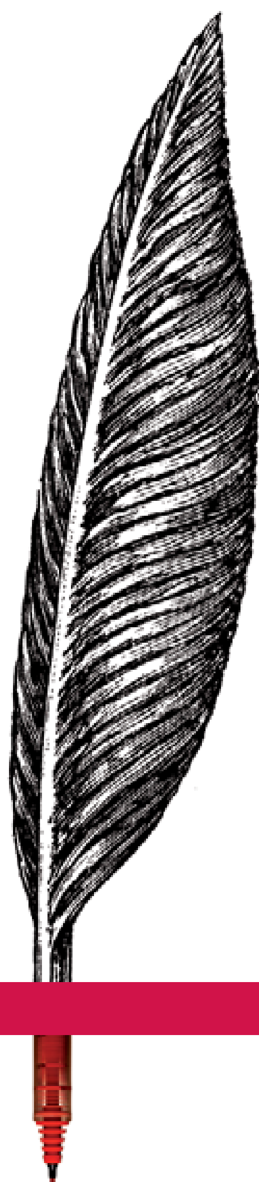
Winckworth Sherwood



Legal Update

Summer 2008

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Housing Policy

Housing is one of the most important priorities for the government – not surprising since everyone (particularly voters) needs a home. As a result, hardly a week seems to go by without another policy announcement from either a government minister, member of a public body or the publication of a review by a specially appointed advisor.

The most recent developments in housing policy were the announcement of the housing minister in December and the new housing and regeneration bill which is currently going through Parliament. Both indicate the government's current thinking and direction and are summarised below:

Written Statement of housing minister, Yvette Cooper – 12 December 2007

The housing minister stated that the government's priority is to increase the supply of housing. By 2010 the government's aim is to build 70,000 houses per year.

The key issues and actions announced were:

- To increase the supply of social housing by allocating £8.4 billion over the next three years. This equates to at least a 5% increase every year for three years for each region. The Housing Corporation and subsequently the Homes and Committees Agency will be tasked with spending this money effectively.
- To allocate £2.4 billion to the ALMO programme over the next three years. The aim of this is to bring a further 150,000 homes up to a decent standard. A further £200 million will be allocated to existing ALMOs, who have yet to pass their inspections. The government is currently assessing the remaining round six funding bids.
- That the 2008 Housing Transfer Programme will shortly be announced to enable local authorities to submit bids to transfer their housing stock into the joint housing sector.
- To allocate almost £2 billion from the regional housing pot to fund improvements to both local authority and private sector stock.
- To create a new regulatory framework to give tenants a greater say over where they live and how their homes are managed. The framework will:
  - reward good performance of and innovation by housing associations;
  - give greater freedom to good housing associations; and
  - allow the regulator to intervene when tenants' needs are not met.

  The new regulator (the 'Office for Tenants and Social Landlords') will initially only apply to RSLs, but the government is committed to extend the regulator's remit to local authorities as quickly as possible. Research is being commissioned to see how this could work.
- To review the housing revenue account ("HRA") subsidy system. The review and report are to be completed in 2009. The government is looking at new ways to finance and manage stock. It may become possible for ALMOs and local authority housing departments to become self financing.
- To invest £1.8 million for eighteen new choice-based letting schemes to allow people to move across local authority areas, with a further £2 million over the next two years to enable all local authorities to be part of the scheme by 2010.
- To publish an action plan to initially invest £15 million to tackle severe overcrowding across thirty eight pathfinders, including all London Boroughs, Birmingham, Bradford, Leicester, Liverpool and Manchester.
- To review the private rented sector – to look at how more and better housing options can be provided.
- To continue running social homebuy pilots.
- To help people move from renting to home ownership. The government will work with RSLs to develop options for sharing housing maintenance costs between landlords and occupiers.
- To promote mixed and stable communities. The Homes and Committees Agency will be asked to look at how to promote mixed income communities in existing areas.

Housing and Regeneration Bill

The Bill is currently undergoing its parliamentary stages and it is intended to give effect to the government's proposals to create the Homes and Communities Agency and the housing regulator, the Office for Tenants and Social Landlords.

The Bill is also intended to achieve a number of other measures, proposed in the housing green paper, including:

- Allowing certain local authorities to keep rental income from new supply dwellings.
- Enabling certain local authorities to opt out of the housing revenue account subsidy system.

A number of other measures are included in the Bill aimed at empowering tenants and giving more freedom to local authorities, including:

- Enabling local authority tenants to consider the options for management of their housing stock and effect a change of landlord.
- Removing the requirement for local authorities to be accepted on an annual disposals programme before seeking consent for a large scale voluntary transfer of housing to the private sector.
- To widen the power of the secretary of state and the Welsh ministers for providing financial assistance for the provision of advice in respect of residential landlord and tenant advice, information and training and for running dispute resolution services.

Joint announcement by the Prime Minister and housing minister – 08 April 2008

A package of new measures to support key workers and other first time buyers was announced, perhaps not with the best timing considering the current 'credit crunch' and 'mortgage squeeze'.

The package includes cash grants of £1,500 to be offered to buyers taking out loans under the open market homebuy scheme. The government also confirmed the locations of various surplus public sector land sites which can be used to provide upto 30,000 new homes.

The housing minister will also convene a working group involving the Council of Mortgage Lenders and housing industry representatives to discuss support which can be provided to homeowners in difficulty with their mortgage repayments.

Possible outcomes

Taking all of the proposed new measures together and subject to stability returning to the financial markets, the following possible developments may occur in the future:

- If the government is to reach its new house building targets – continued/increased construction activity by RSLs and the private sector.
- Possible new build by local authorities – where finance is available, for example from prudential borrowing.
- Continued move of existing housing stock from local authorities to RSLs and ALMOs.
- ALMOs to become autonomous/independent?
- Increased trend of mergers by RSLs – with the 'good' taking over the 'bad'?
- Changes in the governance and management structures of RSLs to reflect the increased power of tenants.

For more information please contact
John-Paul Buck
020 7593 5029
jpbuck@wslaw.co.uk

Local Housing Companies and Strategic Housing Partnerships

Are These the Answer to the Housing Crisis?

Housing Green Paper

The Housing Green Paper ("Homes for the future: more affordable, more sustainable"), issued by the Department for Communities and Local Government in July 2007, identified a range of "local delivery vehicles" which would provide local authorities with a mechanism to improve the quality and speed of housing delivery in their areas through collaborative working with local stakeholders and the private sector. As well as the more established methods, such as urban regeneration companies and city development companies, the Green Paper introduced for discussion a number of relatively new models, including; the Local Authority-Owned Company, the Community Land Trust, the Local Housing Company, the Limited Liability Partnership, the Single estate transformation model and the Strategic Housing and Regeneration Partnership.

Nearly one year on, the author asks what has been the reaction to the Green Paper's comments regarding the use of Local Housing Companies and Strategic Partnerships, where will we go from here and can any lessons be applied from similar approaches in the Education and Defence sectors?

Local Housing Companies

Although there is little detail in the Green Paper, Local Housing Companies are described as being joint venture vehicles (generally a company limited by shares) between the local authority, English Partnerships and "other partners", which will act as the master developer for new communities within a designated area. This can be a tightly defined development scheme, the new eco towns would be a good example, or a much broader region or town and possibly even the whole of the area governed by the authority. The likely other partners are Registered Social Landlords, house builders, charitable housing companies and similar organisations, building contractors and possibly even banks and building societies. The joint venture will be jointly owned, generally 50:50 between the public sector and the private sector partner or partners. It is also possible for a majority of the shares in the LHC to be owned by the private sector, i.e. 51%, with the minority 49% being held by the public sector (likely to be shared though not necessarily equally between the local authority and English Partnerships). The latter approach is likely to be preferable where the LHC is hoping to raise private sector finance.

The key focus of the LHC is the development of a local authority's surplus land to deliver new and affordable housing and for this reason has been heralded by some as a return by local authorities to the major council house building programmes of the 1960s and 70s. The idea is for the local authority to transfer its surplus land to the LHC for nil value in return for control over what is developed (ensuring for example that any development delivers at least 50% affordable housing) and the opportunity to share in the realisation of any development profits and/or long term uplifts in land values where housing is not sold but leased. As a joint venture partner the local authority is in a much better position to control outcomes than through the more traditional route of a sale with overage and a section 106 agreement.

English Partnerships' role is primarily as mentor/facilitator and it is expected to contribute financial and technical advice and possibly also funding for up front set up costs. With links to the wider regeneration market and potential access to funds for infrastructure costs, it may be possible at some point for EP to invest more significantly in the scheme.

DCLG confirmed in the Green Paper that 14 pilot Local Housing Companies (see box below for details) would be created in the coming months with the view to actual construction work starting on sites in 2009/2010. Guidance on how the LHCs should be structured and what accompanying documentation would be needed was issued to the 14 pilot authorities late last year, though it is anticipated that this guidance would not be made publicly available until the end of the pilot programme when at least some of the LHCs are up and running. Although it is not clear yet how many LHCs are in place, the most advanced scheme seems to be in Barking & Dagenham where a "local housing trust" (same concept but using, initially at least, an informal not for profit trust as the joint venture vehicle rather than a company) has been set up with our client, Southern Housing Group (an RSL), to deliver the affordable housing within the Barking Riverside scheme. There are now plans to set up a Local Housing Company to deliver affordable housing across the whole borough.

Leeds	Newcastle
Dacorum	Bristol
Manchester	Nottingham
Wakefield	Harlow
Plymouth	Barking & Dagenham
Sheffield	Sunderland
Peterborough	Wolverhampton

What the critics say

Whilst the proposals continue to be fully supported by DCLG, EP and the various other public housing bodies such as the Housing Corporation and the Chartered Institute of Housing, some concern has been voiced in the press. The first criticism is that the idea is nothing new. LHCs in a slightly different format were first promoted in the early 1990s but the idea never seemed to get off the ground and there wasn't much enthusiasm amongst local authorities. This may have partly been a consequence of the ever present preference by local authorities to simply build new council housing themselves with direct government grant, the so called "fourth way" (i.e. the alternative to stock transfer, ALMOs and PFI). LHCs are seen as a step in the right direction in terms of local authority control over new housing but without new funding from DCLG and bearing in mind the potential impact on local authority finances as a result of the loss of surplus land sale proceeds, the jury is still out as to whether local authorities will be any more enthusiastic this time round.

Others such as Defend Council Housing have been a little more scathing. First the proposals assume that a local authority has sufficient surplus land for sale, which it may not or at least not in quantities which justify a more structured approach to development rather than simply relying on the market to deliver what is desired. Defend argues that the proposals have not been properly debated, particularly at local level, but this can't be the fault of the Green Paper and, if nothing else, the Green Paper does encourage authorities to assess the various options for housing delivery with an emphasis on planning for the long term strategic needs of the authority. There is also concern that the idea of a permanent transfer of an authority's land to a company which is not wholly owned by the authority and which therefore is not accountable through the local electoral process, will be unpalatable to members and will ultimately lead to the continuing loss of publicly owned housing rather than the reverse. Although this does rather assume that public housing is inherently better than private affordable or supported housing, an assumption which, whilst possibly popular with the local electorate, is difficult to justify in light of the excellent job being done by the private sector, particularly RSLs, over the last 10 – 15 years.

Strategic Housing Partnerships

Whilst Local Housing Companies might be a solution to the development of an authority's surplus land, they are unlikely to be a whole solution to the myriad of problems that a typical local authority faces in delivering more affordable and supported housing and in maintaining existing and future stock. Is there a magic solution? Well, maybe…the Housing Green Paper also identified the "strategic housing and regeneration partnership" as a potential local delivery vehicle. Described as a flexible public private partnership joint venture vehicle it could provide all types of new housing and attract wider social infrastructure investment to achieve physical, social and economic regeneration. Beyond that the Green Paper does not elaborate. However behind the scenes there are whispers that more detailed proposals might soon be offered.

