about the day was the way that the debates that played out on the panels represented a microcosm of the issues that have faced the sector in what has been a challenging year. Perhaps like never before has the sector been so politicised (with issues like damp and mould being played out on a national media stage) and against a backdrop of ever increasing financial pressures on the sector (something that is increasingly not just the preserve of the Housing Association sector; we are learning of the same pressures facing local authority landlords).

As we enter the new year here are my thoughts on how the key debates will play out in 2024:

- The tenant voice will be at the heart of everything the sector does. New Consumer Standards are likely to apply from April 2024 and both the sector and the Regulator will be under close scrutiny to see that Government's intentions for a "significant change in landlord behaviour" follow through in practice.
- Development of new homes will remain under pressure as we remain (at least in the foreseeable future) in a higher interest environment and as both Housing Association and local authority resources are diverted away from development into investment into existing stock. Whilst there is clearly a risk of the sector "talking itself" into a problem, there is no doubt that the pressures are real and has been clear that there is a risk that if balance sheets are stretched too far that would have a credit negative impact on associations. Partnerships with institutional investors clearly offer a way forward here, but that will require an appetite from boards and executive teams alike to "do things differently".
- With a prospect of a General Election at some stage this year, the sector might be forgiven for thinking that a change in administration offers some light on the horizon; yet it seems to me that regardless of the outcome of the election that any new government will be fiscally constrained and so the prospect of a material uplift in grant levels seems remote; perhaps the best the sector can ask for is for policy stability that will allow every part of the sector to plan with certainty and to make the sector a (more) attractive one for institutional investors to engage with, alongside some "easy wins" in terms of subtle but important policy changes to promote affordable housing development.

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New building safety rules for works to higher-risk buildings

Since the Building Safety Act came into force last year, housing landlords have been waiting to find out if maintenance and refurbishment works to high-rise buildings would be covered by the new three-stage building control regime (otherwise known as the Gateways). The recent publication of the Building (Higher Risk Buildings Procedures) (England) Regulations 2023 (the Procedures) now provides that clarity.

As anticipated, the Procedures cover construction of new Higher Risk Buildings (meaning buildings measuring 18 metres or seven storeys or higher from ground level); works to existing buildings that causes them to become Higher Risk Buildings (e.g. adding additional storeys, or converting offices into apartments).

The Procedures now clarify that most works to existing Higher-Risk Buildings subject to the 2010 Building Regulations will also be in-scope, and will have to seek approval from the Building Safety Regulator for the works at each of the three Gateway stages. The new rules came into force on 1st October 2023, covering most new in-scope works to Higher-Risk Buildings commenced after that date.

Exempted works

Helpfully, the Procedures set out three categories of works to Higher-Risk Building that are partially or fully exempted from the Gateway regime:

- **Emergency repairs** – These are emergency repairs to a Higher-Risk Building, required to be carried out as a matter of urgency due to the risk of health, safety or welfare of persons in or about the building and where it is not practicable to comply with the building control requirements before the works commence. Landlords undertaking emergency works must notify the Building Safety Regulator as soon as possible after the works are commenced, and must apply to the Regulator for retrospective approval (called a "regularisation certificate") as soon as the works are completed.
- **Scheme works** – These are works to existing Higher-Risk buildings that are self-certified under Regulations 20 and 20A of the 2010 Building Regulations and are fully excluded from the Gateways regime.
- **Exempt works** – A defined list of minor repair and replacement works .to existing Higher-Risk Buildings that don't affect the structure or fabric of the building, which are also excluded from the Gateways regime.

Gateway regime for in-scope works to Higher-Risk Buildings

For all works to existing Higher-Risk Buildings that are not exempt, landlords must follow the Gateway regime under the Procedures. Failure to meet the requirements will be an offence under the Building Act 1984.

- Gateway 1 has been in force since August 2021, and requires landlords undertaking works to a Higher-Risk Building to include a fire safety statement as part of the local authority planning application process.
- Gateway 2, now called "building control approval applications", must be submitted to and approved by the Regulator before the works commence. The Regulator must determine applications within 8 weeks of their submission, and any approvals can be made subject to requirements (eg to revise and resubmit plans for approval).
- During the works period, landlords must notify any "notifiable changes" to the Regulator, and apply to the Regulator for approval for "major changes" before those works can take place. The Regulator must determine change control applications within 8 weeks, and can make approvals subject to specific requirements. Landlords must also ensure that their principal (or sole) contractor maintains a mandatory occurrence reporting system to allow reporting of safety concerns.
- Gateway 3, now called "completion certificate applications", run in a similar way to Gateway 2, with the additional requirement for the principal contractor and principal designer. to provide compliance statements in respect of the works. The Regulator must determine any applications within 8 weeks, which includes inspection of the works as required.
- A "Golden Thread" of key building information for each Higher-Risk Building (comprising all Gateway and change control applications, mandatory occurrence reports and correspondence with the Regulator) must be stored in an electronic facility and provided to the Accountable Person prior to submission of a Gateway 3 application.

Given the last-minute publication of the Requirements, housing landlords have a lot to catch up on.

Before commencing new maintenance programmes, landlords should review their specifications to identify which jobs will be exempt from the Gateway requirements. For in-scope works, landlords and their contractors will need to allow sufficient time to allow Gateway 2 and 3 and change control applications to be approved, and decide who bears the time and cost of any delays in approval. Landlords will also need to coordinate the digital storage of Golden Thread information, and ensure sufficient support from their contractors and consultants to allow the smooth running of the Gateways process. Term contracts and consultant appointments should be amended to reflect these changes.

