trowers & hamlins

QUARTERLY HOUSING UPDATE

Autumn 2021

Contents

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Foreword

This year's final edition draws together articles that capture a number of the key themes that will drive debate in the housing sector into 2022 and beyond.

At the start of the edition, I am delighted that Mushtaq Khan, Chief Executive of Housing Diversity Network has co-authored an important piece with Sharron Webster (our own Head of Diversity and Inclusion) about the critical role of boards in driving diversity and inclusion, and how boards might go about recruiting a more diverse board. I strongly believe that this is an important challenge for the sector, and its seems to me that as boards front up to the challenges that proactive consumer regulation and new Consumer Standards will bring, that (as Mushtaq rightly stresses) having a board that reflects the communities that is serves must be central to delivering top quality customer service.

Elsewhere in the edition, we track the ongoing development of the new building regime- another issue that every landlord and board should be considering as a priority.

Returning to the consumer theme, it has been a privilege this year to lead our teams on the establishment of the New Homes Quality Board and its recent procurement of The Dispute Service as its preferred partner to develop the independent New Homes Ombudsman Service. The New Homes Ombudsman Service will form a central part of the industry's plans to deliver a step change in the quality of new build homes and the customer service provided by house builders and we are delighted to have been at the forefront of the development of the new ombudsman service.

Also on a personal note, it has been an honour to have been asked to Chair the British Property Federation's new Affordable Housing Committee. With the exponential growth in institutional equity investment in the affordable housing sector, it is my view that the time was right to bring together investors and traditional housing associations (who are well represented on the committee) to work together to develop best practice in the deployment of new funding and to ensure that investors and traditional landlords can work together to bring forward the additional homes the country needs. I am very aware that it can often be the case that so called new entrants can be seen as a threat to the traditional affordable housing sector, and I hope that the Committee's work can demonstrate both the need for equity investment in affordable housing and how new entrants can work alongside the traditional sector to deliver common objectives. In this connection, we will be publishing a series of articles in forthcoming editions to explore new delivery structures.

Finally, after what has been another challenging year, may I take this opportunity to wish you all a restful Christmas break.

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Board diversity – bringing diverse talent forward

It is great that conversations about diversity and inclusion are now much more prevalent, and that people are more alive to the need to improve diversity, but if we are being truly honest, can we say that those conversations are converting themselves into action in the way that they should? If you asked your board "what is this organisation's strategy on diversity", would they be able to clearly articulate that beyond "to increase it…"?

D&I are not HR issues, they are leadership issues, and it is boards (and indeed executive teams too since between them they are most influential within the organisation) that should own and drive D&I. If they are the drivers, then they themselves must be diverse and inclusive.

It's not possible to set down in one article all of the things that boards should consider around D&I, but here are a few key thoughts:

- For starters, boards need to move away from viewing D&I in a narrower sense. It's not just about race and gender. It's about diversity of thought and experience in its broadest sense. It's a fair question to ask, "is our board thinking about it in the right way?". If it is not then there may be some initial, and critical, "mind-set" work to do with your board.
- Tied to this, boards need to talk about what kind of organisation they want theirs to be – a representative one (women – tick, ethnic minority background – tick) or truly representative, i.e. taking the best people from the broadest range of background and experiences, rather than looking at this purely in terms of quotas.
- There is a great deal of talent out there, but is your organisation accessing it in the right way? Recruitment of board members has become a very professionalised process. Not entirely a bad thing, but if your only or main way of recruiting is via recruitment consultancy then you need to acknowledge that those very formal processes can be off putting and intimidating to potential talent. Consider the ways in which you recruit and mix it up. Interestingly, some housing providers are starting to recruit their own head-hunters so that recruitment can be more organisation specific.
- Link in with other housing providers, and/ or other businesses operating in and around your area, and talk about what diverse talent you might access via contacts. Word of mouth and building relationships can lead to introductions to great people who you might not otherwise have connected with coming through onto your board.
- Consider who sits on your nominations committee. If you are looking to increase diversity because your board is not as diverse as you want it to be, then having a nominations committee made up solely of board members is less likely to address that issue. Consider introducing more diverse non-board members to your nominations committee.
- Consider specific programmes for nurturing, training and bringing new talent forward. A number of providers are already running their own training/ incubator/ greenhouse programmes, some in conjunction with others. If a significant number of providers across the sector did this, imagine how much talent could collectively be brought forward for future years.

Mushtaq Khan – Chief Executive of Housing Diversity Network – has kindly contributed some of his own thoughts to this article.

'Can you help us in recruiting a more diverse board?'

It's one of the questions that I get asked most often, and I'm sorely tempted to reply that 'we can't 'magic' you a diverse board overnight, it's going to take time, energy and some patience.'

I believe that getting to a point where your board reflects the communities that it serves is a process that needs thinking through. A board recruitment process is complex – you have to consider the competencies of the outgoing board member that you're losing, as well as the expertise, skills, backgrounds of potential replacements. If, at the same time you're looking to amend the diversity profile of the board, enhance the board's strategic thinking and contribute to board culture, then the equation becomes even more complex.

Making sure that you get all this right takes time, effort and some forward-thinking. Unfortunately, too many organisations leave succession planning questions unanswered until the problems of succession are upon them. Then what happens is that organisations take the easy way out and look for a new board member who most resembles the outgoing one. In that very moment, the opportunity to increase board diversity as well update skills and competencies to the rapidly changing strategic and operational goals of the organisation is lost.

This approach – reactive and a way of preserving the status quo – doesn't do much in the way of transforming the make-up of your board. In contrast, the best housing organisations are those who think through the process and are proactive - knowing when each board member plans or is required by their own governance rules to retire. They can therefore begin identifying specific replacements years in advance of these dates.

At the Housing Diversity Network, we know that achieving a diverse and representative housing board continues to be challenging.

In response we have developed a two-year Board Diversity programme which aims to make a real and lasting impact on the development of diversity and inclusion at board level.