The idea is based on the LIFT model used in the NHS and its sister the Building Schools for the Future (BSF) model currently being used to deliver £45bn worth of investment into the secondary school estate. The structure is similar to the Local Housing Company in that a joint venture company is established between the local authority and a "private sector partner", who itself may be a joint venture between a number of private sector companies including RSLs, which for the sake of argument the author shall call the "Local Housing Partnership" or the "LHP". The LHP is tasked with the job of developing site specific proposals which meet the local authority's strategic aims. These proposals are then approved (or not) by the local authority and the LHP is then given the job of putting in place a supply chain to deliver the works or services. These might be refurbishment works, new build works, maintenance services and tenancy management services. The key to the success of the structure is the focus on the strategic needs of the authority, identified by bringing together the remit and the appropriate skills of an authority's housing department and estates department (which might include any almo previously set up by the authority). When combined with the expertise and drive of the private sector partner within a framework which is both flexible and structured, to help the parties avoid losing their way, it produces a solution which is dynamic and has the potential to achieve real change.

The secret to the success of the proposal is its inherent flexibility. The BSF model utilises both traditional funding for refurbishment works and PFI (the Private Finance Initiative) for new build. It allows the parties to agree what may be suitable for a particular project and opens up the possibility for both cross subsidy and securing multiple funding streams, such as Sure Start, Supporting People, NHS funding for extra care housing and Social Housing Grant, awarded either to the local authority directly or through a partnership with a house builder or RSL. Control can be exercised by the local authority through a strategic partnering agreement (similar to that used for BSF) and through the contractual arrangements put in place for individual projects. There needn't be a transfer of land to the LHP except where this is considered appropriate for any particular project.

As the focus for the local authority is on the medium to long term strategic housing needs of its residents, rather than the logistics of delivery, it is in a position to offer to the private sector both a long term interest in the delivery of projects and exclusivity of supply. This could make it a very attractive proposition for RSLs and house builders (as well as the wider partnerships industry).

Is there an appetite for something different?

There is little doubt that as RSLs have grown bigger and more confident in recent years, their appetite for taking on more complicated schemes and securing a more central role in regeneration projects has increased. There has been ample bank funding available and some of the bigger RSLs have started to explore the options that may be opened up if a project finance approach is taken. Indeed even the house builders have begun to look at this more carefully. We have begun to see more strategic relationships emerge between RSLs and house builders (the London Wide Initiative is an example of this) and between local authorities, RSLs and contractors (good examples being the few housing PFI schemes that have got off the ground and the student and staff accommodation schemes that have completed in the higher education and health sectors). Taking a more holistic approach is being encouraged and the Government would appear to be leading by example with the merger of English Partnerships and the Housing Corporation to create the New Homes and Communities Agency.

To be successful though, the challenge for RSLs, and indeed all others engaging in long term strategic schemes, is to build up a resistance to market conditions and to avoid overreaching. There is not doubt that getting involved in long term strategic partnerships can be a drain on resources (both financial and human), but the rewards could be significant and winning a reasonably secure long term stream of business from a local authority can only help an organisation to weather future storms and achieve sustained growth.

It is possible that the current very challenging market conditions might provide the ideal springboard for RSLs and local authorities to be more creative in their approach to housing delivery. The traditional engine for housing delivery is of course the house builders and with many having now closed their doors to new site acquisitions and new development, there really is no choice for local authority and RSLs but to pick up the baton and keep up the supply and they should be supported in doing so by central Government. There is no better time for public investment to be made than when competition for sites is weak and market conditions need stimulation. At times like this the tax payers pound goes further than normal and can be used to achieve social improvements as well as economic ones.

Can lessons learnt from other sectors be applied to Strategic Housing Partnerships?

If public sector investment is made available for strategic housing partnerships, then it is imperative that some consideration is given to the lessons being learnt in the education sector. The BSF programme has been up and running now for nearly five years but initial progress has been slow and many have criticised the programme for its complexity and the dogmatic approach taken by central Government. However nearly 3/4s of all local authorities are involved and the steep learning curve that they have experienced can only be of benefit if a similar concept is applied to housing delivery.

The focus on long term strategic needs means that a lot of time will be spent before delivery is improved but this must mean that what is eventually delivered will be more robust and sustainable. Indeed there is a direct link between education and housing as one supports the other. This is partly why some authorities are now seeking to use their BSF programmes to achieve wider regeneration objectives. To get the strategy right though, the authority must consult fully with local stakeholders. This was something which was not fully appreciated in the early days of BSF and every effort should be made to avoid making the same mistake in housing, particularly as housing is an even more emotive subject for council tax payers than education. As with BSF, the author believes that authorities should be fully supported by central Government through the use of guidance as to best practice and the use of standard documents (which could easily be adapted from the BSF programme). Whilst the solutions to individual sites or areas needs to be flexible and adapt to local needs, the structure of investment and control can be standardised, thus avoiding the danger of authorities spending time and money reinventing the wheel. The key to this approach though is to ensure that the Government wins the hearts and minds of the authorities and its partners before embarking on the programme. This is not going to be

about simply waving the cash but helping participants understand the objectives and the choices that are available and to achieve a sense of mutual purpose.

Conclusions

The author welcomes the more strategic approach being taken by DCLG and EP in the Housing Green Paper in considering ways in which housing delivery can be both increased and tailored to meet social needs. The Local Housing Company model is a welcome opportunity for local authorities to exercise more control over new developments but it can only be one of a range of solutions. The Strategic Housing Partnership concept has the potential to be a holistic long term flexible solution but, as with any highly structured approach, the challenge will be to win hearts and minds. Now would be an ideal time for central Government to invest in housing, to support the market whilst it is experiencing difficulties and whilst it seems unable to deliver the solutions society needs. But it is crucial that intervention is delivered thoughtfully and effectively and the emphasis must be firmly on achieving value for money and improving efficiencies. A review of the current funding streams for housing investment would seem to be sensible but there is little doubt that new funding will also be required. Hopefully it is a case of watch this space!

For more information please contact
Andrea Squires
020 7593 5039
asquires@wslaw.co.uk

Procurement Law Update

Changing Attitudes to the Procurement of Health and Supported Housing Services

The Procurement Regulations

The Public Contracts Regulations 2006 have been in force now since January 2006. Whilst primarily consolidating legislation, since their issue there has been a marked trend within both the public and private sectors towards recognising not just the letter of the law but also the spirit of the Regulations. Satisfying the Procurement Regulations is an everyday fact of life for public sector bodies and unsuccessful contractors have been increasingly prepared to challenge contract awards where they perceive injustice to have occurred.

In one area though, the Procurement Regulations have themselves created some uncertainty. The Regulations are expressed to apply to all contracts to be entered into by contracting (i.e. public) authorities for the receipt of goods, services or works except those which are excluded (e.g. land acquisitions, arbitration services, employment contracts and (with one qualification) services concessions) or are below the financial threshold. In general terms, the Regulations apply equally, irrespective of whether the contract is one for works, services or the supply of goods. Exceptions have been made in two cases, where there is a public works concession contract or a “Part B services contact”. The latter is defined by reference to Part B of Schedule 3 to the Regulations and includes such services as; “hotel and restaurant services”, “legal services”, “recreational, cultural and sporting services” and, of particular interest to Registered Social Landlords and private contractors involved in providing supported housing, “health and social services”.

Application of the Procurement Regulations to Part B services contracts

Regulation 5(2) states that for Part B services contracts only the following key parts of the Regulations shall apply:

- Regulation 4 dealing with the fundamental obligation on the contracting authority when procuring a public contract to treat all economic operators equally and in a non-discriminatory way and to act in a transparent way;
- Regulation 9 dealing with the obligation to specify what if any technical specifications must be met in the provision of the subject matter of the contract;
- Regulation 31 dealing with the obligation on the part of the contracting authority to submit a contract award notice within 48 days of the award of the contract;
- Regulation 43 dealing with the obligation on the contracting authority not to disclose confidential information provided to it by an economic operator;
- Regulation 45 dealing with requests by contracting authorities to require economic operators to indicate in tenders whether any part of a contract is to be sub-contracted;
- Regulation 46 dealing with the obligation on contracting authorities to require those to whom it sub-contracts services for the benefit of the public not to themselves discriminate between offers for goods on the grounds of nationality; and

It is worth noting that there is no obligation in respect of Part B services contracts to publicise an intention to seek offers by sending a notice to the Official Journal, a step which is required in relation to the procurement of all the other sorts of contracts governed by the Regulations.

Commission Guidance

On the face of it therefore, the position seemed clear: no need to issue an OJEU notice and no need to undertake any form of competitive tender. If tenders were sought, as a matter of good practice, Regulation 4 obliged the contracting authority to ensure any bidders were treated equally, fairly and openly. However, the European Commission did not want to stop there and quickly sought to clarify in guidance issued in August 2006 that notwithstanding the precise terms of the Directive (and any local legislation enacting the Directive) any public contract should be procured in accordance with the rules and principles of the EC Treaty which include principles of non-discrimination and equal treatment, transparency, proportionality and mutual recognition. The guidance quotes directly from a number of recent European Court of Justice cases and states that the obligation to act transparently requires contracting authorities to undertake “a degree of advertising sufficient to enable the services to be opened up to competition” at the same time ensuring “the impartiality of the procedures to be reviewed”.

The logical conclusion of this, of course, is that once you open up a contract to competition then, in order to continue to satisfy the fundamental principles of fair competition, you pretty much end up following the principles and procedures laid out in the bulk of the Procurement Regulations. Thus, in practice, there might be little, if no meaningful, distinction between those contracts which are genuinely caught by the Regulations and those which on the face of it seem to be excluded.

Reaction from local authorities

Although it has taken time, there is an increasing recognition by local authorities, who are being encouraged generally to outsource more and more works and services, that operating a full competitive procurement process is the only way forward.

The risk of an EU challenge is obviously something which all contracting authorities want to avoid, but the other driver is the simple fact that effective competition is perceived to be beneficial, as a means of achieving best value and, frankly, justifying what can be difficult decisions.

The implications for bidders are obvious. Competitive procurement processes take time and money. Bidders need to appreciate what sets them apart from their competitors and be able to sell themselves effectively. Bidders need to be skilled at understanding what factors (stated or otherwise) are influencing the authority’s decision. Bidders also need to be careful about preliminary discussions with authorities. Although these can help a bidder to understand an authority’s needs better and to tailor their offer accordingly, there is a risk that time may be wasted or worse, that commercial solutions that may have been debated in pre-procurement discussions end up being revealed to all bidders as part of the authority’s requirement when the contract is formerly opened up for tender.

The obligation to procure will apply even where the operator is itself a contracting authority (e.g. an RSL) and even where there may be some connection between the two. This was confirmed in an ECJ judgement in 2007, namely Jean Auroux and Others v Commune de Roanne, where the court held that a contracting authority is not exempt from using the procedures for the award of a public contract on the ground that the agreement may be concluded only with certain legal persons.

Is fair competition even possible?

In most procurement situations, fair competition is possible and advantageous. However, there are examples where some real problems begin to emerge. In some cases, most notably where the authority is seeking care services to support housing being provided by the private sector, the contract can only be fulfilled by an operator who itself is in a privileged position. The obvious example here is where that operator is in receipt of a government grant provided for the specific purpose in mind or indeed where the operator owns or is to own the land where the parties anticipate the service will be provided from. Whilst the Regulations do exempt contracts which can only be performed by one economic operator this only applies where the uniqueness of the operator is for technical reasons e.g. they hold the patent for the goods or service that the authority is seeking to receive.