For existing programmes involving in-scope works to Higher Risk Buildings, landlords and contractors will need to revisit their contracts and specifications and agree how any Gateway applications will be dealt with.

The Government Guidance on Collaborative Procurement to support Building Safety provides an useful toolkit for landlords to embed the Gateways regime into new and existing works programmes, including guidance on the procurement and selection process and recommended forms of contract to enable early contractor engagement and collaborative working. The guidance recommends a fair risk share for delays caused by the building control approval process and emphasises the need for transparent decision-making and clarity of contractual roles.

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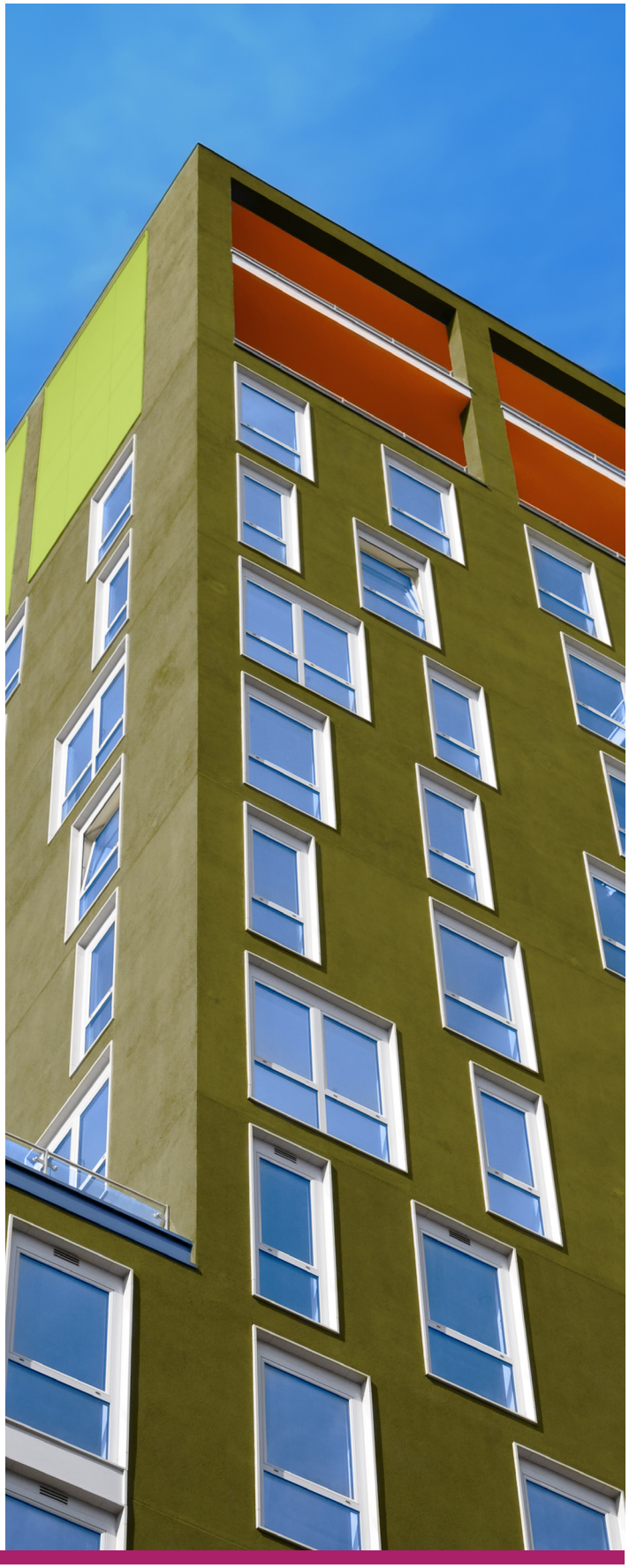

Forthcoming employment law changes to be aware of

There are lots of things in the pipeline for 2024 when it comes to employment law! The main changes are discussed below.

Flexible working

There are going to be changes to the flexible working regime. Under the Employment Relations (Flexible Working) Act 2023 an employee will no longer have to explain what effect, if any, they think their requested change will have and how this should be dealt with. There will be an entitlement to make two requests in any 12-month period, and the time for an employer to come to a decision on a request will be reduced from three to two months.

The government expects these measures to come into force by next July, and has also reiterated that the right to request flexible working will become a "day one" right (this is not provided for in the Act). In the meantime Acas has issued a consultation on an updated statutory Code of Practice and will also update the non-statutory Acas guidance which accompanies the Code.

Family friendly measures

The Carer's Leave Act 2023 will introduce a new and flexible entitlement of one week's unpaid leave per year for employees who are providing or arranging care. It will be available to eligible employees from the first day of their employment. They will be able to take the leave flexibly to suit their caring responsibilities and will not need to provide evidence of how the leave is used or who it will be used for.

The existing redundancy protections enjoyed by those on maternity, adoption or shared parental leave will be extended to cover a period of time after a new parent has returned to work by virtue of the Protection from Redundancy (Pregnancy and Family Leave) Act 2023. The detail will be provided by regulations, but the explanatory notes to the Act suggest that, by extending protection after a protected period of pregnancy, a woman who has miscarried before informing her employer of her pregnancy will also benefit from the redundancy protection.