In essence we work with landlords to recruit and then develop a pool of potential board members from a range of backgrounds. These trainee board members are recruited on potential rather than the 'finished product' and our development process aims to make them board ready at the end of the programme. We also support the capacity of existing board members and senior leadership teams to benefit from greater board diversity.

We are now on the second phase of the programme and currently have board diversity cohorts running in the North East, North West and Lincolnshire.

In all of the cases, we have helped landlords recruit a pool of people who have the potential to be the board members of the future. Nothing is guaranteed – they have to apply like everyone else when a vacancy occurs - but having been through the programme, they stand a much better chance of succeeding.

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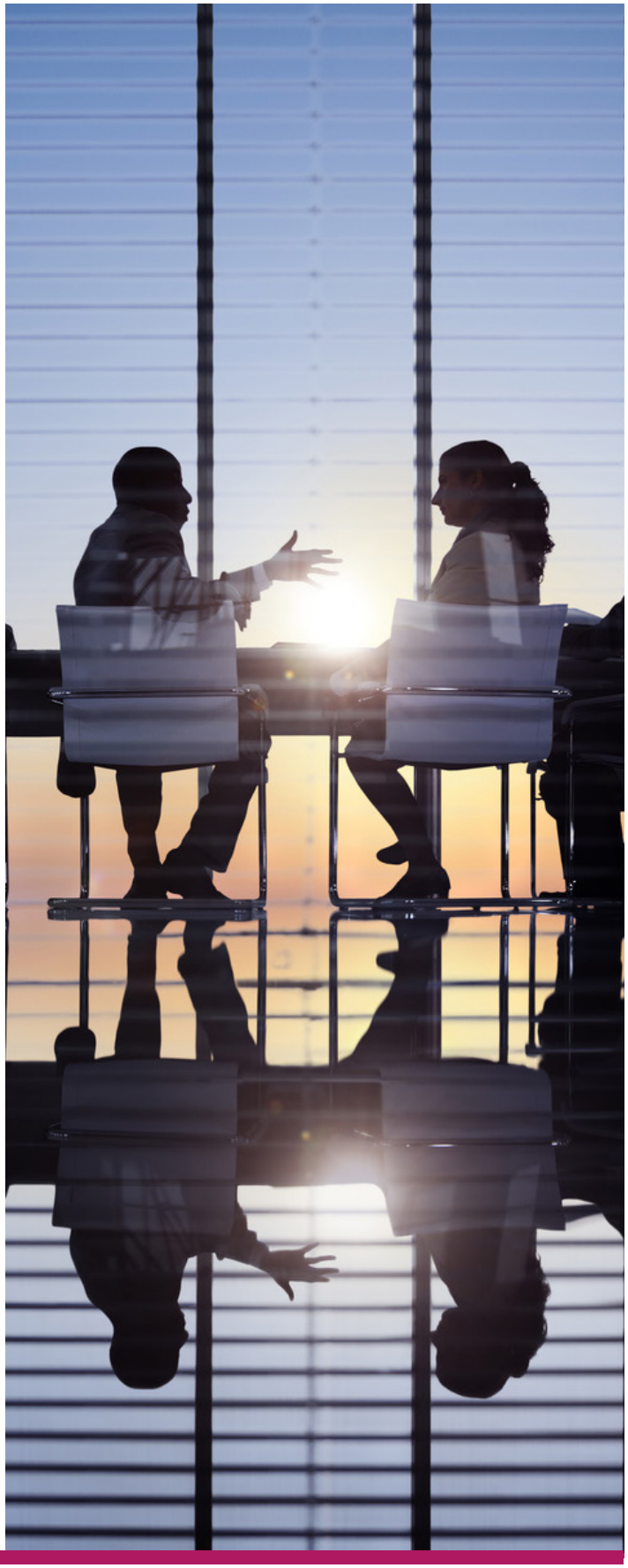

The new building safety regime take shape

The Building Safety Bill, which introduces a new regulatory regime for buildings in England, was presented in Parliament in June and published in July this year. The Bill passed its First and Second Readings in Parliament before being referred to the Public Bills Committee. At the time of writing, no date has been set for a Third Reading, but the Government's Transition Plan anticipates the Bill achieving Royal Assent by July 2022.

In the meantime, the Government has issued several pieces of draft secondary legislation that provide further detail on key parts of the new regulatory regime.

Definition of higher-risk buildings

The draft Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations provide further clarity on the scope of "higher-risk buildings", which will be subject to a stricter regulatory regime for their design, construction and occupation. The Bill defines higher-risk buildings as buildings in England that are at least 18 metres in height or with at least seven storeys and containing two or more dwellings. The draft Regulations provide useful guidance on height measurement, and confirm that hospitals and care homes meeting the height thresholds will be classified as higher-risk buildings for their design and construction. Secure residential institutions, temporary leisure establishments and military premises will be excluded from the higher-risk buildings regime for now.

Dutyholders and competency requirements

The Bill creates "dutyholder" roles with legal obligations in respect of building and design works for in-scope buildings, including a requirement for those working on buildings to be "competent". The draft Building (Appointment of Persons, Industry Competence and Dutyholders) (England) Regulations defines dutyholder roles of client, principal contractor, principal designer, contractor and designer, who have specific duties in respect of most building and design work currently covered by the Building Regulations 2010. Clients must ensure that any third parties they appoint fulfil competency requirements, while appointees must similarly ensure that their employers understand their own "client" obligations. Enhanced obligations and competency measures are expected to apply to dutyholders working on higher-risk buildings.

Gateways

In the Explanatory Notes published with the Bill, the Government anticipated the creation a three-stage Gateway approval regime for the design, construction and major refurbishment of higher-risk buildings, to be administered by the new Building Safety Regulator. The Bill itself was silent on specific requirements for each Gateway, with further detail promised in secondary legislation.