In the example given above, how can an authority run a fair competition where the only operator who would be capable of delivering the contract is one to whom a grant has been given and there is only one person to whom the grant can be given? This is a particular problem where grants are allocated before contracts are awarded and where grants are being made to operators and not to the contracting authority itself, as is the case in respect of housing grants. The solution might be to procure the contract subject to a grant being made and for the successful bidder to then make its grant application, but as housing grants are now being made over a much longer period, it is likely to mean that there is a very long delay in the delivery of the service. If a grant allocation is made before the contract is procured and assuming the grant allocation can be offered to more than one operator in order to open up competition, what will happen if redundant allocations are not then taken up? At the moment the Housing Corporation penalises RSLs who do not take up allocations and so this would have to change. The only other alternative is for grants to be made to the local authority and not the operator, as commonly happens with health grants. It might also explain the preference for using the Private Finance Initiative for extra care schemes, particularly now that PFI’s use for housing renewal schemes has become questionable. A direct allocation might be good news for local authorities but one would have to ask whether it would speed up delivery. It would certainly be a controversial move as far as RSLs are concerned and possibly also unpopular with the Housing Corporation, who might see itself losing control over housing grant expenditure to local authorities.

A final word of caution

As if that were not enough, the Auroux judgement contains some further worrying comments. In this case the mayor of Roanne sought to award a contract to a semi-public body (also a contracting authority) to develop a leisure centre with associated commercial uses. The land was to be acquired by the operator, whose principal role was to undertake development and project management services. The court ruled that the works were to be undertaken on behalf of the contracting authority despite the fact that the contracting authority would not be the owner of the works or the land upon which they were built. Consideration was found to be payable by the authority to the operator because the authority undertook to contribute to the cost of the works and the operator would have the opportunity to obtain income from third parties for the use of the works. The court held that the arrangements did amount to a public works contract which should have been competitively tendered.

With the increasing use of sophisticated development and joint venture agreements between local authorities and contractors particularly for regeneration projects, comes a growing worry about the application of the Procurement Regulations. Perhaps the question will come down to the level of control exercised by the authority, the more control the more likely the arrangements will be caught by the Regulations. There will undoubtedly be more case law on this issue.

Future developments

Although considered a curse by some, there is no doubt that local authorities are having to adopt more formal and more transparent

procedures for the procurement of public contracts. This needn't be a bad thing where effective procurement techniques are adopted. There are implications for complex schemes and where grant funding is necessary. The use of framework agreements is likely to become more popular as a means of simplifying future procurement needs provided sufficient control can be established as to how later contracts are allocated.

For more information please contact
Andrea Squires
020 7593 5039
asquires@wslaw.co.uk

Shared Ownership Leaseholders – What Should We Be Planning for?

Introduction

How will the upcoming housing market slow down affect shared owners and Registered Social Landlords? What can RSL's do now to make future decisions as easy and as painless as possible? This briefing aims to look at these two questions and how RSLs can prepare themselves for the inevitable slow down in the property market and be prepared for the effects of the credit crunch on its shared ownership leaseholders.

Step One – Recognise the risks

It would be foolish of any RSL to not recognise in one way or another that the housing market is going to slow down and the value of property is not going to continue to climb in the way that it has done over the past few years. Much has been written about the effect of various economic events on the housing market, but what has been missing is how these will affect RSLs as Landlords, and part equity owners, of shared ownership properties.

Where a shared ownership scheme is grant funded, the shared ownership leases that are subsequently granted of the properties in that scheme must comply with the conditions set out in the Housing Corporation's Capital Funding Guide. These conditions include sample shared ownership leases that can be used, and within the sample leases certain clauses that must be used, these are the "fundamental clauses". Failure to use these fundamental clauses in the leases is a breach of the grant conditions.

One of the fundamental clauses is the mortgagee protection clause. This provides mortgagees with a funding safety net from the RSL, but only applies if the mortgagee and the terms of its mortgage offer have been approved before the mortgage is completed. This is often done by the solicitors acting for the RSL on the grant of the lease and forms part of the initial conveyancing package.

The mortgagee protection clause states that if a leaseholder defaults on their mortgage and the mortgagee takes possession of the property, then under the staircasing provisions of the lease, the mortgagee can staircase to 100% and sell a 100% interest in the property on the open market in order to recover its money. The mortgagee protection clause says that if the value of a property is not sufficient to repay the outstanding money to the mortgagee, any shortfall will be taken by the mortgagee from the amount owing to the RSL for its share of the equity.

The mortgagee is allowed to recover, the original capital (but not including any amount of the initial advance that was in excess of the premium paid to the Landlord for the purchase of the initial share) that it lent plus 12 months' unpaid interest, plus the mortgagee's legal costs, plus any estate agent's commission, plus any other costs of expenses incurred by the mortgagee in respect of the 100% sale. All of this is deducted from the 100% sale price before any amount is paid to the RSL for the staircasing.

Example

A property is valued at £200,000 at the grant of the lease. Fred buys a 50% share in the property for £100,000 with a 100% mortgage for £100,000 with Mill Bank, and pays rent on the remaining 50% to the RSL.

Fred loses his job and stops making his mortgage and his rent payments. Mill Bank takes possession proceedings against Fred and go to sell the property on the open market.

The property is now worth £180,000, meaning that Mill Bank's share is only worth £90,000. As the RSL approved

the terms of the mortgage offer to Fred, the RSL now has to make up the difference to Mill Bank.

On completion of the sale of the property, Mill Bank get £100,000 plus their costs of £5,000 and the RSL only receive £75,000, which is the equivalent of a loss of £25,000 on the original value of its share.

The consent or approval of the mortgage offer is key to protecting the RSL's interest under the lease and ensuring that the mortgagee protection clause only covers what it should. RSLs need to consider who is responsible for approving mortgage offers after the initial grant of the lease when the leaseholder re-mortgages on a staircasing or if the share in the property is assigned. There is a danger that the RSL could inadvertently release and underwrite a share of the equity to the leaseholder.

Example

5 years after the initial grant of his lease, Fred decides to staircase to 75%. The total value of his property has now risen from the initial £200,000 to £300,000 and Fred has to pay £75,000 to the RSL for the extra 25% interest in the property.

Whilst borrowing this £75,000, Fred decides to repay his original mortgage from Mill Bank of £100,000 and make the most of the increase in value of his equity and take out a new mortgage over his 75% share in the property. His mortgage is now for £225,000: £100,000 of which is used to pay off Mill Bank; £75,000 of which is used to buy the 25% share from the RSL and the remaining £50,000 is Fred's to do with as he wishes.

The RSL approve this mortgage offer, as on the face of it, Fred's 75% share in the property is worth £225,000. However, if the value of the property subsequently drops and then Fred gets into difficulty, the RSL will have approved the loan of £225,000 and the new lender will be entitled to recover £225,000 under the mortgagee protection provisions before paying anything to the RSL.

The effect of the mortgagee protection clause on an RSL is that as soon as a leaseholder stops paying their mortgage, the RSL is at risk of a claim from the mortgagee. With every month that goes by the amount owed to the mortgagee goes up and so the amount that will eventually be returned to the RSL will go down. If the value of the property should decrease further, for example if the leaseholder scarpers and the property becomes run down, then the amount that will be returned to the RSL will decrease further.

Of course, many leaseholders will stop paying the rent due to the RSL before they stop paying the mortgage. In the past, RSL's have relied on mortgage companies to take an interest in the properties that they have lent on and, in a number of cases, pay the rent due to the RSL and add those amounts on to the mortgage debt. Whilst a mortgagee agreeing to do this is all very well for the RSL in the short term, if the leaseholder doesn't catch up and subsequently defaults on his mortgage as well, these rent amounts will merely be deducted from the amount due to the RSL on completion of a sale by a mortgagee under the mortgagee protection provisions.

So, once a RSL recognises that this risk exists, what should it do?

Step Two – Prepare a strategy

RSLs need to be prepared for what happens when shared ownership leaseholders cannot afford their rent and/or mortgage payments. It is essential that RSLs have a policy in place so that applications from leaseholders can be considered fairly and with due consideration for the circumstances in each case.

There are a number of options available to RSLs when considering how leaseholders in difficulty can be best assisted and the RSL's interest in the property best protected. These include:

- Converting the rent arrears due to the RSL into a secured loan;
- Allowing the leaseholder to sublet the property to generate additional income;
- Grant funded flexible tenure – although the Housing Corporation see this as a "last resort" option;
- Privately funded flexible tenure.

These are discussed in more detail below. It is worth pointing out before we consider these options that housing benefit may be available to a leaseholder in respect of the rental element of the shared ownership lease and this should be looked into further and proper advice taken by the leaseholder at the time.

Conversion of rent arrears into a secured loan

If a RSL thought that the financial difficulties of a leaseholder were going to be short term (ie 1 to 2 years), or it thought that the value of the property would increase in the mid to long term, then it might not be in either the RSL's or the leaseholder's best interest to bring the lease to an end.

A RSL could agree with a leaseholder that it will not take any enforcement action against the leaseholder for the non-payment of the rent for a set period of time, and instead, at the end of that period of time agree to take a charge over the property for the amount owing to it instead.

This charge would have to be postponed to the mortgagee's charge, but it could enable the leaseholder to concentrate on making the payment to the mortgagee, and so reducing the amount owed to the mortgagee, which would ultimately be collected from the RSL through the mortgagee protection provisions.

Any agreement in this way would need to be properly evidenced and discussed with the mortgagee. The impact of this on the RSL's accounts would also need to be taken into consideration and how any loan covenants in the RSL's loan documents would be affected would need to be carefully looked at.

Subletting

Whilst a grant funded shared ownership property has to include a restriction on sub-letting, the Housing Corporation recognise that there may be circumstances when it would be advantageous for a leaseholder to be able to sub-let. RSLs must consider a request to sub-let on a case by case basis and there must be clear and genuine reasons for allowing a leaseholder to sub-let.

Part of agreeing that a leaseholder can sub-let could involve a realistic appraisal of the leaseholder's financial position, including a valuation of what the property is worth on the open market for sale as a buy to let property and what rental income the property could obtain.

When deciding whether to agree to the sub-letting of a property, the RSL must receive confirmation from the mortgagee that it has agreed to the sub-let.

Grant funded flexible tenure

The Housing Corporation will allow the Recycled Capital Grant Fund to be used to fund the repurchase of a share in a shared ownership property by the RSL, where the leaseholder is in severe financial difficulties and as a last resort to enable a leaseholder to remain in their home. This could be a purchase of part of the leaseholder's share in the property or the whole of the leaseholder's share in the property and the leaseholder would then be granted an assured tenancy on the RSL's standard terms.

There is no right or entitlement to flexible tenure and the RSL has complete discretion over whether to offer it to a shared ownership leaseholder or not. The RSL must be satisfied that the shared ownership leaseholder has

exhausted the other options and will be required to provide evidence of the difficulty they are having meeting their mortgage repayments.

Use of pre-emption provisions
The most attractive option for a leaseholder in difficulty might be to sell their interest in the property and stop the amount that they owe increasing any further. In a falling market, this might also be the best thing to do in order to protect the RSLs interest in the property.

If this happens, the RSL could consider using its nomination powers under the lease or agree to buy back the property. This would enable the RSL to retain the property within its stock and potentially sell it on a new shared ownership lease. It is quite possible that the size or location of the property is attractive to the RSL and the RSL can obtain private funding at better rates than the leaseholder, which would enable it to buy out the leaseholder's share.

If the RSL used private finance to buy back the property, it could then consider letting the property at a higher than affordable but less than market rent, possibly to the previous leaseholder. If the scheme had been grant funded then the appropriate credit would have to be made to the Recycled Capital Grant Fund, but this can then be re-invested in accordance with the Capital Funding Guide.

Step Three – Revise the strategy as and when it happens

The best option for each property and each leaseholder is going to be different, equally the preferred options for each RSL is going to be different. What is without doubt is that the issues that we have set out above are going to be relevant for RSLs and shared ownership leaseholders going into an economic slow down.