There will be a new right under the Neonatal Care (Leave and Pay) Act 2023 allowing eligible employed parents whose new-born baby is admitted to neonatal care to take up to 12 weeks of paid leave in addition to entitlements such as maternity and paternity leave. The entitlement will be available to parents whose babies are born prematurely or who are sick and require specialist care after birth.

The government has stated that all of these entitlements will be implemented "in due course".

Right to request flexible working patterns

The Workers (Predictable Terms and Conditions) Act 2023 is expected to come into force next September. It will amend the Employment Rights Act 1996 to give workers and agency workers the right to request a predictable work pattern. Employers, temporary work agencies and hirers will be able to reject applications based on statutory grounds. Acas is due to produce a new code of practice to provide guidance on making and handling requests, a draft of which will be available for consultation this autumn.

Code of Practice on dismissal and re-engagement

The government launched a consultation, which closed on 18 April, on a statutory Code of Practice on Dismissal and Re-engagement. A failure to follow the Code will not give rise to any standalone claims, but it will be admissible in evidence in proceedings before a court or employment tribunal and any provision of the Code which is of relevance must be taken into account.

Changes to retained EU employment law

On 12 May the government issued a consultation; 'Retained EU Employment law: Consultation on reforms to the Working Time Regulations, Holiday Pay and the Transfer of Undertakings (Protection of Employment) Regulations'. The consultation, as the title suggests, focuses on three key areas: record keeping requirements under the Working Time Regulations (WTR), simplifying annual leave and holiday pay calculations in the WTR, and consultation requirements under TUPE. The consultation closed on 7 July and we are awaiting a response.

The WTR stipulate that records should be kept which are "adequate" to show the employer's compliance with the 48-hour week and with the requirement not to exceed an average of 8 hours in a 24-hour period for night workers. These records need to be retained for two years. However, uncertainty was introduced by a case which held that employers must have an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.

The government is proposing to remove the uncertainty about record-keeping obligations by legislating to clarify that employers do not have to record the daily working hours of their workers.

The government is also proposing to simplify holiday pay and annual leave calculations by creating "one pot of annual leave entitlement" of 5.6 weeks with an accompanying single minimum rate for holiday pay. The government also proposes to introduce rolled-up holiday

pay (while acknowledging that, though it has been ruled unlawful, it is currently still used by many employers).

Finally, the government is proposing to extend the ability of micro businesses (with fewer than ten employees) to inform and consult directly with employees to small businesses (with fewer than 50 employees). This would mean that all small businesses without existing representatives would be able to consult directly with employees if that were simpler and easier, rather than arranging elections for affected employees to vote for new representatives. Direct consultation would only be allowed if no existing employee representatives were in place.

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Land Registry delays and the impact on property charging for Registered Providers

It has been widely reported that there are considerable delays in the processing of applications at the Land Registry. In particular, this is affecting applications to divide existing titles (transfers of part) and registration of new leases (dispositionary first leases). The Land Registry, on their website, are quoting *"where preparatory work has been done, we complete half of applications to divide existing titles or register a new lease in about 13 months. Almost all are completed in about 20 months. Where no preparatory work has been done, half are completed in just over 18 months and almost all in 22 months."* The result being that most applications to register acquisitions of properties on new developments by Registered Providers (RP's) are taking on average nearly two years.

This is having a clear impact on the ability of RP's to deal with their properties and, in particular, put them forward for charge.

So why does this delay in registration have an impact on charging? Funders require confirmation that the properties are registered at the Land Registry with title absolute and the title numbers and postal addresses are as per the schedule of properties attached to the certificate of title. As the borrower's solicitors we are required to provide an undertaking to use reasonable endeavours to perfect the RP's title to the properties and the security under the charge and deal promptly with any requisitions on title raised by the Land Registry relating to the application to register the RP as proprietor of the Properties.

Issues arise when the application to register the acquisition of the properties by the RP has been made by a third-party solicitor. Registration, and responding to requisitions, is therefore outside of our direct control. We frequently find that where requisitions are raised it requires input from developers, thence involving yet another party. This can add to the length of time it takes to resolve issues and increase uncertainty in relation to borrowing timescales.

This doesn't mean that properties in the course of registration can't be charged. Subject to funder approval, we can resolve this issue by disclosing the required information in relation to the development title and obtaining the necessary undertakings from the relevant third-party solicitors, addressed to the funders that any registration issues will be dealt with. It is likely that as a result of the additional confirmations required the cost and timescale for the charging will increase. Further consideration may need to be given in relation to the extent of property list checking. A more extensive review of transfer and lease plans, plot to postal addresses and further funder requirements (such as SIM searches) may all need to be considered.

Many RP's ask if applications to register can be expedited to get the completed registrations through ready for a charging transaction. The Land Registry give the following guidance on requests to expedite:

The expedite (fast-track) process is available for applications, either residential or commercial, where a delay would put any kind of property transaction at risk, for example, a refinancing deal. The age, degree of complexity and type of application are not factors in whether or not we will expedite. If a delay in registration is causing problems, whether legal, financial or personal, our criteria for expedition are met. We usually only consider requests from the organisation that sent us the application or the buyer or seller of the property. You will need to provide evidence which clearly shows why you are asking us to expedite your application.

Although the request to expedite is an option, if there is a prior application delaying the acquisition registration, expediting is unlikely to resolve the issue. Our recommendation is to check in the first instance if there are prior applications. Where there are pending applications subject to requisitions, a request to expedite is unlikely to be effective. In this instance chasing confirmation from any prior applicants that requisitions are in hand is likely to be more beneficial. We suggest creating a tracker of pending applications, noting where there are prior applications, and focusing on expediting those which have first-priority at the Land Registry.