Guidance was published over the summer about Gateway 1, which came into force on 1 August this year. Gateway 1 requires that clients submit a Fire Statement as part of local authority planning applications for any higher risk building work, providing details about building and fire safety measures in the proposed plans.

In October, the Government published the draft Building (Higher-Risk Buildings) (England) Regulations, which provide extensive detail on the requirements for Gateways 2 and 3, covering the design and construction and major refurbishment of higher-risk buildings (HRB work). Key details are:

- Gateway 2, now called "building control approval", must be applied for by the client (or someone acting on the client's behalf) and approved by the Regulator before HRB work can commence. Applicants are required to submit detailed information about the proposed HRB work, competency declarations in respect of the dutyholders undertaking the work, together with a range of supporting documents (including plans, design and build approach documents, fire emergency files and the planning statement from Gateway 1). The Regulator must approve or reject building control applications within three months and can approve an application subject to certain requirements being fulfilled.
- Changes to the HRB work will be subject to a change control approval process. "Major changes" (as yet undefined) will require the client or applicant to submit a "change control application" to the Regulator for approval before the change can be implemented. The Regulator must approve or reject all change control applications within four weeks. "Notifiable changes" are required to be notified to the Regulator, though works are expected to be allowed to progress if the Regulator has not responded within a specified time.
- Gateway 2, now called "completion certificate approval", must be applied for and approved by the Regulator when the HRB works have been completed. Clients or applicants must issue updated information about the as-built building, as well as a signed declaration from key dutyholders that the HRB work is compliant with the Building Regulations. The Regulator must approve or reject applications within three months, and can approve an application subject to specified requirements. Clients

or applicants may also apply for partial completion certificate approval. Higher-risk buildings must not be occupied until a completion certificate or partial completion certificate application has been approved.

- Clients for HRB work must collate and maintain "golden thread information", which must be provided to the Accountable Person for the higher-risk building (if known) prior to the completion certificate application being issued.
- Clients must also submit "key building information" about each HRB works project to the Regulator, to be stored in an online portal set up for that purpose.
- The draft Regulations require the Regulator to direct the way in which applications and information are provided, which may include requiring electronic submission. Further guidance is still awaited about the precise standards for electronic submissions.
- Decisions of the Regulator on HRB work applications may be formally reviewed or appealed to the First Tier-Tribunal and/or to the Secretary of State.

Managing building safety risks in higher-risk buildings

The draft Higher-Risk Buildings (Prescribed Principles for Management of Building Safety Risks) Regulations set out useful guidance that Accountable Persons must follow to prevent "building safety risks" from materialising in the higher-risk buildings for which they are responsible.

Regulation of construction products

The draft Construction Products Regulations sets out the proposed new regime to strengthen regulation of the marketing and supply of construction products in the UK, as anticipated by the Bill. All construction products will be required to meet a general safety requirement, with stricter regulation of "safety-critical products" where the failure of such products would result in death or serious injury. The draft Regulations make it an offence to make false or misleading claims in respect of the performance of construction products and give the Construction Products Regulator broad powers to enforce the new safety regime.

Further information about the new legislation, including our *Essential Guide to the Building Safety Bill*, is available on our website.

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Landlords beware: Shared ownership changes and the problem with enlargement

Shared ownership leaseholders will be given the right to extend their leases by 990 years at zero ground rent as part of the leasehold reforms that the Government has announced under the Leasehold Reform (Ground Rent) Bill. The new model shared ownership lease requires any new leases be granted with a minimum 990 year term.

As a result, many property developers will now require the grant of a 999 year lease, as opposed to the 125/250 year leases typically seen in the market until now.

In this context, it is useful to note the risk of "enlargement" provisions. In short, this is where a leaseholder can exercise a right to a freehold interest in the same land.

Enlargement can occur where a lease has a term of at least 300 years. Given the longer leases now required by developers in order to satisfy the shared ownership requirements, enlargement is an issue landowner need to be aware of and work around in order to preserve the value of a freehold reversion.

Under section 153 of the Law of Property Act 1925 (section 153), in order to satisfy enlargement, a lease needs to meet the following criteria:

- the lease was originally granted for a term of 300 years or more and has at least 200 years left to run;
- the ground rent is a peppercorn or has no monetary value; and
- the lease does not contain a forfeiture clause permitting the landlord to re-enter in the event of a breach of a tenant covenant.

Subject to those requirements being met, the leaseholder may proceed to apply to enlarge their lease by executing a deed of enlargement. It is important to note that the enlargement process undertaken by a leaseholder does not require the leaseholder to consult with the landlord in advance or obtain prior written consent from the landlord. In addition, enlargement provisions cannot be contracted out of in a lease.

Landlords wishing to protect their freehold interest should consider steps to take the lease outside the ambit of section 153, including reserving a sufficient annual rent or including forfeiture provisions.

In practice there may be difficulties with the introduction of measures such as these. For example, will developers agree to include forfeiture in a 999 year lease (which they have paid a valuable premium for) for a breach of covenant relating to decoration? Will the inclusion of a ground rent in such a long lease affect their borrowing ability?

With longer lease terms to accommodate shared ownership requirements set to become the new market standard, these matters will need to be met head on. With the right guidance, they can be navigated to ensure the right outcome for all involved.

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For the record: How to rectify your registered title

How could errors in your registered title affect the value of your property, and when can they be rectified?

How important is rectification?

In some instances, mistakes on registered titles are only spotted years after registration applications are completed, perhaps when a property is next sold or re-mortgaged.

> *"Errors in the registration of charges, the rights or covenants registered on a title or an inaccurate title boundary could have significant ramifications for the value of the property and should be altered as soon as possible."*

Aside from property owners, mistakes will likely affect any lenders or mortgagees who require certainty in relation to secured property. In the context of a development site, certain forms of restriction entered on titles to individual plots may prevent certain dispositions (such as the grant of shared ownership leases) and delay sales as a consequence.

