

Edition 1

Focus

on Housing



The housing lifecycle
The rise of renting continues

Real Estate Law in 2019
Key developments for this year

Mental health and student accommodation
How can providers help their customers?

Plus:
Government housing plans
Blockchain and student housing
Viability assessments



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Welcome...

...to the first edition of **Focus on Housing**

I'm honoured to be able to introduce this first edition of our newest magazine. In this and future editions, we'll be sharing insights into what's happening within the housing sector. We'll also highlight the work we're doing to represent the interests of our clients across the country, and our efforts in helping to shape the future of the industry.

This is a role we take extremely seriously, indeed it's incumbent on us to do, beyond the privilege of providing legal services to our student accommodation, private rented sector (PRS) and home builder clients.

It's fair to say that over the last 12 months in particular, the housing sector has seen many disruptors rearing their heads. From government and local politics to the media's portrayal of the housing crisis and the 'ground rent scandal,' it's a time of great change for the industry.

This first edition looks at how housing is increasingly, and unavoidably, about providing a service to a consumer. This trend is something that purpose built student accommodation and build-to-rent providers have been talking about for some time now, but it's rapidly expanding out into other areas of the sector.

We have compiled a collection of articles on leasehold reform, planning law and build-to-rent from experts across Irwin Mitchell. We also have an article on student housing from Knight Frank's James Pullen, and comment from Natasha Devon MBE on how the student housing experience can affect mental health. We're extremely grateful to both for their contributions.

Finally, we look at government legislation, and other legal developments across real estate more generally, that are on the horizon and, of which, you need to be aware.

I sincerely hope that you enjoy the read and find it useful for your businesses.

Best wishes,

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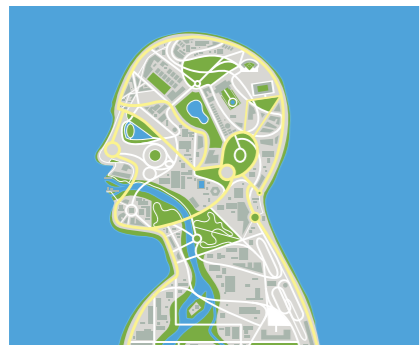


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The evolution of the housing lifecycle

It's estimated that 5.79 million households will be in the private rented sector by 2021. What does this rise mean for the housing industry?

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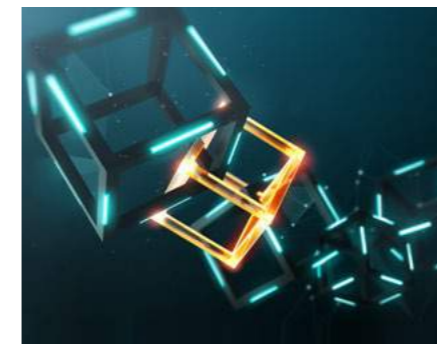
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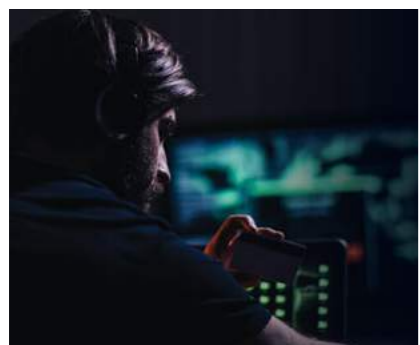
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Lease terms: clarity and reform

Buying a leasehold property can be complicated. Could standardisation make things easier?



Louise Oliver
Associate, Residential Property

There's been a crisis of confidence in the leasehold market.

Government, Parliament, and the Law Commission have all separately identified, and are consulting on, a number of issues with the current system. The question is whether these can be solved by changing professional and market practices, as well as legislation.

Homebuyers of leasehold properties deserve sympathy. Moving house is notoriously stressful, so when trying to deal with relocation, as well as family and work obligations, it must be tempting to avoid reading a 50-page lease.