It is unlikely we will see improvement with the Land Registry processing times anytime soon. The Land Registry say:

We have increased our overall caseworker resource by around 1,000 in the last few years, including over 500 in the last two years alone to help process additional cases. We believe improvements can only be delivered through a combination of recruitment and training as well as automation. At the moment, 29% of our applications to change the register are automated – we want to increase this to up to 70% in the next three years. We are also exploring short term approaches. One includes our having created two dedicated teams focused on the oldest complex cases with a specific goal to reduce the processing times for these applications.

In the meantime, and, as always when it comes to property charging, the key is to be prepared and check where applications are being held up and what the appropriate action or solution is. This will assist in focusing and prioritising any actions required either in expediting registrations or charging prior to completion of registration.

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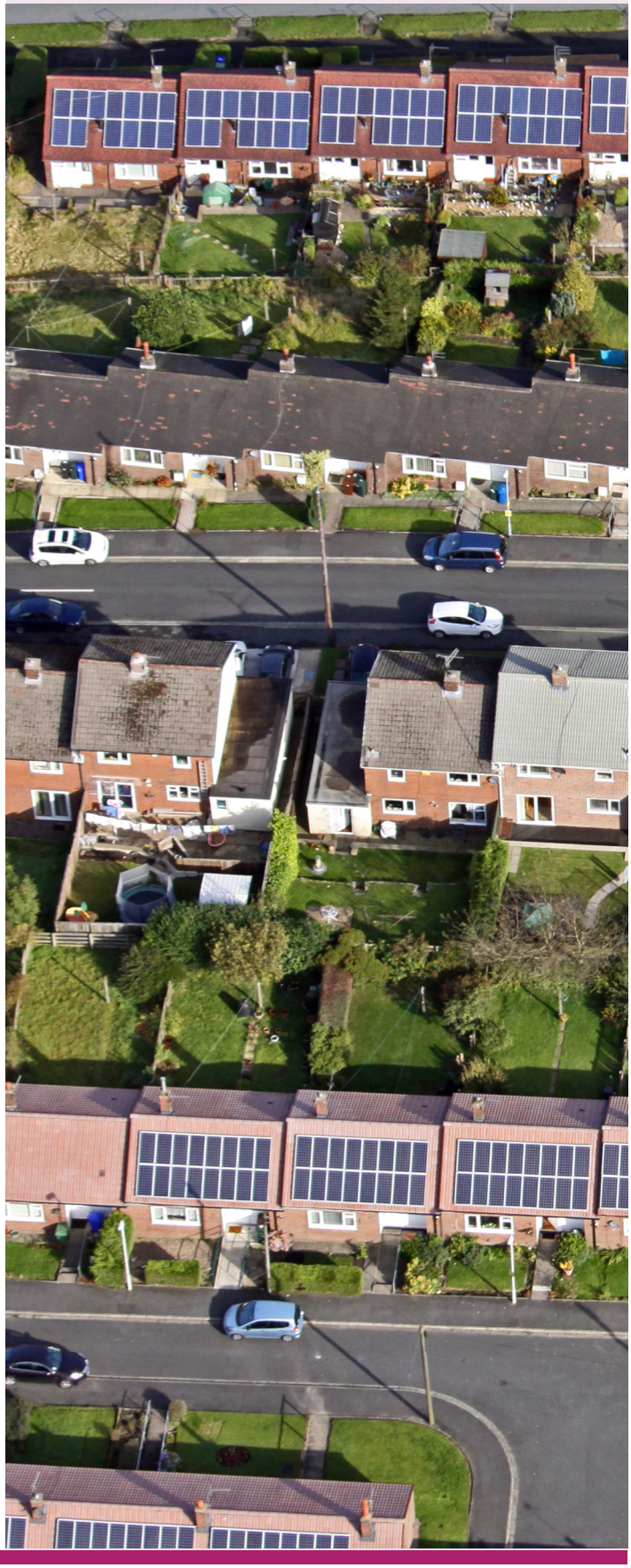

Title restrictions: will they help or hinder?

Is it possible for a title restriction to be removed from a registered title when the obligation it is intended to protect has not been complied with?

This scenario was presented in the recent case of Carlton Vale Limited v Gapper [2023] UKUT 141 (LC) where the Upper Tribunal (Lands Chamber) decided that the title restriction in question should be removed.

In this case, the lease of a pub was surrendered and, as part of the consideration for such surrender, the landlord and tenant purportedly entered into an overage agreement which was protected by a restriction registered against the title to the property. The terms of the overage agreement provided that the restriction could be removed upon the earlier of the payment of any overage due, or the expiry of five years from the date of the agreement.

Although this article focuses on the parts of the judgment relating to the title restriction, the appeal considered various points, including whether the agreement had been validly executed and whether a party could be allowed to profit from its own wrong. As to whether the overage agreement was binding, it was decided that it was binding and that the overage had been triggered, meaning that the landlord was obligated to pay the tenant. Despite this, and the fact that the landlord did not intend to pay the tenant, the Upper Tribunal found that the restriction protecting the overage could be removed from the title on the basis that five years had elapsed from the date of the overage agreement. It was held that the parties had "unequivocally" agreed distinct parameters for the release of the restriction which were not tied to compliance with the terms of the agreement around payment of the overage. The judgment clearly distinguished the contractual right to receive an overage payment from the agreement of the parties for the removal of the title restriction.