Rectification by the Land Registry

Rectification is a specific type of alteration to a registered title. It does not relate to simply updating the register or amending administrative errors in documents submitted to the Land Registry, but it is used to correct mistakes recorded in the register which prejudicially affect the title of a registered proprietor.

In the first instance, an application to the Land Registry should be made in order to determine whether rectification is appropriate. Following a successful application, a title register can be rectified by the Land Registry or pursuant to a court order obliging the Land Registry to affect such rectification. A compensation scheme is in place to indemnify anyone who suffers loss as a result of rectification of the register, a mistake in the register that was not rectified (but should have been), or a mistake in the register before it was rectified.

Rectification by the court

Aside from errors in a title register, mistakes may also be made in the documents provided to the Land Registry, where the intentions of parties to a transaction or their understanding of an agreement are not accurately recorded. Here, registered titles will correctly reflect the documents submitted for registration but may not reflect the agreed position between parties, meaning an associated title entry will also be incorrect.

In these circumstances, a claim may be made to court for rectification of a registered title. Recently, the court has revised its approach to rectifying such errors following the judgment in *Ralph v Ralph [2021] EWCA Civ 1106*. The Court of Appeal ruled that both parties must hold a "continuing common intention" in respect of the matter to be rectified before the court will consider amending a title register and in addition such intention must have been communicated between them before the court will consider rectification.

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Maximising value – tenure options for Integrated Retirement Communities

The UK retirement sector is a long way from saturated. Filling the market gap will require investment, development, regulation and, probably, legislation – but what can be done in the meantime to open up the offer? This article explores how alternative tenure options can reach a broader customer base.

Currently, say in the context of affordable housing, the vast majority of Integrated Retirement Communities (IRCs)[1] occupations are on the basis of a long lease for-sale model. Similar to buying an apartment at any other stage of life, a lease (anywhere between 125 and 999 years) is granted for a premium, giving the owner a legal interest in land as security for the value they have paid up front. Generally, the IRC market is not funded by mortgages, so this suits very well those who have capital available, who have owned and sold their family homes, for example. Occupiers will also need to ensure they are able to meet the ongoing service charges and potential care fees, which can limit the amount they are willing to spend up front on a lease premium. The concept of deferred fees (also called event fees) can help with this by reducing the ongoing cost of the accommodation in return for capital paid from the resale value of a dwelling.

There are a variety of reasons why the long leasehold model may not suit everyone. There are older people who don't have that chunk of capital and for these people, a rental product may be the best option. There are some positives to renting – the barriers to entry are much lower than buying – no conveyancing cost and timescale, easy to exit if it isn't to taste. However, whilst rental is familiar to, and popular with, investors, such as pension funds, looking for stable long-term income, customers may see it as a temporary option, or one carrying a "what if I run out of money" question. These can be barriers for potential occupiers who have been homeowners for most of their lives. This doesn't mean there is no room for rented IRC offerings – there absolutely is – but the proposition requires careful thought.

Where a dwelling is let to an individual or individuals who occupy that dwelling as their principal home, the Housing Act 1988 tells us that is an assured tenancy. That could be a fully assured, or "lifetime" tenancy (AT), or an assured shorthold tenancy, or AST. Social housing providers are familiar with both types, but outside of this the AT is not commonly used.

The key difference for both operators and occupiers is that with an AST, the landlord may (as the law currently stands, though Government intends to revisit this) end the tenancy – after a period of notice – without any particular set of circumstances existing. With an AT, possession can only be regained on certain grounds, including the tenant being in arrears of rent. Clearly the former gives more control to an operator, but the latter is more in keeping with the idea of a home for life and can be an effective way to help potential occupiers overcome their fears and understand they have security.

Using rental products does have tax implications – both for landlords (who won't be able to recover input VAT on the rental element) and for tenants (who will have to consider SDLT liability if the rent tips over £125,000).

There's also a hybrid option which sits between the rental and the for-sale models: shared ownership. Here again we have a product which is common to social housing but increasingly recognised as a means to offer wider customer choice in the IRC sector. This part buy, part rent model has been used to allow those without the capital to buy outright the opportunity to get a foot on the housing ladder. Once a tenant buys an initial equity share (paying rent on the remaining unowned share), they can over time "staircase" (buy more shares of the equity), thus reducing their unowned share and rent payable on it. Reducing the amount of capital outlay, particularly in a market where mortgages are not used to fund purchases, can vastly increase the size of any local market, and allow people to buy into an aspirational product.

[1]When the authors discuss IRCs here, we mean age-restricted housing communities for older people, where occupiers live in self-contained accommodation, accompanied by a range of communal facilities and services, including the availability of meals and care and support.

Shared ownership can be provided with or without the help of capital grant from Homes England (or the GLA in London), however, the grant-funded option comes with certain strings, including rent capped at 3%, staircasing capped at 75% (at which point the rent payable reduces to zero) for older people's products, the inclusion of certain fundamental clauses and a requirement to repay/ recycle grant on staircasing receipts (along with a portion of the profit, save in the case of not-for-profit registered providers). It also means (at the moment at least) a registered provider landlord is required.

Without grant, shared ownership can be delivered free from any of these limitations.

The authors hope that, in the long term, the UK government will introduce legislation to provide for alternative tenure types outside of the above that balance the need for resident security and consumer fairness, with varied payment options and an attractive proposition for investors but for the time being, there is a space in the sector for more resident choice over tenure – space which we increasingly see both incumbent operators and new market entrants looking to offer to maximise flexibility and create growth.

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Managing conflicting beliefs

Most employers these days recognise the importance of promoting diversity and inclusion in their workforce. Giving people the same opportunities to progress, teaching them to embrace difference and making it clear that discrimination and harassment of others will not be tolerated are all ways of contributing to a positive work environment.

What happens though when conflicting beliefs come into play? Some individuals may hold beliefs that are offensive to others leaving the employer liable for any resulting harassment and discrimination claims.