There are undoubtedly inconsistencies in the standard and contents of lease reports provided by lawyers up and down the country.

Some lawyers and conveyancers don't consider that they can take the time needed to explain the lease to their client. This is because the fee they're able to charge often only covers the cost of carrying out the legal transaction, not advising on its terms.

How many purchasers read a lease report in full? Does the excitement of exchange and completion lead them straight to the report summary, and signing the contract? Either way, there seems to be a vital piece missing to this puzzle.

Setting the standards

One practice that might help (which Irwin Mitchell has proposed in its response to the current consultations) is the introduction of standard form residential leases. But drafting these wouldn't be straightforward, given the complexities of each building. There would need to be various precedents for the different types of properties (terraced, converted, purpose-built), and a single schedule including specific individual provisions to allow for some flexibility.

An additional proposal (also submitted by Irwin Mitchell to the HCLG inquiry) is to develop a standard form of lease report with questions that must be answered in all cases, to be used by all lawyers across the country. Again, this could help a purchaser when they review their lease. The report could include a table informing purchasers whether particular clauses are present in the lease, and show them where those clauses are located. Leases already have to include a "prescribed clauses table" for Land Registry purposes, which explains where to find particular text that needs to be put on title registers. Surely purchasers should have the same level of guidance, if not more?

The table could, for example, point the purchaser to the definition of any ground rent, set out the initial amount, and clarify where, how and when that rent is to be reviewed. The legislation introducing these tables could mandate that the lease and the table contain a clear worked example, setting out how the rent would increase in the future. It might be more feasible to have a purchaser first read the table and the clauses pointed out in it, rather than wade through the entire lease.

An informed decision

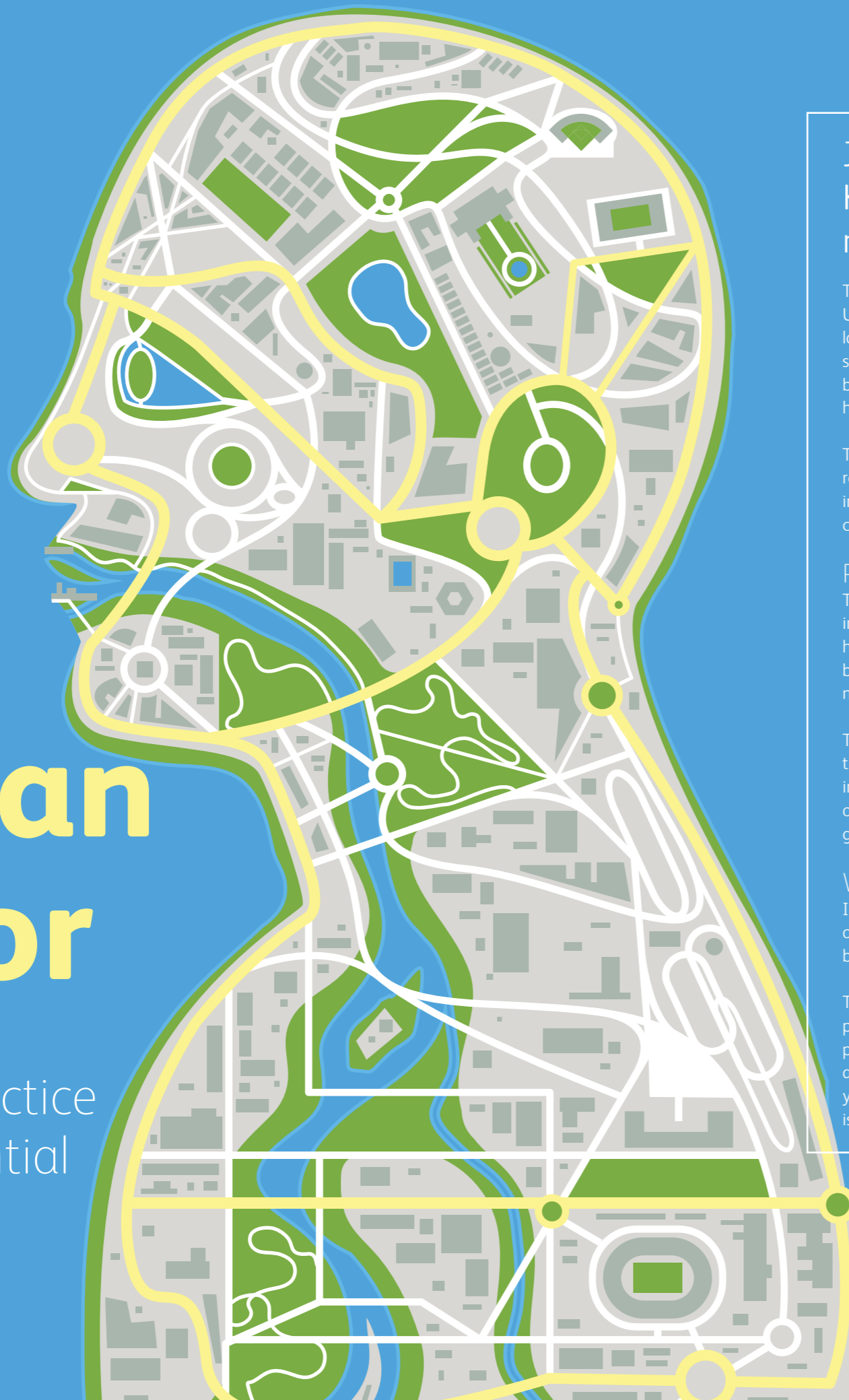
This standardised reporting approach is already used in commercial property conveyancing, so it could be easily adopted. These proposals wouldn't replace the need to review the lease, but would make it less forbidding. In turn, this would make it more likely that purchasers would review and understand the terms they're signing up to.