What does this mean in practice? Here, the Upper Tribunal was willing to uphold the agreement between the parties in relation to the restriction. This serves as a good reminder to think carefully when imposing a restriction about the protection it is intended to afford and how it should operate. These considerations may differ depending on whether a party will benefit from the restriction or be subject to it, but as a general rule, we recommend looking at the following as a starting point:

- Does the restriction relate to the whole of the registered title or only part of it? Should there be a limit on how long the restriction will remain registered on the title? It is usually worth agreeing this upfront so that the restriction does not end up staying on the title for longer than is intended.
- When drafting the restriction, we would recommend using HM Land Registry's standard form restrictions in the majority of cases (as opposed to non-standard wording) to avoid requisitions upon registration. We also suggest following the Land Registry's guidance relating to certificates of compliance and consents to ensure that their requirements have been complied with.
- Should the obligation protected by the restriction be caveated in certain circumstances? In the context of a development site, it is fairly standard for sales of individual dwellings, creation of security and dealings with statutory undertakers to be carved out from the terms of the restriction. A certificate may still need to be submitted to comply with the restriction but it should not have to certify compliance with the underlying obligation being protected.
- Will a certificate or consent be required to comply with the restriction and who can provide this? Consider whether it should be limited to the beneficiary of the restriction or, for example, a conveyancer. If it is anticipated that multiple certificates or consents are required, the latter option can relieve the administrative burden on a specified party or provide more control to a party subject to the restriction if their solicitor is able to produce the necessary certificates or consents.
- Under what circumstances can an application be made for its removal? Is the release subject to the relevant obligation being satisfied; for example, the beneficiary of the restriction having received all monies due? If so, we would recommend incorporating a mechanism to resolve disputes in the event that there is a difference of opinion in this regard.
- From a timing perspective, it is usually sensible to factor in any delays or difficulties in obtaining a written consent or certificate, particularly if this is being provided by a specified party (especially if you have had no prior contact with them), to try to mitigate any unexpected hold-ups to the transaction. Where delays seem likely, it may be worth requiring co-operation of the appropriate parties in any contractual arrangements or obtaining a solicitor's undertaking.

The factors above are just a few of the things that should be taken into account when considering a restriction and, depending on the transaction, there can be many more. Agreeing the wording of a restriction, any parameters around when it can be removed and compliance with its terms can become quite complex. As shown by the decision in Carlton Vale Limited v Gapper, these factors should not be overlooked. Please do not hesitate to contact Trowers & Hamlins if you require any advice in this area.

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Building Safety Act: URS v BDW judgment

The Court of Appeal (CoA) has issued its first decision covering extended time limits for pursuing certain claims under the Building Safety Act 2022 (the Act).

The Building Safety Act

The Act extends the time limits for bringing various claims, including those under the Defective Premises Act 1972 (the DPA). Section 1 of the DPA imposes a duty on parties taking on work in connection with the provision of a dwelling to carry out work in a workmanlike and / or professional manner so that a building is 'fit for habitation' when completed.

The Act also adds a new Section 2A into the DPA which extends the duty to work in relation to any part of a building which contains one or more 'dwellings', and works to existing 'dwellings', not only new ones. This section applies to work completed on or after 28 June 2022.

The time limit has been extended for claims under the DPA from six to 15 years, as well as a longer 30-year retrospective limitation period for claims that accrued before the Act took effect in June 2022.

Background to the Claim

In URS Corporation Ltd v BDW Trading Ltd [2023], BDW engaged URS as its structural engineer in respect of residential developments in London and Leicester (the Buildings). Following practical completion, which took place between February 2005 and October 2012, BDW sold the apartments in both the developments to third parties and transferred its freehold interests.

Following the Grenfell tragedy BDW investigated their developments and discovered serious structural design defects. The Buildings had not yet suffered any physical damage and no claims had been brought against BDW by any of the apartment owners. Nonetheless, BDW incurred costs undertaking temporary works and permanent remedial works and evacuated residents in one block.

BDW brought a claim against URS in 2019 for its losses. After the extended time limits were introduced by the Act, BDW sought to amend their pleadings to include a claim under Section 1 of the DPA, and to also add claims under the Civil Liability (Contribution) Act 1978.

While the case remains the subject of ongoing court proceedings, the judgment was issued in 2023 regarding the amendments sought by BDW.

The Judgment

Scope of duty of care – The scope of the duty owed in negligence by a designer to a developer covers the risk of economic loss caused by structural deficiencies or defects.

The cause of action in negligence – Where there is no physical damage, a cause of action accrues in negligence, at practical completion at the latest. The court clarified that BDW not only had a proprietary interest in the Buildings when URS' duty of care first arose, but also when the cause of action accrued on practical completion. Had the cause of action accrued when BDW no longer had a proprietary interest in the buildings, its claim in negligence may have failed.

Who owes and is owed a duty of care under the DPA? – Parties who are owed a duty under the DPA include the original developer, but also anyone else who subsequently acquires a legal or equitable interest in the property. Parties owing a duty include the developer as well as anyone taking on design or construction work in respect of a dwelling.

Extended time limits for DPA claims under the Act – BDW were permitted to amend their claim, after proceedings had already commenced, following the extended time limits brought in by the Act. The extended limits are to be treated as always having been in force. Note that claims which have been finally determined by a court or settled cannot be re-opened, however, due to an express carve out in the Act.

Recovery of contribution for remedying defects – It was not necessary for an owner or other third party to make a claim against BDW before BDW were entitled to seek a contribution from URS for liability under the Civil Liability (Contribution) Act 1978.