Religious and philosophical beliefs

The Equality Act 2010 provides that individuals are protected from discrimination on the grounds of their religious or philosophical beliefs. For a belief to qualify for protection it must fulfil the criteria set out in *Grainger plc and others v Nicholson*. It must be genuinely held; be a belief and not an opinion or viewpoint; be a belief as to a weighty and substantial aspect of human life and behaviour, and attain a certain level of cogency, seriousness, cohesion and importance. Finally, it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The recent resignation of Kathlyn Stock, a philosophy professor at Sussex University who expressed her belief that gender identity does not outweigh biological sex, and that people cannot change their biological sex shows how contentious such beliefs can be. Her resignation followed a protest by students asking for her dismissal despite the University's defence of her right to exercise her academic freedom and freedom of speech. Similar issues cropped up in the case of *Forstater v CGD Europe and others*, which similarly received lots of press attention. Here the Employment Appeal Tribunal (EAT) held that the claimant's gender critical belief was a philosophical belief which qualified for protection under the Equality Act 2010.

Gender critical belief was a "philosophical belief"

The claimant was a visiting fellow of a not-for-profit think tank focussing on international development. She believes that a person's sex is a material reality that should not be conflated with gender or gender identity, that being female is an immutable biological fact, not a feeling or an identity, and that a trans woman is not in reality a woman. She also believes that, while a person can identify as another sex and ask other people to go along with it and can change their legal sex under the Gender Recognition Act 2004 this does not change their actual sex. She engaged in debates on social media about gender identity issues, and made some remarks which some trans people found offensive. Following an investigation her visiting fellowship was not renewed. She brought a claim for discrimination on the grounds of her philosophical belief.

At a preliminary hearing, a tribunal concluded that the claimant's beliefs did not amount to a philosophical belief that qualified for protection as they did not satisfy one of the criteria set out in Grainger plc and others v Nicholson, namely that the belief must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others. The EAT upheld the claimant's appeal and remitted the case to a freshly constituted tribunal to determine whether the claimant had suffered discrimination as a result of her belief.

The EAT noted that freedom of expression is one of the essential foundations of democratic society, which cannot exist without pluralism, tolerance and broadmindedness. It concluded that it is not for the court to inquire into the validity of a belief, and a belief only needs to satisfy a very modest threshold to be protected under Article 9 (which protects the right to freedom of thought, conscience and belief).

In coming to its conclusion, the EAT looked at whether a person falls outside the scope of protection under Articles 9 and 10 (freedom of expression) by virtue of Article 17 (which prohibits the abuse of Convention rights to engage in any activity aimed at the destruction of the rights and freedoms of others). Case law has held that Article 17 only excludes the "gravest forms of hate speech" which incite violence or hatred aimed at destroying the Convention rights and freedoms of others. The EAT held that only beliefs which are caught by Article 17, such as pursuing totalitarianism, advocating Nazism, or espousing violence and hatred, would fail to qualify under the Grainger criterion and be found to be not worthy of respect in a democratic society. It concluded that beliefs which are offensive, shocking or even disturbing to others, including those which would fall into the less serious category of hate speech, can still be protected.

The claimant's gender-critical beliefs, which were widely shared in society (including by some trans persons), and which did not seek to destroy the rights of trans persons, did not fall into the category of beliefs excluded from protection by Article 17.

In reaching its decision in Forstater, the EAT made it clear that it was not expressing any view of the merits of either side of the transgender debate. The decision does not mean that trans persons do not have protections against discrimination and harassment, nor that those with gender-critical beliefs can "misgender" trans persons with impunity.

Practicalities

The decision in Forstater, and the debate surrounding it, shows how easy it is for the beliefs of one individual to conflict with the beliefs of another. In a workplace context this can mean that people are treated less favourably (for example being overlooked for promotion or excluded from activities) because they hold certain beliefs. However, it can also mean that, if strongly held beliefs are openly expressed, others can feel uncomfortable to the point where the behaviour has a negative impact on their dignity at work. This can lead to conflict and potential harassment claims.

> *"A good starting point is to put a policy in place which prohibits behaviour which could amount to unlawful harassment and makes it clear that this behaviour will extend to the expression of strongly held beliefs on religion, belief or sexuality."*

Staff should be given training and told that, although they are fully entitled to hold their own personal beliefs, they need to be aware that they are not shared by everyone. Another thing to be aware of is social media, and staff should be told that the expression of discriminatory views on any work-related social media is unacceptable. Finally, make sure that any complaints are taken seriously and don't be afraid to use your disciplinary policy.

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Welcome guidance from the Court on defending minor data breach claims

Since the introduction of the Data Protection Act 2018 (DPA) and the GDPR, there has been a significant increase in claims arising from minor data breaches.

These claims typically follow a similar pattern.

- A lengthy letter of claim will be sent alleging breaches of the DPA and GPDR, as well as breaches of confidence and privacy, and negligence.
- The letter will say that the claimant has suffered distress as a result and that the claimant will commence proceedings in the High Court if liability is not admitted and damages paid.
- The letter will also indicate that the claimant has entered into a conditional fee arrangement (CFA) and taken out "after the event" insurance (ATE Policy) so that the claimant will not have to pay their own legal costs, or those of the defendant, even if they lose the case. By pursuing a breach of confidence and privacy claim, the claimant can seek to recover the cost of the ATE Policy, whereas this is not possible for claims under the DPA and GDPR alone.

There is a rudimentary strategy behind these claims. The claimant has no financial risk because of the CFA and the ATE Policy, whilst the defendant will incur legal costs from the outset in defending the claim. These costs can quickly become disproportionate to the value of the claim, meaning the defendant will often feel compelled to settle the claim at an early stage for commercial reasons.

Until recently, there has been a lack of case law to encourage organisations to fight these minor data breach claims. Helpfully, that has now changed following the three cases that we discuss below.