Whatever policy the RSL produces, assumptions are going to have to be made as to the nature of the slow down and the effect of it on the RSLs business. Does the RSL think that the slow down is only going to be short term? In that case, can the business plan weather the storm or should additional provisions be included to allow for all eventualities.

This policy is one that will need to be flexible in terms of the options available to the RSL, but also one that can be revisited regularly in light of the market changes. Whilst we all hope that it will be a policy that can sit in a filing cabinet getting dusty, it's more likely that it will be needed in the not too distant future.

Conclusion

RSLs should be prepared for the economic slow down and its effects on, not only new shared ownership sales, but existing shared ownership leaseholders. Mortgagees may take a different view on the safety of their security than they have done to date and might be more willing to rely on the mortgagee protection provisions and ensure that they get their outstanding debt from the RSL. There's no real advantage for a mortgagee to take action within the first 12 months of a leaseholder having difficulties, whilst it makes sense for a RSL to start taking action and doing what it can as soon as it becomes aware of a problem. RSLs must be ready to take whatever action it can as soon as possible in order to protect it's share of the property.

For more information please contact
Sarah Hartles
020 7593 5185
shartles@wslaw.co.uk

Acquiring a Property Portfolio Company

An acquisition of a portfolio of properties might consist of a transfer of those assets directly from the seller to the buyer or the purchase of a target company that owns the properties.

This note focuses on a sale/purchase of a property owning company and assumes a very simple transaction without sophisticated accounting or tax structuring. It assumes the target company is dormant and has no employees. It outlines the corporate steps in the transaction process and aims to alert you to key points to consider. Aspects relating to the acquisition of the properties themselves are not addressed in this note.

Getting the transaction started

The first step should be entry into a confidentiality agreement. Although that will be of paramount importance to you as a seller, to preserve the confidentiality of the details of the target company's business, it can serve a useful role for the buyer.

As a buyer, you will want the price you offer to be kept confidential and you can record your rights to withdraw from the transaction process without liability to the seller. You will seek to limit the duration of the confidentiality agreement – this is not because of any wish to breach confidentiality but to avoid assuming obligations that never fall away (even though long forgotten).

As buyer, you may also use the confidentiality agreement as a means of creating a "lock-out" or exclusivity period. That would reserve a right for you to negotiate with the seller during a defined period, to the exclusion of third party buyers. As seller, you would wish to keep that period short, so as to increase the pressure on the buyer to progress his enquiries.

Often there will be an exchange of correspondence between the parties in which the seller or buyer will outline an offer or basis of sale/purchase. Where the other party agrees to proceed, it is possible that exchange alone could create a contract of sale. To avoid that outcome, some key phrases should be included in your correspondence. Most importantly, whether you are buyer or seller, the words "Subject to contract" should appear on your documents. Usually, that will be enough to ensure a contract is not concluded by the exchange of emails or letters.

Further detail about any proposed deal can be included in an offer letter – such as the treatment of contingent tax liabilities. Sometimes, so much detail is included that parties call it a "Heads of Terms". How much is included will depend on how much negotiation of the offer letter/heads of terms you wish to undertake. Usually, we would advise you to focus on the ultimate transaction documents themselves rather than the offer letter, so as to avoid duplication of effort but a heads of terms can be useful to clarify what the parties intend should happen.

As buyer or seller, you may like to control the preparation of the first draft transaction documents. That way, you can structure them in the way you choose and communicate the sense of protection you want (or are willing to give) to the other party. If you are a seller, however, you may want the buyer to drive the purchase process, so you do not incur costs if the buyer is not serious about proceeding. Ultimately, what you decide to do may vary with each transaction. Control of first draft documents does, however, often place a party in a strong position so far as negotiations are concerned.

Structuring the transaction

Hand in hand with the offer process and, preferably, well in advance, it will always be advisable for you to have a detailed conversation with your lawyers and accountants about what goal you want to achieve through the acquisition or disposal, so you can structure it in the best way. If you

are the seller you may need to consider where the properties now sit within your group and whether it is appropriate to sell that particular company to a third party. The target company may have other assets that you wish to retain or potential liabilities that a buyer would not be willing to assume, with the result that it may be better to move the assets to another group company that will become the target company.

Moving assets around a group and selling a company out of your group will have tax implications and it is important to plan for those in advance; and take advantage of any benefits that may be available, whilst avoiding any detriment that may arise.

As a seller, you may wish to retain the target company's corporation tax losses by surrendering them to other companies within your group. To avoid detriment to a buyer, you will also need to consider the treatment of the degrouping tax charge that arises when a company leaves a group holding an asset acquired within the previous six years from another company within its group. In that case, an obligation on a seller to enter into a joint election to retain that tax charge within its group may be created in the share purchase agreement. If you are the seller, your accountants can advise you on the effect of that election; and, on which company within the seller's group should be party to that election. As a buyer, you will be concerned to know that election has been put in place to avoid any unwanted tax costs arising post completion within your newly acquired company.

Due diligence

Acquiring any asset requires careful examination of the pros and cons of the acquisition and a legal due diligence exercise is a fundamental part of that process.

Besides the enquiries that will be made by the buyer's property law team, it is vital to investigate both the company that owns the properties and the company that owns the target company. The reason for that is because when you acquire the target company you assume all of its liabilities as well as its assets.

The best scenario for a buyer would be to purchase a newly created company that has no pre-existing liabilities. The worst scenario is to buy a company that's been kicking around for years from a seller who keeps inadequate records and has no inclination to make any effort to answer your queries on the company.

If you are a buyer, there are two key ways to protect yourself, in addition to having a well drafted share purchase agreement. The first is to send a detailed due diligence questionnaire to the seller, covering topics including title to the shares, charges over the shares or assets, the nature of any outstanding contracts, bank accounts, liabilities to employees, insurance claims, tax compliance and so on.

If the target company is dormant, without employees and has not traded at all or for years, there should be a nil-return on all those questions but the questions must be asked and answered as part of the process because that should serve to focus the mind of the seller on the transaction and flush out information that would not otherwise come to light.

The second step, as a buyer, is for your lawyers to check as much as possible about the target company and the seller on your behalf by doing searches of relevant public registries, such as at Companies House and the Companies' Court. How far you ask your lawyers to go in their investigation will be a function of how much you are willing to spend to ensure that you don't get caught out buying something you did not expect.

As a buyer, your accountants should also play an important role in your acquisition process by performing financial due diligence to check the financial health of the target company and so ensure that the profitability you believe exists does exist and should continue to be available to you post transfer.

As a seller, your accountants' role will focus on responding to the buyer's due diligence process, your tax planning and accounting for the proceeds of the sale.

As a seller, you can assist yourself in the transaction process by responding fully and competently to the buyer's enquiries. The more information you send to the buyer and the more organised you are in your responses, the better you will be able to protect yourself against future claims by the buyer for misrepresentation or breach of warranty. Your lawyers should help you organise your replies to enquiries, for maximum benefit to you.

The transaction documents

A simple transaction of the type described in this note will consist of a share purchase agreement and a disclosure letter and not much more. A complex transaction might include a purchase price escrow agreement, loan notes, parent company guarantee and option agreements.

Share Purchase Agreement

A share transfer agreement will regulate the rights and obligations of the parties in relation to the transfer of the shares. Usually, it will be a fairly weighty document and will recite protections for the seller and the buyer.

As seller, you will wish to ensure you cap your liability under the contract to an agreed level; create threshold values before claims can be brought; and regulate the manner in which claims against you can be conducted where they originate from a third party claim against the target company or the buyer. As seller, you will also wish to impose time limits for the bringing of claims and qualifications on the extent of knowledge that you are expected to have in respect of the assets to be acquired by the buyer. You will also limit the possibility for the buyer to back out of the transaction.

As seller, you will wish to pare down your exposure under the share purchase agreement to the maximum extent, not only to limit liability for the sake of it but also because you will not want to offer protections to the buyer that would not have been available to the buyer on a simple and direct property transfer. Also, once the target company has been sold you will not want any form of continued responsibility in connection with it. One weapon available to a seller is a disclosure letter (discussed further below).

In large part, the aspirations of the buyer under the share purchase agreement will be equal and opposite to those of the seller. The buyer will hope the seller may overlook the protections described above; or where they are sought, will try to reduce their effect to make them as favourable to the buyer as possible.

Warranties and indemnities

The buyer will seek to record representations and warranties made by the seller as the basis for its entry into the contract. If its negotiating power permits, it will request dozens of warranties from the seller (i.e. statements about the state of the company, the shares and its assets, which the seller promises to be true as at completion of the transaction). Where one of those warranties is found to be untrue, the buyer will have a claim for breach of warranty. That is a contractual claim for damages and is subject to well defined law on what may or may not be recoverable; that, in turn, will be governed by the thresholds and caps on liability introduced into the share sale contract by the seller.

Where, in consequence of its due diligence findings, the buyer anticipates a specific problem with the company, he is unlikely to permit the seller to hide behind the types of protection described above or to take advantage of the law's requirement that the buyer's warranty claim should be reasonable or subject to a duty on the buyer to mitigate its loss.

Instead, the buyer will seek indemnities from the seller to protect the buyer against those specific problems. Indemnities are

intended to create a pound-for-pound recovery remedy for the buyer in the event of loss, cost or expense incurred by the buyer in consequence of the seller's breach of contract (including a breach of warranty). Indemnities are a powerful weapon for a buyer that an informed seller will seek to narrow in scope as much as possible.

The Disclosure Letter

The disclosure letter is a letter prepared by the seller's lawyers that is intended to limit the buyer's ability to bring a claim for breach of warranty. It allows the seller to lay his cards on the table and put the buyer on notice of matters that may not fit with the warranties sought by the buyer. The disclosure letter is a negotiated document and there will be some toing and froing between the parties as to what it says; its effect is to put the buyer on notice of facts about the company and prevent future claims by the buyer.

The disclosure process will feed off the replies to enquiries that the seller has given to the buyer. As a seller, you will wish everything you have said and every document you have given to the buyer to count as disclosure – that's why it is useful to pass those replies through your lawyers, to ensure they are taken into account for disclosure purposes. As a buyer, you will try to be strict with the seller and ensure that only those documents clearly referenced to a warranty will count as disclosure. As a buyer, you will not want email exchanges or phone calls to be taken into account as disclosure and you will aim to limit the list of public registries mentioned within the disclosure letter, so that you are not expected to be on notice of their contents.

Getting things in order

Although a buyer will hope that a seller will know and understand its own target company completely, that is often not the case. The buyer will usually need to prompt and prod the seller to ensure that the required steps are being taken to allow the transfer to take place.

Important and time consuming steps will address loan and finance arrangements between lenders and the target company or seller. Such arrangements will usually involve registered charges and debentures both at the Land Registry and Companies House. Having those registrations removed will require contact with the lender's securities department, recovery of archived documents, forms to be filled, boxes to be ticked – all very cumbersome and time consuming. The only solution is to allow plenty of time for it all to happen in time for completion.

Post completion steps

After the transaction completes, a number of steps are required to ensure that applicable rules and regulations are fulfilled. Forms for resignation from the target company of those directors appointed by the seller and appointment of new directors appointed by the buyer must be filed at Companies House, along with notification of a change in registered office and any change to the accounting reference date of the company. Auditors must be notified if they are to be appointed for the new company within the buyer's group. Stock transfer forms must be submitted for stamping to HMRC and the statutory books must be written up to record the share transfer once the stamped forms are received back from the Revenue, unless a declaration of trust has been created to govern the interim period.

For housekeeping purposes, the buyer may wish to consider adopting new objects (in the target's memorandum) or new articles of association for the target company, so as to conform those documents with the rest of the group, for ease of company secretarial management. The buyer may also wish to organise how the newly acquired assets are held within its group and hive them up, down or across to another company within its group. Any intra-group debt assumed upon acquisition of the company will need to be accounted for within the books of the buyer. Any amendments to the nature of that debt should only be made after consulting with the buyer's lawyers and accountants to avoid inadvertently creating unlawful financial assistance or tax avoidance.