Comment

Housing providers should note:

- The extended time limits under the DPA may enable housing providers with defects that render a property unfit for habitation to bring claims against the design and construction team that would otherwise have been time-barred. Whilst the extended time limits were brought in with the building safety issues in mind, they are not limited to such issues.
- Housing providers who have developed properties will not be penalised for 'acting responsibly' in carrying out remedial works where safety issues are identified, even where they no longer own a property, and the purchasers have not made claims. This is useful for housing providers who are reviewing their portfolios and wish to take a proactive approach to building

safety. It is clear the avenues for such housing providers to recover costs of remedial works for building defects, particularly historic ones, have been widened.

- The extended time limits and the widening of scope of claims that can be brought under the DPA is likely to increase the number of DPA claims. Housing providers should be aware that the extended liability works both ways, i.e., there may be an increase in the number of claims being brought against them by owners too.
- The duties under the DPA cannot be contracted out of and any contractual provision which seeks to do so is deemed void . Housing providers should ensure that any exclusion of liability clauses carve out liability under the DPA so that it cannot be argued the whole clause is void.

Generally, the judgment shows it is becoming more difficult for parties to escape liability for building safety claims.

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Consumer standards and meaningful tenant engagement

RPs will be all too familiar with the long line of events leading up to the implementation of the Social Housing (Regulation) Act 2023 and its purpose to reform the regulatory regime and drive significant change in landlord behaviour.

A key part of Act is the reform of the consumer regulatory regime and, in particular, revisions to the consumer standards. Drafts of the new consumer standards have been out for consultation with the intention that they will apply from April 2024. The changes centre around two main themes, being 1) the adequacy of the safety and quality of housing; and 2) the importance of tenant influence in the heart of decision making and the importance of scrutiny by tenants of their landlords.

Over the last few months Trowers have run several events looking at the changing landscape of consumer regulation. These events have been very well attended and well received. Following the success of those events, we have also recently held a more targeted session looking at the "golden thread" of tenant voice and engagement and how providers should work that into their organisations. We hosted what was an incredibly valuable session, with insights being shared from three RPs and also TPAS as leading tenant engagement experts.

To use the Regulator's language, the 'desired outcome' is clear. RPs need to embed the tenant voice within their decision making structures, making sure that they can evidence that tenant views are actually influencing decisions taken at board level. How RPs reach that desired outcome is up to them. What is clear from talking to a number of RPs is that there is no one size fits all approach. Similarly, there is no single engagement structure an RP can adopt to completely satisfy the expectations. RPs will have to tailor their engagement approach according to their tenants and implement a number of different tenant touch points within their business to make sure they are feeding through truly representative tenant views.

Anecdotally we hear from RPs that they try and fail to engage with their tenants because those tenants are not interested in being engaged. This is not enough. RPs need to take the view that lack of engagement is a failing of the engagement structure itself and a failure to properly tailor to their residents. RPs need to think more creatively about how to engage their tenants. We heard a number of great examples from RPs, including a "chips and chat" Friday. An RP arranged for a chip van to drive around its estates and set up tables with different staff teams available for chats. Tenants who engaged and shared views would receive fish and chips to have with their neighbours. This was effective not just in driving engagement, but helping foster a better sense of community amongst residents.

We have also heard from RPs who might have thought that their tenants would oppose rent increases to the maximum cap level. In fact, by involving tenants in business considerations, those tenants articulated that a higher priority for them was continued investment in housing stock and so the tenants advocated for higher rent increases. This may come as a surprise to some RPs and illustrates that if you make assumptions about your tenants wishes you may, even if well intentioned, move in a direction that actually does not represent your tenant voice.

In creating an engagement structure, RPs might consider the TPAS pyramid approach. This is where tenant engagement is embedded at each level of decision making. This should start with some influence at board level and then feed down through to the day-to-day contact that employees of the RP are having with residents. It is important that everyone within an RP understands that engagement, even if just informal, is part of everyone's job.

Of course, knowing what your tenants want and what engagement structure will work for your tenants comes back to another key point the Regulator is keen to stress – the importance of underlying data. RPs must understand who their tenants are and what their needs and wishes are. For example, do you know how many of your tenants have difficulty using computers or difficulty reading? Simply, an RP that does not have accurate underlying data about its tenants and about its stock cannot tailor an appropriate engagement structure, cannot interpret the views of their tenants correctly and cannot comply with the regulatory standards.

It is though not just the RP itself which must have access to accurate data. In order for tenants to be able to properly scrutinise their landlord, they too must have access to data, information and resources within their landlord.

Establishing engagement structures is though only half the battle. A point the Regulator is keen to stress is that those engagement structures must actually then result in outcomes. In other words, can your RP evidence that the engagement is actually influencing the decision making? To what extent have things actually changed because of what your tenants' views are?

As mentioned, there is no one size fits all approach to tenant engagement and RPs are going to have to tailor their approach accordingly. Nevertheless, it can be invaluable to share experiences and ideas with other RPs. To help facilitate this, we will be running further events on issues relating to the new consumer standards.

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Credit ratings, credit rating agencies and ESG assessments

Global credit rating agency, S&P Global Ratings, have recently announced that it will stop providing numerical scores against ESG criteria for corporate borrowers. This announcement has put credit ratings, credit rating agencies and ESG assessments in the spotlight.

In this article, we seek to explain what credit ratings and credit rating agencies are, the role they play on a capital markets transaction, how they assess a borrower's ESG exposure and recent developments in the market.