In Warren v DSG Retail Ltd [2021] EWHC 2168 (QB), the defendant was the victim of a cyber-attack which resulted in the data of its customers being compromised. The claimant duly issued a claim for breaches of the Data Protection Act 1998 (as was the applicable legislation at the time), misuse of private information, breach of confidence and negligence. However, the Judge struck out the privacy and confidence claims because there had been no "positive misuse" by the defendant of the claimant's data. Rather, this was the action of a rogue third party. Consequently, the claimant lost the ability to recover his ATE Policy, therefore creating a financial barrier and greater degree of risk for claimants who may be contemplating similar claims.

In Rolfe and others v Veale Wasbrough Vizards LLP [2021] EWHC 2809 (QB), the defendant accidently sent a letter (containing generic personal data) by email to the wrong person. The defendant quickly established with the recipient that the email had been sent in error, with the recipient confirming that they had deleted the email. The claimant nevertheless issued a claim for misuse of private information, breach of confidence, and for breaches under the DPA and GDPR.

On this occasion, the Judge dismissed all of the claims (before the case got to trial), stating strongly that "We have a plainly exaggerated claim for time spent by the Claimants dealing with the case and a frankly inherently implausible suggestion that the minimal breach caused significant distress and worry or even made them 'feel ill'. In my judgment no person of ordinary fortitude would reasonably suffer the distress claimed arising in these circumstances in the 21st Century, in a case where a single breach was quickly remedied."

The Supreme Court then delivered its long-awaited judgment in Lloyd v Google LLC [2021] UKSC 50. This case related to allegations that Google had secretly tracked the internet activity of millions of Apple iPhone users and used the data collected in this way for commercial purposes without the users' knowledge or consent. The claimant had argued that every person affected by this should be compensated by Google for the loss of control of their data, without having to prove that any actual damage had been caused to them personally. However, the Supreme Court rejected this notion and reinforced the principle that a claimant has to prove they have suffered material damage (i.e. financial loss) and/or distress above a minimum threshold to have a viable data breach claim.

The significance of these cases is that organisations can now take a more robust approach to defending minor data breach claims when the data breach is obviously trivial, and where the claimant has failed to provide any evidence of actual loss or distress. We also expect there will be a reduction in these minor data breach claims generally, as it may no longer be economical for claimant law firms to run these claims on a CFA basis.

However, these cases do not provide a complete shield. It remains important for organisations to react quickly to any form of data breach – both in terms of addressing the issue with the affected person (where appropriate) and taking steps to rectify the breach whilst mitigating the risk of it being repeated. Minor data breaches will continue to happen, and whilst it is hoped the Courts will now be more inclined to dismiss opportunistic claims for what they are, there may be less sympathy for an organisation which does not learn from its mistakes.

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Licences – a quick solution may cause lengthy problems

A licence is an arrangement that can be used to document the occupation of a premises, and is often seen as a "quick fix". However, if it is not handled carefully, the occupier may have the rights to stay in the premises indefinitely.

A licence grants a personal right or permission for a party to 'occupy'. Generally, a licence is used to cover short periods of occupation and can be used as a short-term solution. Alternatively, it can be used as a temporary solution whilst the terms of a formal lease are being agreed upon by solicitors. As such, when handled with care, a licence serves as a useful tool for property owners.

However, there is a risk that when a property owner agrees to grant a licence, the property owner can inadvertently grant a 'lease in disguise'. This is because, case law has concluded that even if a document is called a 'licence', if it has the characteristics of a 'lease' it will be considered a lease. A key characteristic as to whether an arrangement is a licence or a lease, is whether the occupying party has a right of 'exclusive use' of the premises. In other words, can the occupier lock the property owner out of the premises?

It is important to understand whether a licence or a lease has been agreed upon because a property owner may unconsciously grant an occupier statutory rights. More specifically the right for the tenant to remain in the premises and renew its tenancy at the end of the term. This is known as security of tenure.

The Landlord and Tenant 1954 Act (the 1954 Act) provides that business tenants have a right to renew the lease on the same terms as the previous lease unless a landlord can prove certain statutory grounds to refuse the new lease. The key point here is that the 1954 Act only applies to leases and does not apply to licences. If the statutory grounds cannot be proven, the occupier cannot be forced to vacate the premises. On some occasions even where a statutory ground is proven, the property owner may be required to pay financial compensation to the occupier when the lease finally does come to an end.

Therefore, it is in a property owner's interest to ensure the licence is actually a licence in practice, but if it is a lease, it is important to ensure an occupier does not have security of tenure. When agreeing to enter a lease, without security of tenure, both parties must agree before the start of the lease to opt-out of sections 24 to 28 of the 1954 Act and follow the formal procedure. This is known as 'contracting out' and it is a relatively simple process.

So where does the risk lie? If the property owner believes a licence has been granted, without any security of tenure (because the 1954 Act does not apply to licences), but in fact, it is later deemed to be a lease, the property owner has inadvertently granted a lease with security of tenure (because it has not been opted out). Therefore, the intention to grant occupation over a short period will lead to a right for the occupier to stay in the premises indefinitely.

If the arrangement is a licence in practice, the occupier/property owner will have few rights and obligations and generally speaking the licence can be revoked through giving notice of revocation to the licensee giving them a reasonable time to leave the property. If the property owner wants to grant a licence, it is strongly advised to take legal advice to ensure that the rights granted are those intended.

From a occupiers' perspective, agreeing to a licence can also pose a risk. As mentioned above the difference between a lease and a licence is that for an arrangement to be construed as a licence the occupier must not be given exclusive possession of the premises. Therefore, licences are usually prepared on this basis and incorporate express terms to ensure that the occupier is not given "exclusive possession". This means the property owner must have the right to relocate the occupier to any other premises and the occupier must not be able to exclude the property owner from the use of the premises while the occupier is in occupation. This is likely to be unappealing to an occupier.

Granting a licence may seem like a quick solution, but in our experience taking this type of shortcut can lead to problems. Therefore, it will almost always be best to have legal certainty from the outset by obtaining legal advice when negotiating terms for a commercial premises to ensure the arrangement mirrors the intentions of the parties.