Getting it right

Acquiring or disposing of any major asset is of great significance to both buyer and seller from a legal and accounting point of view. There are established transactional procedures to follow and they range from a simple transfer of the type described above to complex structures involving share exchanges, deferred consideration, earn outs, escrow accounts, restrictive covenants and options. Deal structures should always take account of tax planning, which can create significant savings and should be considered at the outset.

In summary, the complexity of any deal will be driven by the level of protection sought by the buyer and the seller and the sophistication of the accountancy and tax planning of the parties. If you would like any guidance on any of the matters described above, please don't hesitate to contact Neil Morgan or Richard Tinham on 020 7593 5000.

For more information please contact
Neil Morgan
020 7593 0273
nmorgan@wslaw.co.uk

The Future of Restrictive Covenants

Introduction

With the recent political pressure for new housing particularly in London and the South East the reform of the existing law on restrictive covenants could be an effective means of facilitating the availability of land for development.

In March 2008 the Law Commission published a consultation paper on easements, covenants and profits à prendre.

The Law Commission proposed substantial reforms of the existing law of easements, profits à prendre and covenants which will attempt to simplify and modernise the statutory means of discharging, modifying and extinguishing restrictive covenants.

In recent cases the Lands Tribunal and more importantly the Court of Appeal have ordered the discharge and variation of restrictive covenants to allow for residential development of burdened land.

This paper examines some of the implications of the existing regime, the impact of recent case law and the Law Commission's proposals.

Basic characteristics of Restrictive Covenants

A restrictive covenant is an agreement in a deed that one party will restrict or burden the use of its own land in someway for the benefit of another's land.

Restrictive covenants amongst many other things may:

- limit the possible uses of land (i.e. for residential use only)
- restrict the number or type of building that may be built on the land
- prohibit the land being used for a specific trade or business

Restrictive covenants may also be enforceable by one party's successors in title against successors in title as well as between the original contracting parties.

By this process, restrictive covenants have traditionally been used to protect and preserve the character of a particular neighbourhood and preserve value to persons for particular purposes.

Existing law for the modification and discharge of Restrictive Covenants

Statutory Legislation

Law of Property Act 1925
Section 84 of the Law of Property Act 1925 allows any person who has an interest in land or property affected by a restrictive covenant to apply to the Lands Tribunal for an order to discharge or vary the restrictive covenant subject to establishing one of a number of specified grounds including:

- a change in circumstances rendering the restriction obsolete, i.e. changes in the character of the property concerned or changes in the neighbourhood
- the discharge or variation will not injure those with the benefit of the restriction
- where the continued existence of the restriction would impede some other reasonable use of the land, e.g. where the restriction is contrary to the public interest

Housing Act 1985
Section 610 of the Housing Act 1985 allows a person interested in any property to apply to the County Court to vary the terms of a legal instrument which imposes restrictions on the said property provided the following circumstances apply:

- owing to a change in the character of the neighbourhood the property cannot be readily used as a single dwelling house but could be let if converted into two or more dwellings or
- planning permission has been granted for the use of the property as two or more dwellings and the conversion is prohibited by a restrictive covenant affecting the title

Recent case law

Lawntown Ltd v Camenzuli (2008)
The Lawntown case is an example of a developer lodging an application at the County Court pursuant to Section 610 of the Housing Act 1985 for the restrictive covenants to be varied.

The developer secured a planning permission to convert a semi detached house in London into two self contained flats.

Neighbours objected to the redevelopment on the basis that the redevelopment would breach restrictive covenants which prohibited the conversion of the house into flats.

In granting the variation, the County Court considered all relevant competing factors such as the preservation of the character of the neighbourhood against the need for more housing. The Court also held that in this particular case compensation for the objector was not appropriate as there was no evidence that the neighbouring property values would be adversely affected by the proposed development.

The decision was appealed to and upheld by the Court of Appeal.

This case shows that restrictive covenants cannot be viewed in a vacuum. The benefit of a restrictive covenant must be weighed against current government policy and statutory legislation. In this particular case the Court of Appeal supported the decision of the County Court that the demand for housing in London far outweighed any benefit gained by the restrictive covenant.

Re Land at Alisha House – Lands Tribunal
The Lands Tribunal was asked to consider an application pursuant to Section 84 of the Law of Property Act 1925 for the discharge of a restrictive covenant affecting the land at Alisha House in Durham which prohibited the residential redevelopment of the land.

The Easington District Council in its capacity as local planning authority granted the developer a planning permission for the construction of 30 residential units.

The Easington District Council was also the beneficiary of the restrictive covenant and in its capacity as beneficiary the Council objected to the proposed development.

The Lands Tribunal Judge decided there is "a close coincidence between its (Easington District Council) role as landowner and that of local planning authority… The grant of that permission was, in my opinion, an event of singular importance in this case and is the best evidence that the practical benefits secured by the restriction are not of substantial advantage to it. Those benefits were considered by the objector in the context of the residential planning application and were overridden in favour of residential development".

The decision of the Lands Tribunal was to discharge the restriction and allow the redevelopment and award compensation to the Council in the sum of £23,500. This sum was arrived at on the basis of a 60% uplift on a price (£15,000) the Council obtained on the sale of some other land subject to the same restrictive covenant.

Whilst the decision of the Lands Tribunal is not binding on other courts it is an example of the effect a planning permission granted by a local authority in its capacity as local planning authority may have on the local authority's ability to enforce the benefit of a restrictive covenant in its capacity as landowner.

The case for reform

Identifying the beneficiary of Restrictive Covenants
One of the main problems in assessing the impact of restrictive covenants is the difficulty in identifying the land which has the benefit of the restrictive covenants. Whilst the burden of the restrictive covenant is recorded on the landowner's title there is no requirement that the land benefiting from the restrictive

covenant to be identified. As a consequence it is often difficult and usually impossible to determine whether there is anyone who is capable of enforcing the restrictive covenant.

Where a beneficiary cannot be located it is difficult if not impossible to negotiate a release from the covenant and therefore the covenant remains on the landowner's title indefinitely.

The result is that land which is potentially developable is laden by archaic and often unnecessary and inappropriate restrictions.

Planning Covenants
Increasingly the source of modern restrictive covenants has been through the planning process. Local planning authorities have been granted statutory powers to enter into planning agreements with landowners, such as 'Section 106 Agreements' pursuant to the Town and Country Planning Act 1990, in order to restrict or regulate the development and use of land.

Local planning authorities can place restrictions on the landowner such as improving off site infra structure, improving roads and drainage and the provision of educational or amenity space.

Now that new developments are controlled by local planning authorities the need for restrictive covenants as a means to preserve the character of a neighbourhood largely diminishes.

The Law Commission's Proposals

The Law Commission has made numerous efforts to reform the law of restrictive covenants dating back as far as 1963.

The Law Commission prepared a working paper in 1971 on the law of restrictive covenants followed by a further report and draft bill in 1984.

The Law Commission's latest proposals are:

- the creation of a new property right called the "Land Obligation" replacing the current regime of positive and restrictive covenants. A Land Obligation:
  - could only be created expressly over registered land where the benefit and burden would be recorded against the parties' titles
  - would be contained in a prescribed instrument attaching a plan identifying all the land benefiting from and burdened by the Land Obligation
  - would only be enforceable between current owners of the land benefited and burdened
- Section 84 of the Law of Property Act 1925 should be expanded so that applications may be made to discharge and modify not only restrictive covenants but also Land Obligations.

The proposals are designed to simplify the current law. The introduction of Land Obligations will ensure that the property with the benefit of the Land Obligation will be noted on the relevant title making it easier to approach the beneficiary where a variation or discharge of the restrictive covenant is required.

Difficulties in amending the law on Restrictive Covenants

One of the major stumbling blocks is how to deal with the huge number of restrictive covenants which already exist.

The Law Commission proposed the following solutions:

- Repeating the proposal made by the Scottish Law Commission. It proposed a "sunset" rule. Once a restrictive covenant reaches a specified age the landowner burdened by the restrictive covenant could apply for it to be extinguished
- Extinguishment after a dealing, (such as a sale or purchase) unless re-registered as a Land Obligation
- Compulsory re-registration as a Land Obligation

Conclusions

There is little doubt that the current law of restrictive covenants is complex, cumbersome, outdated and in need of reform.

The difficulty in locating the beneficiaries of restrictive covenants makes it impossible to obtain releases thus stymieing potential redevelopment. Admittedly title indemnity insurance is available to protect against any breach of a restrictive covenant but this is far from an ideal solution.

It is likely that the Courts will be asked to play a greater role in protecting the rights of the beneficiary against the rights and interests of the public in having the restrictive covenant varied or discharged.

The Law Commission has proposed alternatives to the existing law of restrictive covenants with little success. The latest proposals have much merit but there is no guarantee that they will produce results or will in fact be implemented.

The Law Commission consultation periods lasts until 30 June 2008 so this is a perfect opportunity for those with experience with the law of restrictive covenants to share their opinions.

For more information please contact
Huseyin Huseyin
020 7593 5128
hhuseyin@wslaw.co.uk

Recent Changes to the Housing Corporation's General Consent under Section 9 of the Housing Act 1996

This briefing looks at the changes made to the Housing Corporation's General Consent in February 2008 and how these changes will affect Registered Social Landlord's when they dispose of an interest in land.

Background

Section 9 of the Housing Act 1996 ("the Act") states that the consent of the Housing Corporation is required for any disposal of land by a Registered Social Landlord ("RSL") other than those exempt disposals listed in section 10 of the Act. For the purposes of section 9, a disposal of land includes a sale, the granting of a lease, entering into a mortgage or charge or any other disposition.

The Act includes provisions for the Housing Corporation to give its consent "generally to all registered social landlords". The Housing Corporation does this by publishing a General Consent. If a disposal falls within the General Consent, a RSL does not have to make an application to the Housing Corporation for consent under section 9 of the Act. Instead, the RSL can self certify that the disposal falls within the General Consent on a HACON 5 form. The HACON 5 form has to be completed, signed on behalf of the RSL and kept in a register by the RSL.

A new General Consent was issued by the Housing Corporation on 1st February 2008, following consultation with RSLs and their advisors. The last General Consent was issued in April 2003 and this briefing aims to look at the differences between the 2003 General Consent and the 2008 General Consent and how it will affect RSLs.

Conditions attached to the use of the General Consent

The use of the General Consent by a RSL to make a disposal without obtaining specific consent, is dependent on the conditions set out in Part II of the General Consent being satisfied. It is for the Secretary and one other officer or employee of the RSL to certify on the form HACON 5 that the disposal complies with the conditions.

There has been one major change to the conditions. Condition 3 to the 2008 General Consent states:

> "An independent and qualified valuer must confirm that the consideration for the disposal or, in the case of an auction, the reserve price is, in their opinion, the best that can reasonably be obtained. This confirmation needs to be dated three months or less before the contract is exchanged – or any other period as the Corporation may specify…."

Previously, the requirement to have a valuation report on the consideration being obtained for the disposal only applied to "an open market sale or sale at auction".

This revised condition means that for every disposal where the General Consent is to be relied on, confirmation must be received from a valuer that the consideration is the best that can be reasonably obtained, not more than three months before exchange, or if there is no exchange, the completion of the disposal. For some disposals this will not mean a change in practice, however, for some this will be a new requirement.

It is usual practice to obtain a valuation report for the grant of a charge to a private lender, and it is often a requirement of the private lender that the valuation is less than three months old, but this will now apply to the grant of a charge to a local health authority. Now, the valuer will need to be given as much information as possible about the nature of the scheme and the consideration being given by the local health authority to the RSL in exchange for the charge over the property, in order to give his opinion.