What is a credit rating?

A credit rating is an independent assessment of a borrower's ability to pay back a debt. It is based on an assessment undertaken by a credit rating agency and is designed to provide potential investors with an evaluation of a prospective borrower's creditworthiness and risk. They are assigned by a credit rating agency and use letter designations ranging from A (as a high, or "solid", credit rating) to C or D (as a low, or riskier, credit rating). They can be assigned to individual borrowers, but can also be assigned to financial instruments issued by those borrowers. Rating agencies stress that the ratings they issue are an independent opinion of the borrower and that they are not a guarantee of total risk exposure.

What is a credit rating agency?

A credit rating agency is an independent company that analyses a borrower's creditworthiness, or the financial instrument being issued by a borrower and assigns them a credit rating. The three major credit rating agencies are S&P, Fitch and Moody's. The financial instruments that a credit rating agency typically provides a rating on are debt products such as bonds.

What role do credit ratings play on a transaction?

On a capital markets transaction, borrowers obtain a credit rating from a rating agency in order to showcase their credit profile to investors.

This takes the form of a letter designation, giving the potential investor a snapshot insight into the creditworthiness of the borrower. The letter designation varies from rating agency to rating agency, but essentially range from a designation implying an investment grade status (which means, in the opinion of the rating agency, the borrower is likely to be able to meet its debt obligations) through to a designation implying a higher risk of default (sometimes referred to as 'junk').

The credit rating is obtained prior to the transaction and can change, depending on the borrower. On some capital markets transactions, rating changes can trigger coupon increases or decreases.

How do credit rating agencies assess a borrower's ESG exposure and what recent developments have there been?

In addition to providing a credit rating, some ratings agencies (and other assessors) issue analysis of a borrower's environmental, social and governance (or, ESG) exposure as part of its evaluation of the borrower and/or its financial instrument. They then ascribe a numerical value to the borrower based on that analysis.

In assessing ESG risks, S&P Global Ratings had previously ascribed a numerical value as well as providing detailed written analysis of the ESG risks, but it has since taken the decision to remove the numerical score from their assessment. In contrast, other credit rating agencies (such as Moody's) continue to provide a numerical assessment that rates ESG criteria on a scale of one to five.

ESG ratings – and the credit rating agencies behind them – have come under intense scrutiny recently, particularly in the United States where certain Republican states are challenging reliance by investors on ESG as an investment criteria for state pension funds. In the lead-up to the US election next year, this scrutiny may continue.

Similarly, ESG ratings may differ as between the assessors. For instance, an emphasis on different objectives may lead to different rating outcomes, such as an overemphasis by one assessor on the financial costs of net zero transition measures by a borrower as opposed to an overemphasis by another assessor on the environmental impact of the activities of the borrower. It is possible that these different methodologies could lead to different rating outcomes which, in turn, can be confusing for the borrower and investors alike.

Financial regulators in the UK have been exploring potential regulatory reforms to ensure there is transparency and good conduct in the ESG ratings market. HM Treasury has recently concluded a consultation on expanding the regulatory oversight of the Financial Conduct Authority to cover ESG ratings providers and we await the outcome of that consultation as at the date of publication.

Therefore, borrowers looking to showcase their ESG credentials, or investors looking to invest in prospective borrowers or products based on a desire for exposure to ESG, will need to carefully scrutinise how the relevant ESG rating has been arrived at as part of the transaction process.

In our experience, borrowers and investors are increasingly focussed on ESG metrics as part of their business strategies and this will no doubt intensify as markets continue to adapt to the UK's net zero transition.

We will be pleased to address any questions that you may have.

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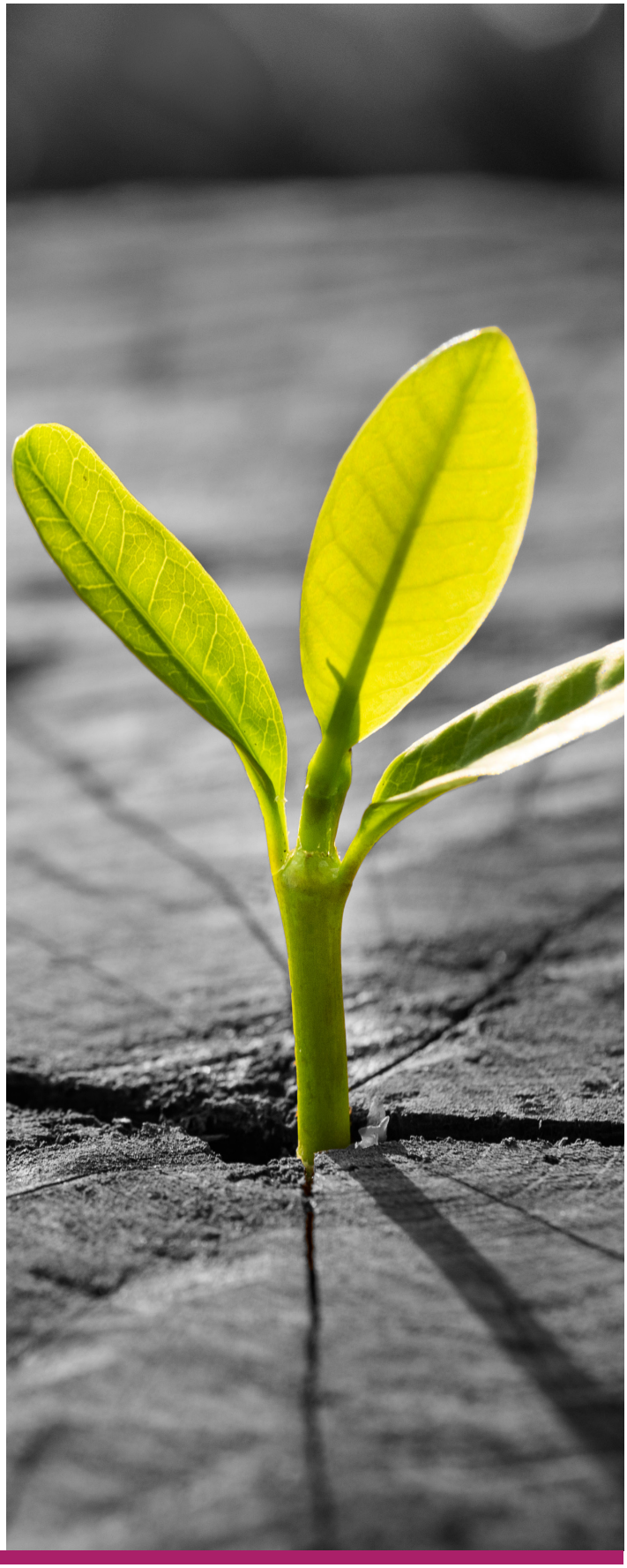