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Electronic execution – our top tips to make it work for you

Once the hard work of drafting, negotiating and agreeing documents is complete, the parties need to sign on the dotted line. Increasingly, electronic signing is being used in real estate transactions to facilitate faster and more efficient completions. Over the last few months, however, we have identified some recurrent pitfalls to watch out for.

The rise of home working

Because of the pandemic and the resulting shift to home working, more organisations than ever began looking for convenient ways to execute and witness documents remotely. Electronic signing fits that bill, and is also more environmentally friendly than physical signings, with less paper and ink required to bring a transaction to a close.

Whilst digital platforms for electronic signing such as DocuSign have been commonplace in some sectors for years, electronically signed deeds could not be registered at the Land Registry.

This all changed shortly after the pandemic began in 2020, when the Land Registry started to accept digital signatures for most documents for the first time.

Best practice for electronic signing

Based on our experience over the last year, we have developed the following tips for clients to take full advantage of electronic signing:

1. Make sure you have final documents before starting the signing process – Unlike with physical documents, electronic documents cannot be manuscript amended before completion; instead, the incorrect document must be withdrawn and re-signed.

Recirculating documents can delay completion: parties who signed a previous version of a document before a mistake is noticed will need to re-sign.

2. All parties must agree – One party cannot unilaterally choose to use electronic signing.

Also, generally, all parties to the documents must be represented by solicitors. Where you are contracting with, for example, unrepresented tenants, you cannot use electronic signing platforms. Think about this early to avoid surprises, or worse, having to re-execute documents that you have signed electronically.

3. Sealing or signing? – Only local authorities can apply a digital seal through electronic signature platforms. Every other organisation that executes deeds by applying a seal will need to seal a hard copy document in the normal way.

It is possible to have a "mixed" signing, with some parties signing a counterpart in hard copy or by Mercury, and others signing by electronic signature. You just need to agree that process up front.

4. Don't forget Mercury – The Mercury process sits between electronic signing and a traditional hard copy completion. The Mercury procedure allows signatories to print only the execution pages of documents, sign them and scan them back to their solicitor for completion.

For parties unfamiliar with electronic signing processes, or for parties who cannot sign by DocuSign for reasons mentioned above, the Mercury process can be just as quick and convenient as electronic signing.

5. Remember the Land Registry certificates – To register electronically signed documents at the Land Registry, you need a certificate signed by the conveyancer who controlled the signing process. In the certificate, the conveyancer confirms that they followed the step-by-step signing process set out in Land Registry Practice Guide 8.

Make sure that the person controlling the signing process agrees to provide the necessary certificate; without it, you cannot register documents at the Land Registry.

This rule applies not only to the transactional documents (leases, contracts, transfers), but also to powers of attorney. If an attorney signing a document is authorised to do so by a power of attorney which was signed electronically, you will need a certificate in relation to the power of attorney itself. This is often missed, especially if the power of attorney was entered into long before completion or was dealt with by a client in-house.

6. Witnessing still means actual witnessing – The witness must be physically present when someone presses the buttons to apply their electronic signature to a document, just like a witness of a hard copy signing. It is not enough for a witness to watch someone electronically sign over a video call.

Also, if possible, witnesses should not be related to the signatories. Given the rise of home working, however, a witness being a family member may be unavoidable.

7. Think about confidential information – A packet or "envelope" of documents sent for signing can contain multiple contracts. Even if a party needs to sign or witness only one document in the envelope, they can view all of the documents they are sent, not just the ones they need to sign unless the default visibility settings are adjusted.

To protect commercially sensitive information, separate confidential documents into a different envelope which is sent only to those people who need to see those documents. This will limit how many people can see your sensitive data.

8. Dating documents – By default, all documents in an electronic envelope will be dated with the same date.

If you need to date some documents with different dates, either put them in a different envelope or remember to insert the date manually.

9. Filing! – There will be no hard copy dated document, so the signed and dated PDF circulated at the end of the electronic signing process will be the only original. File it for future reference.

Avoiding potential pitfalls with electronic signing comes down to one thing: good preparation. If the electronic signing process is well-organised and issues are considered and addressed early, completion can run smoothly and save all parties time and expense.

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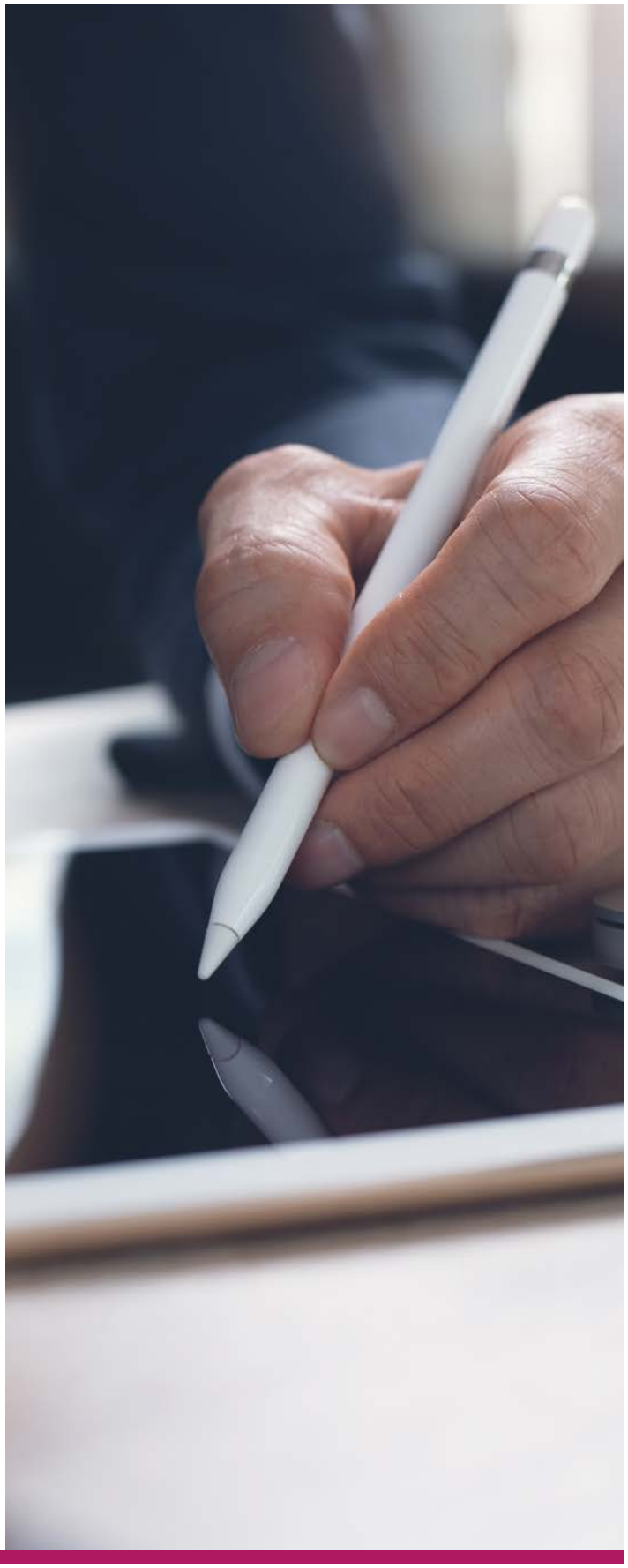