This valuation condition will need to be satisfied for all disposals where any of the General Consents are relied on including the grant of easements, the disposal of properties under section 106 agreements, and the surrender of a leasehold interest in exchange for the grant of a longer lease.

The Housing Corporation have told us that they do not consider a valuation report necessary for a charge being granted to any of the bodies listed in category 6 of the General Consent, however, this is not how the General Consent is worded. If I was acting for a local health authority, developer or other organisation being granted a charge, I would want to ensure that there was a valuation report, that satisfied the conditions, in place so that we could rely on the HACON 5 given by the RSL.

The Housing Corporation have also said that there are a number of circumstances where establishing best price is not a relevant condition and that it will not require RSLs to apply the criteria strictly. The application of the conditions to each of the categories within the General Consent may be worth checking with your lead regulator before making a decision as to which of the conditions are relevant and relying on a HACON 5.

New disposals that fall within the General Consent

There are some useful new disposal categories:

- The sale of a property with vacant possession, that was acquired, without public grant or subsidy, specifically for disposal on the open market and that has never formed part of the RSL's rental stock (category 2(a)).
- The disposal of a property in accordance with a requirement in an agreement made under section 106 of the Town and Country Planning Act 1990, where the consideration is not less than the maximum amount agreed with the local authority (category 2(b)).
- The transfer of untenanted properties to another RSL, unless either RSL is under supervision or the transfer would reduce the stock of the RSL by more than 50%. The Housing Corporation recognise that for this type of disposal the valuation report may conclude that the consideration may be less than the best price that may reasonably be obtained (category 3).
- The transfer of untenanted properties to a local authority or to an Arm's Length Management Organisation, unless the RSL is under supervision. The amendment to the condition requiring a valuation report does not apply to these disposals, so the valuer would have to be satisfied that the consideration is the best that can reasonably be obtained (categories 4 and 5). Although, any valuation would have to take into account any grant affecting the properties.
- The extension of a term of a lease where the original lease was a shared ownership lease, or a lease granted under the right to buy or right to acquire, or the lessee is exercising a statutory right to extend (categories 7(h), (i) and (j)).
- The disposal of a property to a private individual where a specific section 9 consent has been granted but either the price or the individual has changed (category 14).

It should be noted that this is only a summary of some of the new categories of disposals and when considering whether a disposal falls within the General Consent, you should consider the Housing Corporation's Disposing of Land booklet in detail and take the appropriate advice before relying on the General Consent.

Amendments

A number of disposals within the General Consent have been amended to reflect changes in homeownership schemes (for example, reference to Voluntary Purchase Grant has been removed and Social Homebuy is now included) or changes in organisational structure (for example, NHS Trust has been amended to refer to a public health authority or trust).

The following amendments have been made to categories within the General Consent:

The disposal by granting of a right of way or other type of easement has now been extended to include those valued at £10,000 or less, this is an increase from the previous £5,000 or less (category 8(c)).

The disposal of land that the RSL considers is surplus to requirements and is vacant, has been extended to include land valued at £10,000 or less, this is an increase from the previous £5,000 or less (category 10(c)).

The disposal of land to a local authority for the provision of estate roads or other road schemes has been extended to include a disposal where the land is to be used for the provision of recycling facilities.

General Consents withdrawn

The Housing Corporation has removed the general consent that enabled a RSL to grant a lease of 10 years or less at a rent but no premium. Specific consent will now be required for the grant of such leases unless the grant falls within another category of general consent, for example category 7(d) gives consent for a lease of non-residential land for less than 25 years.

Forms

As part of the Disposing of Land booklet, the Housing Corporation have published new HACON 2, HACON 5 and HACON 6 forms and these new style forms should be used from February 2008.

Conclusion

The amendments to the General Consent mean that a RSL will have to be satisfied that under a strict interpretation of the General Consent, at the point contracts are exchanged or just before a disposal is completed, it has a valuation report that is not more than three months old or that it has a specific section 9 consent for the disposal. In practice, this could lead to a number of valuations being needed and additional valuation costs for the RSL.

The new additions to the General Consent will mean more disposals can be self certified by the RSL, but the benefit of these may be out weighed by the additional valuation requirements until such time as the Housing Corporation publish further guidance regarding their interpretation of the conditions.

For more information please contact
Sarah Hartles
020 7593 5185
shartles@wslaw.co.uk

Independent Safeguarding Authority

A New Regime to Protect Children and Vulnerable Adults

Background

In 2002, two schoolchildren in Soham – Jessica Chapman and Holly Wells – were murdered by Ian Huntley, a caretaker at their school.

In the aftermath of the tragedy, one of the saddest discoveries was that the deaths could have been prevented, had there been a better platform for sharing information between various agencies, such as local authority social services and police forces.

Although Huntley's behaviour had caused concern to a number of agencies, and on a number of different occasions, no one organisation had access to a full picture or had put together those aspects of the picture they had.

Sir Michael Bichard was commissioned to examine the failures that led to the deaths, and recommendations led to the Safeguarding Vulnerable Groups Act 2006 ("the Act"). Under the Act, the Independent Safeguarding Authority ("ISA") was established to help prevent unsuitable people from working with children and vulnerable adults.

The key proposition is that one agency, the ISA, will gather and monitor information that was previously found in a number of different sources. The scheme will have access to non-conviction information from a range of different sources.

The new regime will have a significant impact on the responsibilities of employers such as RSLs who have staff and/or volunteers working in roles with children and vulnerable adults.

In a nutshell

- A vulnerable adult is somebody who is at least 18 and includes: an adult in sheltered housing and an adult in residential accommodation provided, for example, in relation with any care or nursing he or she requires.
- Individuals who work, in either a paid or unpaid capacity, with children or vulnerable adults, will have to register with the ISA. The ISA will keep a central list made up partly of CRB information but also from information provided by employers and the public. There will be no fee for volunteers but there will be a one-off fee of £64 per person.
- If information is available to the ISA to suggest that the individual should not be working with children or vulnerable adults, the individual could be barred from the central list.
- Employers who have roles which involve working with children or vulnerable adults, will be required from 12 October 2009 to ensure before recruiting staff into these roles or allowing existing staff to move into these roles, that such staff are registered with the ISA.
- Employers will eventually be under a duty to refer certain information about their employees and ex-employees to the ISA. This duty will arise if an individual is dismissed or resigns because they harmed or may have harmed a child or vulnerable adult.
- The Act will impact on RSLs in relation to:
  - provision of care and support services in supported housing;
  - staff who may visit tenants' homes (where children or vulnerable adults may be present) i.e. most technical services staff;
  - drivers of vehicles used by children or vulnerable adults.

The new regime

The regime hinges on defining the type of activity which involves working with children and vulnerable adults. The two key concepts are "Regulated Activity" and "Controlled Activity".

Employers must identify roles within their organisation that meet the definitions of these activities.

Regulated Activity
This is:

- work which involves certain close contact with children or vulnerable adults frequently, intensively and/or overnight;
- any activity allowing contact with children or vulnerable adults that is in a specified place (e.g. a school) frequently or intensively.

In the context of deciding whether contact is frequent and/or intensive, "frequent" means once a month or more, and "intensive" means taking place on three or more days in a 30-day period.

Examples of regulated activity

In relation to children	In relation to vulnerable adults
Teaching, training or instruction	Teaching, training or instruction
Care or supervision	Care or supervision
Advice or guidance provided wholly or mainly for children, if the advice or guidance relates to their physical, emotional or educational well-being	Assistance, advice or guidance provided wholly or mainly for vulnerable adults
Treatment or therapy	The inspection of certain establishments, such as a care home, by certain organisations, such as the Healthcare Commission
Certain positions or responsibility, e.g. school governor, trustee of certain charities	Certain positions of responsibility, e.g. trustee of certain charities, director of adult social services
Driving a school bus	Driving a vehicle used to transport vulnerable adults

What does regulated activity mean for employers?

- It will from 12 October 2009 be a criminal offence for an employer to take on an individual in regulated activity if it fails to check that individual's ISA status.
- It will be a criminal offence (from a date yet to be set) for an employer to allow a barred individual, or an individual who is not yet registered with the ISA, to work for any length of time in any regulated activity.

What does regulated activity mean for individuals?

- All individuals providing a regulated activity must be ISA registered.
- It will be a criminal offence, punishable by up to five years in prison, for a barred individual to take part in any regulated activity for any length of time.

Further duties for employers

Once the scheme is in operation, employers will have a duty to refer certain information about employees to the ISA.

This duty arises when an individual is dismissed or resigns, because they harmed or may harm a child or vulnerable adult.

The duty to refer the information arises as soon as the information becomes available, therefore it is important that employers do not err in acting immediately.

There will be a penalty for employers for not referring relevant information without a reasonable excuse.

When is the new regime in force?

12 October 2009 is the start date for the ban on recruiting non-ISA registered staff to controlled or regulated jobs.

In is expected that existing employees will need to be registered with the ISA from 2010 on a phased basis. Those employees with no Criminal Records Bureau ("CRB") check will be registered first. Then, those employees with CRB checks should be registered, beginning with those whose CRB checks are the oldest.

What should employers do next?

- Identify all positions in your organisation that involve dealing with children or vulnerable adults (including dealing with records containing sensitive information about children or vulnerable adults);
- Remember that this activity involves paid and unpaid work, so includes any volunteers;
- Change internal procedures so that whenever a new position is created, you assess whether the position could involve regulated or controlled activity;
- Any new recruits involved in regulated or controlled activity must only be recruited subject to a satisfactory ISA check before they start. A clause should be inserted into employment contracts issued for October 2009 making the employment conditional on a satisfactory check;
- Beware of situations where employees move internally into roles involving regulated or controlled activity from other roles. Any moves from 12 October 2009 must be preceded by a satisfactory ISA check;
- Confidentiality of Data Protection clauses in contracts and compromise agreements should be amended now to specifically allow the disclosure of information to the ISA.

For more information please contact
James Lynas
020 7593 5175
jlynas@wslaw.co.uk

Software Licences – Making the Customer Aware

IT contracts nowadays form an integral part of most businesses and their operation. Whether acquiring the latest Microsoft package or purchasing a bespoke piece of software written specifically to meet your business needs, as the customer, your overriding concern should be to fully understand what it is that you are buying. This article aims to highlight the main issues in software licensing with a view to increasing your bargaining strength in any future negotiations.

Software licences – general

On most occasions when software is purchased it will normally be done so on the suppliers standard terms of business which, depending on the respective bargaining strength of the parties, will or will not be negotiable. When a business acquires a Microsoft consumer package it is unlikely that the business will seek to negotiate the terms on which it acquires the software.

In certain circumstances your business may need to customise a piece of software. Again the supplier will probably seek to contract on its standard terms, however, there may be far more room for negotiation where this software has been written at your request. Where the terms of the software licence are negotiable it is important to be able to identify any shortcomings in the supplier's standard terms and identify possible solutions. Standard terms of trading are often one sided and in favour of the supplier and offer little, if any, contractual protection for you as the customer. The supplier may be disappointed to receive a revised form of the contract but where the bargaining positions of the parties are rated fairly evenly, they should not be surprised to receive an amended version, particularly where the customer is investing a lot of money in the production of the software. It is our experience that standard form contracts offered by medium sized suppliers are often poorly drafted and in some cases, of little meaning.

Restricted use

There are a number of ways in which a supplier can restrict the use of software, for example, by placing restrictions on any of the following:

- the machine on which the software is loaded;
- the purpose for which the software is used;
- the number of users; and
- third party support of the software – the customer is likely to be restricted from contracting with third parties for ongoing maintenance, support and upgrades.

As the customer, you need to carefully identify the restrictions that the supplier is trying to enforce and look to ensure that those restrictions do not unduly inhibit your intended use of the software.