Landlord's certificates – where are we now?

It is over a year since the implementation of the landlord's certificate scheme under the Building Safety Act 2022 and its secondary legislation. Amendment regulations and an entirely new form of certificate have been issued by Government to address previous difficulties. This article focuses on the current position for residential landlords who continue to grapple with a process where strict deadlines for compliance leave minimal room for manoeuvre.

When it was first introduced last year, the landlord certificate process was one of the least publicised aspects of the Building Safety Act 2022 and its supporting regulations. A well-meaning initiative: the purpose of the landlord's certificate was to enable leaseholders of properties in "relevant buildings" (of at least 5 storeys or 11 metres in height) to understand the extent to which they may be liable for remediation costs of building safety defects at buildings that their property is situated in. However, what happened in practice was the latest chapter of delays in the conveyancing process for leasehold flats, as landlords struggled to get to grips with the enormous volume of information that needed to be compiled in order to provide a compliant certificate. Whilst the amendment regulations have simplified the process for some, the current form of landlord's certificate continues to be a source of significant confusion for landlords.

Who completes it?

The landlord's certificate needs to be completed by the "current landlord" – that is to say, the landlord of the leasehold interest in question at the time that the certificate is being completed.

the difficulty encountered by some current landlords is that the certificate needs to provide information about the property as at 14 February 2022 – the "qualifying time". The current landlord may not have been the landlord at the qualifying time or may have had a different level of involvement in the management or control of the building in question, and so the information or evidence required to complete the certificate may not be readily available.

As a result, current landlords are encouraged to contact superior landlords and other landlords in the building who may have information or documents that will support a current landlord in completing the landlord's certificate and may be required to be submitted as accompanying evidence.

What evidence is needed?

The evidence to be provided is dependent on whether or not the current landlord:

- was the developer of the building or is responsible for the relevant defects (if any are identified at the time of completing the certificate);
- is aware of any relevant defects when the certificate is completed; or
- met the contribution condition, which applies where the landlord group's net worth as at 14 February 2022 was more than £2,000,000 per relevant building (although there is an exemption for private registered providers of social housing or local authorities).

Even landlords who are not aware of any relevant defects at the time of completing the certificate will still need to produce evidence relating to the year of construction of the building, as well as details of all "relevant works" undertaken since 28 June 1992.

"Relevant works" is an extremely wide definition encompassing all works of construction, conversion, and general works to the building during the period between 28 June 1992 to 28 June 2022, plus any works completed after that date that relate to the remediation of relevant defects.

On a strict interpretation, this could mean any and all works undertaken at the building for any purpose and could result in a landlord producing a list of everything done to the building during that time period. It is difficult to see what purpose this serves, but for landlords who wish to avoid any risk of non-compliance the key message is to begin gathering these details as soon as possible because the certificate and accompanying evidence must both be provided, with serious consequences if the deadlines are missed.

What are the time limits?

There is a strict time limit of 28 days to provide the landlord certificate from a triggering event. Triggering events include receiving notification that the leasehold interest is to be sold and discovery of a new relevant defect that was not covered by a previous landlord's certificate. The deadline is strict and non-negotiable, with no provision for obtaining an extension.

Landlords can therefore be easily caught out, with severe consequences in that the landlord who misses this deadline will be deemed to be responsible for any relevant defects at the building and consequently will not be able to recover any costs of remediation from the leaseholder in question, regardless of whether they have "qualifying lease" status.

A further deadline that was inserted when the regulations were recently amended, is that within one week of either serving a landlord certificate or receiving a leaseholder deed of certificate, the current landlord must provide a copy of the certificate to any Resident Management Company, Right to Manage company or named manager. In the case of a landlord's certificate, this must also be provided to any other landlords of premises in the building within the same timeframe. If the landlord fails to do so, then the costs of remediating relevant defects in the building cannot be recovered via service charges.

Conclusion

The key messages for landlords of relevant buildings are to ensure that they are aware of the triggering circumstances for completing a landlord's certificate, diarise the deadlines accordingly and to compile the supporting information (including details of relevant works) in advance of requests being made, where possible.

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