The Electronic Communications Code and what local authorities need to know

Local authorities (LAs) are in a unique position to help deliver the government's 5G connectivity targets and to reassure the public as to the misinformation around 5G, in particular health and safety concerns regarding electro-magnetic radiation emitted from 5G masts.

However, as well as delivering the local planning function, LAs are also extensive landowners in their own right and need to balance competing interests, including the Department for Levelling Up, Housing and Communities (DLUHC) 27 August 2020 guidance, with obligations to achieve "best value" when entering into land agreements and the provisions of the National Planning Policy Framework.

Code issues for LAs to consider

There has been a raft of recent cases under the Code resulting in issues that LAs should consider:

Access to LA sites for MSVs

Since the DLUHC guidance calling on LAs to help boost gigabit broadband rollout and 5G mobile coverage to assist in the UK's coronavirus recovery, we have seen a substantial increase in operator requests seeking access to survey LA sites (so called multi-skilled visits, or MSVs).

LA buildings in urban areas may be attractive if they meet an operator's height criteria. *CTIL v University of London* established that rooftop access surveys constitute a Code right. Often, any prejudice to the landowner is considered capable of being compensated in money. In *EE Ltd and another v London Underground Ltd*, the landowner's security concerns, and the building being designated as critical national infrastructure was not enough to convince the Tribunal that the operator's Code access rights should be cast aside, so it is difficult to see what reasons could be given to prevent access for MSVs.

The best course is likely to be early engagement with operators, and advice from a telecoms surveyor, to ensure that an LA's landowner position is protected. If terms cannot be agreed, the operator may apply to the Tribunal for rights to carry out an MSV and, given the recent case law, will likely succeed.

Negotiating Code agreements

The Code has broadly increased operator rights and, as it sets out the terms a court would impose, operators seek to include them by agreement. From a landowner's perspective, the key consideration in negotiating a Code agreement is asset protection, which subject to the particular attributes of the site may include:

- Safeguarding the interests of residents whilst the operator accesses the building to install and thereafter inspect, maintain and repair their apparatus. This may include supervised access rights, a pre-approved list of operator personnel able to access the building, an operator obligation to cause the least possible inconvenience when undertaking works (for example, agreeing set down areas for equipment and the positioning of cranes etc.) and an indemnity covering damage the operator may cause during visits and works.
- A requirement for the operator to give reasonable prior notice before visits to the building and/or works may take place, to enable the landowner to communicate with affected parties in the building and to minimise the risk of any undue interference or disruption to the day-to-day running of the building.
- Securing a costs recovery provision for the landowner's benefit, to include taking professional advice, instructing a telecoms surveyor and negotiating and entering into a Code agreement.
- Considering the ICNIRP public exposure guidelines with the operator and seeking input from a telecoms surveyor on the technical aspect of any health risk posed to the landowner or its asset by the operator's proposed apparatus. This is particularly relevant to LAs, in light of the MHCLG guidance to quell concerns over the risk posed by 5G technology, if installation is to take place in proximity to residential buildings.
- Making provision for any maintenance programmes or redevelopment works planned by the landowner, and who bears the costs of switching off the apparatus, or if necessary, relocating the apparatus to enable plans to be realised.

It is highly unlikely that a landowner's interests will be aligned with that of an operator. Each request for a Code agreement, and the appropriate terms to sufficiently safeguard a landowner's asset, must be considered on a case-by-case basis and where there is a high level of prejudice to a landowner for which money is inadequate compensation, a landowner might justifiably refuse a Code agreement without inclusion of a particular asset-protecting measure.

Compensation and rent payable to LAs

Under the Code, the basis for calculating payments to be made to the landowner by an operator disregards the operator's use of the site for its apparatus and any uniqueness the site has to that operator.

There have been a number of decisions which give an indication of the approach the Tribunal may take, if asked, to the valuation of a particular type of site. In CTIL v London and Quadrant Housing Trust, the Tribunal held that an annual rent of £5,000 is a good indication of the market value of a Code agreement for a rooftop site on a residential building, and whilst there may be features of a particular building to justify a modest range, the Tribunal would not expect significant variations one way or the other. In On Tower UK Ltd v JH and FW Green Ltd, the Tribunal considered a rural greenfield site and determined that absent of particular special attributes an annual rent of £750 would be appropriate. Whether these decisions are creating a valuation benchmark under the Code remains to be seen.

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