Regardless of the size of your organisation, you need to consider whether the licence being granted is wide enough to meet your particular requirements. The customer should ensure, if necessary, that the licence extends to all other companies, persons and workstations in its group which are likely to want to use the software.

Points for consideration

- Does the licence cover all users who might expect to use the software? Is the licence transferable to and/or capable of being used by other companies in the group?
- Are the restrictions acceptable bearing in mind the purpose for which the software is intended? Consider both current and future business requirements.
- What happens if you replace or increase your hardware capabilities?

Term

The distinction between consumer packages and business packages often lies in the term afforded by the software licence. Consumer package software normally comes with an unlimited licence. Bespoke business package software will usually come with a more limited licence.

Points for consideration

- Is the term of the licence suitable bearing in mind your business requirements?
- Consider the termination provisions – are these unilateral in favour of the supplier or is there provision for you to bring the licence to an end before the end of the term? In what circumstances can you terminate the licence?
- What happens on expiry? Is there provision to extend the licence at the end of the term? Does the licence continue on the same terms or do the terms have to be renegotiated?

Fees

The payment provisions will vary depending on the type of software licence being acquired. In certain circumstances the customer will pay a one off fee and in other cases the customer will pay a one off fee followed by a recurring annual fee, usually associated with ongoing support and maintenance.

Points for consideration

- Does the fee only become payable on successful delivery, installation and data migration?
- Does the fee include any support and maintenance services?
- Consider timing of payments – are monthly instalments preferable to a one off annual charge?
- Are upgrades included in the licence package?
- Is there provision to allow the supplier to increase its charges during the term of the agreement? If so, how are these increases limited?

Backup and alterations

Ideally the customer will have the right to develop, repair and update the software itself (although the usefulness of such provisions may be questionable) and therefore not rely on the supplier in order to make any amendments to the software. The supplier will in all likelihood seek to retain all associated intellectual property rights so that the customer is dependant on it for any alterations.

Points for consideration

- Does the licence allow the user to make copies for backup, testing or other purposes? If so, are these clauses drafted widely enough bearing in mind the business critical nature of the software or are restrictions imposed?
- Are there any rights to alter or maintain the software? If so, then in order to receive the full benefit of this right, the customer will need access to the source code or object code as appropriate.
- How will the terms of access to the source code be dealt with? Will the parties be entering into an escrow agreement governing the conditions for the release of the software? If this is the case, are the terms for the release of the software clear and easily enforceable?

Delivery, installation and testing

Depending on the nature of the software it may be appropriate to conduct acceptance testing to ensure that the software is working and performs in accordance with the specification. It is important to determine at the outset how responsibility for installation and testing is to be split between the parties. Where the testing does not meet expectations, the customer will usually be able to rely on warranties given by the supplier that it will perform in accordance with the criteria. It is advisable to try and

negotiate that payment (or at least payment of the final instalment) is conditional upon successful completion of the testing phase.

Points for consideration

- How will the software be delivered (on CD-ROMS, by internet download)?
- Is sufficient time for testing and accepting the software provided for? Conversely, is the supplier to be under strict time obligations for delivery?
- If you are not responsible for performing acceptance testing, are you and the supplier clear what constitutes acceptance? It is important to ensure that your requirements have been understood and are contractually enforceable.
- Did the test that you are conducting accurately demonstrate the way in which you expect the software to perform in your business environment? The testing should be sufficient to cover the software's intended function, expected usage and demand.
- Is there adequate provision to terminate the licence and recoup any money paid out if the software does not meet acceptance criteria within a certain period of time?
- Where your bargaining position is strong try to insist on liquidated damages for any delay in delivery or acceptance.

Maintenance obligations

Software support and maintenance agreements can cover a wide range of services and it is important to identify which services are essential for your business requirements. A customer will pay a fee for any ongoing support. This may be a fixed charge or it may fluctuate depending on the service requirements that your business has.

As the customer you should try to ensure, as far as it is possible to do so, that the supplier commits to particular service levels. For example, try and ensure that the supplier agrees to minimum response times, minimum levels of service availability and also try to get the supplier to commit to fixing the fault within a specified period. Failure to achieve any specified service levels may entitle you to be compensated. The more integral the software is to your business, the more important it is to insist on rapid response times in any support and maintenance agreement.

Points for consideration

- Are you clear on how payment for maintenance and support will operate? Do you pay for the number of hours provided or for the particular fix in question?
- Does the licence include new versions of the software? Are you obliged to accept modifications?
- Are different priority levels assigned to different faults and do the priority levels accord with your understanding of what constitutes the most important faults?
- Which faults have the most commercial significance to your business?
- Are the "fix" times satisfactory? Are the helpdesk opening hours satisfactory? Do you require 24 hour support?
- How will support be provided? Will any support be required onsite or will it be provided remotely?

Warranties, indemnities and limitations on liability

The customer can expect to receive certain warranties from the supplier as the bare minimum:

A warranty that the software will comply with the agreed specification. The customer should therefore ensure that the specification is sufficient in order to obtain the benefit of the warranty.

An undertaking to repair or replace defective software provided that it is notified within a certain number of days of delivery. It is in the customer's interest to try and negotiate as long a warranty as possible.

A warranty that the supplier has the right to grant any intellectual property licence. Warranties are often accompanied by indemnities and the customer can expect to be indemnified in the event that any use of the software infringes the rights of any third parties.

Where the supplier is also providing support and maintenance services it will be usual to expect a warranty that the services will be performed with reasonable skill and care and in accordance with good industry practice.

Points for consideration

- Has the supplier tried to limits its liability? If the supplier has tried to cap its liability, is the cap high enough bearing in mind the financial risk that you will be exposed to in the event that things go wrong? How business critical is the software in question?
- Has the supplier tried to exclude liability for certain losses? Be clear as to what losses the supplier will not accept liability for and how this may impact on your business.

Summary

There are many factors to consider when negotiating and entering into a software licence. This article highlights some of the main issues that you should take into account. We regularly advise a wide range of businesses, from multi-national organisations to small companies, on all aspects of software licensing. We can use our experience in this field to negotiate the best possible solution to meet your business requirements.

For further information please contact
Richard Tinham
020 7593 5165
rtinham@wslaw.co.uk

Mel Oster
020 7593 5106
moster@wslaw.co.uk

Chancel Repair Liability

Shall we start from the beginning? As far back at Henry VIII? Or further back, to the days before Richard the Lionheart became King in 1157. The Rector of the Parish was responsible for repairing the eastern end of the church which holds the altar (the Chancel) whilst the parishioners maintained the nave (where they sat and listened to the Rector's sermons). Monasteries flourished and their number grew for the next four centuries, and by the 16th Century many monasteries employed a Rector.

In 1534 Henry VIII made himself the Supreme Head of the Church of England, dissolved the monasteries and seized ownership of all their property. This property was then dispersed along with the chancel repair liability. If the property was sold to more than one person then they shared the burden of repairing the chancel, and these people were known as lay rectors. Mr and Mrs Wallbank are two such "lay rectors".

In 2003 the House of Lords overturned a Court of Appeal decision in Parochial Church Council of the Parish of Aston Cantlow v. Wallbank (26 June 2003) and Mr and Mrs Wallbank – the new owners of a rectorial field – were ordered to pay a £95,000 repair bill for their local parish plus legal fees which had escalated to £250,000. Mr and Mrs Wallbank had inherited a field classified as rectorial property and under the Chancel Repairs Act 1932 this made them liable for repairs to the chancel of their local church – St John the Baptist Church.

Following the Aston Cantlow decision, the Government introduced the Transitional Provisions Order which came into force in October 2003 (Land Registration Act) which preserves the repair liability until 2013. Its aim is to stop the liability being an unregistered interest which overrides first registration in 2013, and the liability will also cease to be an unregistered interest which overrides registered dispositions. Therefore all properties that are liable should have cautionary notices registered against them at the Land Registry. The Church authorities have until 2013 to apply to the Land Registry to register these entries otherwise the property's liabilities will cease upon sale. Proprietors who are liable should make sure that their neighbours who share the liability are registered otherwise they will be alone in settling any repair bill. Owners will still be liable after 2013 whether or not a notice has been registered but they can escape liability by selling the property.

However the changes only remove the ability for the interest to override; the interest itself is not extinguished. Post 2013 the liability will remain as an unregistered disposition as it always has, which will only lose priority over a registered disposition for valuable consideration. IT seems that the lack or omission of a notice registered against the charges register will not effect the enforcement of any claim.

So the chancel repair liability's existence will not come to a tidy conclusion in 2013 but will survive beyond that date.

And unfortunately (for some) following the House of Lords' decision many purchasers' solicitors and parish councils have started investigating chancel liabilities. The parish has a responsibility to generate income in this way and the parish's claim can fall indiscriminately against any or all of the "lay rectors" but they would be well advised to pursue lay rectors with greater resources and funds than the average property owner, such as a Housing Association, Developer or House Builder.

But will this liability affect many proprietors? The liability only attaches to medieval parishes where at least part of the medieval chancel remains intact, and runs with the land which falls within the parish boundary. These are not modern boundaries but can only be ascertained by scrutinising the National Archives' parish entries. If a purchaser was investigating title to a property he was keen to buy, and the title deeds revealed a liability he would be well advised to conduct a search of the Archives and find other proprietors who can share the burden of the liability and enter cautionary notices against those titles, in order to safeguard his own position post-2013. If liability was established the purchaser would be liable to settle any sum demanded for repair. He could be entitled to demand contributions from other proprietors amongst whom the liability is shared and if they refused, then enforcement proceedings may be brought in court.

If the purchaser's chancel search showed a possible liability he would also have the option of taking out an insurance policy. This is a popular option for a prospective purchaser as it is cheap and quick, and bypasses the problem but does not solve it.

In practical terms a registered social landlord ("RSL") would be well advised when buying a site for residential development (or a building for refurbishment and sale) to carry out a search to reveal whether the land is burdened with chancel repair liability.

If the search is clear then a copy should be enclosed in the legal pack and forwarded to the purchasers' solicitors. If the search expires by the time of sale then the RSL landlord should carry out a block search against all the properties that are being sold and include a contribution towards the cost of the search in each purchaser's contract (or completion statement).

If the search is not clear and it reveals a potential liability then the RSL landlord should obtain a block indemnity policy which covers each purchaser in the event of a claim. (The risk of a claim being made is very low so purchasers should accept a policy if the search does reveal a liability). Similarly the RSL landlord can recoup the cost of the policy from the purchasers by including a contribution towards the cost of the policy in the completion statement.

The RSL must ask their conveyancer to check and approve the policy wording and cover. For instance, does the policy cover the purchaser's mortgagee and is it transferable to a subsequent purchaser? If all this information is included in the legal pack at the outset then delays can be avoided later in the transaction.

In the rare event that RSL does not take out an indemnity policy (if the search reveals a potential liability) and the parish enters a cautionary notice against the RSL's title then RSL should instruct their conveyancer to identify all the titles which fall into that parish's medieval boundary and enter notices against them so that if and when if the parish demands the cost of repair from the RSL the burden can be shared by the other registered proprietors.

The RSL must establish their position at the outset of any transaction otherwise the questions about chancel repair will reoccur upon every sale and assignment.

If parish councils invest more time and resources in establishing this liability by the 2013 deadline then the liability will be registered as a notice against the title of many home-owners not in the process of selling their property and not aware of the option of an insurance policy. Only time will tell how this medieval liability will evolve.

For further information please contact
Labeeba Zia
020 7593 5123
lzia@wslaw.co.uk

Directors Duties under the Companies Act 2006

The Companies Bill received Royal Assent on the 8th November 2006. The Companies Act 2006 ("the Act") will largely replace the current Companies Act 1985 as amended although some parts will remain in force such as those relating to community interest companies, company investigations, and financial services. Amongst other things the Act, for the first time, has codified the general duties of directors. With the exception of the provisions dealing with a conflict of interest (ss.175 – 177) which come into force on 1 October 2008, the provisions relating to directors general duties came into force on 1 October 2007.

If you are a director, or have been invited to become one, you need to be familiar with these duties.

Common Law

Up until 1 October 2007 a director's general duties were almost entirely based in common law. They had been developed through the courts as case law over a number of years. In addition, there were also a few duties set out in statute such as health and safety and insolvency obligations. These common law duties include an obligation:-

- to act in good faith in the best interests of the company as a whole;
- to avoid conflict;
- not to make a secret profit;
- to exercise independent judgement; and
- to exercise skill and care.

Codifying directors' duties

The Act set out to codify director's duties so that company lawyers no longer had to look back at 150 years worth of judges' decisions to ascertain a director's responsibility in any given situation. The aim was that anyone could open a statute book and see the position clearly set out over a few pages of text, however, this was somewhat thwarted by section 170(4) of the Act which states that the general duties of directors shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

The Seven General Duties

Duty to act within powers (s.171)
This duty codifies the current common law position that directors must act in accordance with the company's constitution (i.e. the memorandum and articles of association, including decisions taken in accordance with the articles of association and other decisions taken by the members where they can be regarded as decisions of the company). The directors must exercise their powers for the purposes conferred so, for instance, shares should be issued to raise money and not to stop a person gaining control to the company;

Duty to promote the success of the company (s.172)
Although the duty will still be owed to the members as a whole and not to any other stakeholders, in fulfilling this duty the director must, so far as reasonably practicable, take into account:

- the likely consequences of any decision in the long term;
- the interests of the company's employees;
- the need to foster business relationships with suppliers, customers, and others;
- the impact of the company's operations on the community and environment;
- the desirability of maintaining a reputation for high standards of business conduct; and
- the need to act fairly as between members of the company.

It is not clear how this requirement will take into account the long term consequences of the directors' decisions, nor how the different interest groups to be considered can be satisfied – particularly as the wording seems to move away from the basic concept of acting in the best interests of the company and uses the new (more difficult) concept of "success".

There also seems no need for a director to have regard to the interests of the future members of the company when acting on behalf of the company. This will create concerns for boards, both at a practical level in deciding how to reflect the new requirements when making decisions, and also in terms of the increased scope for challenges to review directors' decisions, particularly given the new provisions regarding shareholder remedies. There is also a potential conflict between ensuring the success of the company in respect of the interests of the employees where they are not shareholders.

Duty to exercise independent judgement (s.173)
There is no equivalent duty at common law. However, directors are under a current obligation not to fetter their discretion to act or take decisions. This is not infringed by a director acting in accordance with an agreement duly entered into by the company which restricts the future exercise of discretion by its directors; or in a way authorised by the company's constitution. From directors' point of view it is therefore likely to prove helpful to have the company as a party to a shareholders' agreement and to have appropriate provisions in that document.

Duty to exercise reasonable care, skill and diligence (s.174)
No change in the standards required. This obligation is judged against a reasonably diligent person with levels of general knowledge, skill and experience gauged objectively and subjectively. Thus, people with specialist knowledge will have a heavier burden than those who do not have specialist knowledge, but there will be a minimum level expected from all.

Duty to avoid conflicts of interest (s.175)
There is an exception where they arise out of a proposed transaction or arrangement with the company. Currently, if a director allows his personal interests or duties to another person to conflict with his duty to the company then, unless the shareholders consent to the conflict the company can void any relevant contract and he must account to the company for any secret profit he has made. Significantly, this is avoided where authorised by the directors but it is important to check that this is not invalidated by the company's articles, a lack of quorum or that the agreement is obtained counting the vote cast by the interested director.

Duty not to accept benefits from third parties (s.176)
There is no express duty to this effect at common law. It appears to derive from the current duties, to act in the company's interests and rules dealing with conflict of interest. A director must not accept a benefit (including a bribe) from a third party by reason of his being a director.

A director obtaining a benefit from a third party can only be authorised by the members of the company and not the board.

Duty to declare interest in proposed transaction or arrangement (s.177)
The rules of equity determined that directors could not enjoy an interest in any proposed transaction or arrangement which involved the company unless the acquisition of the potential interest had been authorised by the members of the company. If a director is interested in any way (whether directly or indirectly) in a proposed transaction or arrangement with the company he must declare the nature of the interest to the other directors. The declaration must be made before the transaction or arrangement is entered into.

Health and safety

In addition to the above, directors should not forget that they can be held personally liable

for breach of duties imposed on organisations and employers by health and safety law.

Organisations must provide a written health and safety policy if they employ five or more people. They must assess the risks posed by their activities and put in place preventative and protective measures, obtain competent health and safety advice and consult employees about risks and preventative and protective measures. The sanctions for failure to comply with these duties include fines, imprisonment and disqualification as a director.

Directors should ensure that health and safety considerations are taken into account in board decisions. Appointment of a health and safety director may help ensure that they are not forgotten. Health and safety policy must be communicated throughout an organisation and any necessary training provided to employees. Directors should also monitor implementation of risk management procedures and carry out periodic audits of their effectiveness. The Institute of Directors and Health and Safety Commission have drawn up a useful 'health and safety leadership checklist' to assist in this respect.

Conclusion and action points

Although the duties cannot be excluded or changed they can be ratified by a vote of the shareholders subject to a few exceptions such as fraud. These duties will be owed by a director (including a shadow director) to the company and are not owed to the individual shareholders and so must be enforced by the company rather than by its shareholders. The Act has widened the fraud exception by providing that any shareholder may bring a derivative action in respect of breaches of duty (which have not been ratified) including notably negligence even where a director has not profited by it, but subject to the requirement that the court's approval to bring the action must be obtained.

Some concern has been raised that the changes to the directors duties coupled with the new provisions allowing shareholders to bring derivative claims may increase directors' exposure to litigation. Directors should therefore make themselves aware of the new changes and corporate practices should be reviewed as should any existing director and officer insurance to ensure that claims under the new regime are covered.

For further information please contact
Richard Tinham
020 7593 5165
rtinham@wslaw.co.uk

James Oxley
020 7593 5045
joxley@wslaw.co.uk

The Scope of the Rules on Works Contracts and the Implications of Auroux v Commune de Roanne

The Directive and Auroux

People who deal with land transactions regularly may not have dealt with procurement issues before. Land transactions are often exempt from the procurement regime and/or historically have been structured in such a way so that they fell within the so called "land exemption". While recent case law sheds more light on what constitutes a works contract it also has the effect of widening the scope of contracts caught by the EU procurement rules.

The Public Contracts Directive 2004/18/EC ("on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts") (the "Directive") setting out the rules and obligations concerning public sector procurement was implemented in the UK in 2006 when the Public Contracts Regulations 2006 (SI 2006 No.5) (the "Regulations") came into force.

In broad terms, the Regulations set out principles and procedures that RSLs (who are generally considered to be contracting authorities for the purposes of the Regulations) must follow when seeking to award contracts in respect of goods, services and works. The Regulations apply to all forms of contract (whether single contracts or multi-supplier framework agreements) unless they fall within an exempt category or the value of the contract is below the relevant threshold. The type of contracts that are exempt include those which are: classified as secret; for the acquisition of land; for financial services; concluded with a view to raising money or capital; and those in respect of employment.

While the Directive and the Regulations continue to draw a distinction between contracts for works, services and supplies, for the most part a similar procedure applies to all forms of contract. As with all contracts awarded by RSLs, consideration needs to be given to what the RSL is procuring, whether the value of the contract is above the relevant threshold and whether any exemptions apply. For the purposes of this note, we will only consider the application of the procurement rules to work(s) contracts.

Consideration was given as to what constitutes a "works" contract in a case involving a French local authority: Jean Auroux and others v Commune de Roanne. In this case the local authority sought to construct a leisure centre in the area around a railway station, which was to include a multiplex cinema, commercial premises, a public car park, access roads and public spaces. The construction of other commercial premises and a hotel were envisaged subsequently. In order to execute that project, the municipality of Roanne engaged a semi-public development company, to acquire land, obtain funding, carry out studies, organise an engineering competition, procure the construction works, coordinate the project and keep the municipality informed. An important feature of the arrangements was that not all the buildings to be constructed were to be owned by Roanne and only the car park, access roads and public spaces were to be transferred to Roanne once completed.

The court held that the contract between the local authority and the development needed to be advertised in accordance with the Directive because its ultimate objective was the design and execution of works corresponding to the specified requirements of the local authority regardless of the fact that most of the elements of the development were private/commercial in nature. The ECJ made it clear that it is the realisation of works by whatever means that determines the application of the award procedures

regardless of the ownership and final utilisation of the works constructed under the development agreement.

The “land exemption”

The Directive excludes from its application contracts for the acquisition or rental by whatever means of land, existing buildings or other immovable property. The “land exclusion” covers both land and existing buildings. To the extent, therefore, that the buildings in question have already been built, the purchase of land together with buildings on that land are excluded from the application of the Directive and Regulations.

The situation may, however, be different where the buildings have not yet been erected. Until Auroux it was arguable that where the development was already planned and construction was about to or had commenced, this would still have qualified as a contract for the purchase of land and “existing” buildings to the extent that all an RSL will be doing is buying a building “off plan”.

Following the ruling in Auroux, RSLs need to be more careful when receiving “works” or a “work” alongside a land transaction particularly where a land development agreement entered into by RSLs requires construction to meet the RSL’s specifications.

What are Works?

“Public Works Contracts” are defined in the Directive as “…. public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority.”

A “work” means “the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function.”

Works

The first part of the definition relating to “works” is self explanatory (i.e. the ”execution” or the “design and execution” of activities falling under Annex I of the Directive.

Work

The second part of the definition of a “Public Works Contract” is rather more encompassing, its purpose being to cover the possibility that RSLs may set up complex ownership or contracting structures that may result in a works contract not being directly awarded by the RSL itself. This is also commonly known as “indirect procurement”.

The European Commision’s view is that the provisions of the Directive have to be applied regardless of legal nature of the contractual arrangement (be it a sales, rental, leasing or any other contract) without regard to the ownership structure and the final utilisation of the premises constructed under a contract if it involves “the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority”.

The Directive does not provide any further clarifications as to what constitutes “requirements specified” but, if a contracting authority details or influences the requirements for the relevant works, it will be a matter of degree and a review of the facts applicable to those works will be necessary.

The next step in deciding whether activities constitute a “work” is whether their outcome fulfil “an economical and technical function”. Whether the work relates to a wider development or to a building within that development, if it is considered to fulfil an economic and technical function and the other elements of a “public works contract” are present, the provisions of the Directive will apply.

Conclusions

The implications of Auroux for the development and regeneration market are quite wide reaching in so far as it is not only the public sector elements of a development that need to be looked at but also the private/ commercial elements.

RSLs will need to be careful in the future in seeking to determine whether any particular development agreement will need to be advertised in accordance with the provisions of the Directive. Matters such as the purpose of the agreement, financial contributions and risk, ownership (including transfer at a later stage) and occupational rights will need to be considered in detail before proceeding with the project.

The “land exemption” cannot always be relied upon if the purpose of the transaction is the construction of works to an RSLs’ specification and requirements. The upshot of the recent case law, if one could call it so, is that the ECJ has taken a further step towards clarifying the practical interpretation and application of the Directive.

For further information please contact

Richard Tinham	**Dan Rugina**
020 7593 5165	**020 7593 5184**
rtinham@wslaw.co.uk	**drugina@wslaw.co.uk**

Winckworth
Sherwood

Solicitors and
Parliamentary Agents

35 Great Peter Street
London SW1P 3LR

T 020 7593 5000
F 020 7593 5099
DX 148400 Westminster 5
www.wslaw.co.uk