Some would argue the leasehold system is far from perfect. But the alternatives, such as the Commonhold scheme, also leave a lot to be desired. While the concept of leasehold ownership is easily misunderstood, a uniform approach implementing the above proposals would go a long way to providing transparent advice and clarity on lease terms.

For now, the government will continue to consider the various consultations into the leasehold system. Purchasers should be vigilant when reviewing their lawyer's report and the lease terms themselves, and raise any concerns before exchanging contracts.

The human factor

Moving from theory to practice in UK residential investment



James Pullan, Global Head of Student Property at Knight Frank, looks at different sectors of the housing market – and the opportunities on offer for investors.

The theoretical case for institutional investment in UK residential property has been building for the last 20 years, underpinned by a slow but consistent shift in household tenure. But the practical case, built largely on the success of the UK student sector, has only recently gained significant traction.

The difference has been a new understanding and recognition of the human factor, demonstrated in the changing mindset of both investors and, crucially, consumers.

Private rented sector (PRS)

The long-term decline in private renting ended in the 1990s. Between 2000 and 2017, the total housing stock in England increased by over 10%, but the share of stock that was privately rented more than doubled.

This shift has been driven by long-term changes in the wider housing market, the economy (especially in key regional cities) and by demographics. All of these have driven consistent, long-term rental growth in residential property.

What does this mean for investors?

Investors are beginning to react to this growing opportunity, especially given current low returns in bond markets.

There are currently around 132,000 units of purpose-built rented accommodation in the pipeline. Half of these have been completed or are under construction, and the other half have yet to start construction. Much of this construction is taking place in major cities, such as London,

Birmingham and Manchester, and there are signs of development activity picking up in other locations.

At Knight Frank, our analysis of the key drivers in the rental market, combined with the outlook for household growth, indicates that the sector is set to expand from 5 million households to 5.79m by 2021. As a result, investors will become increasingly committed to longer-term income returns, as opposed to capital value. We forecast that the size of the UK build-to-rent (BTR) market is set to increase significantly from an estimated £25 billion in 2017 to £70bn by 2022.

Student property v residential

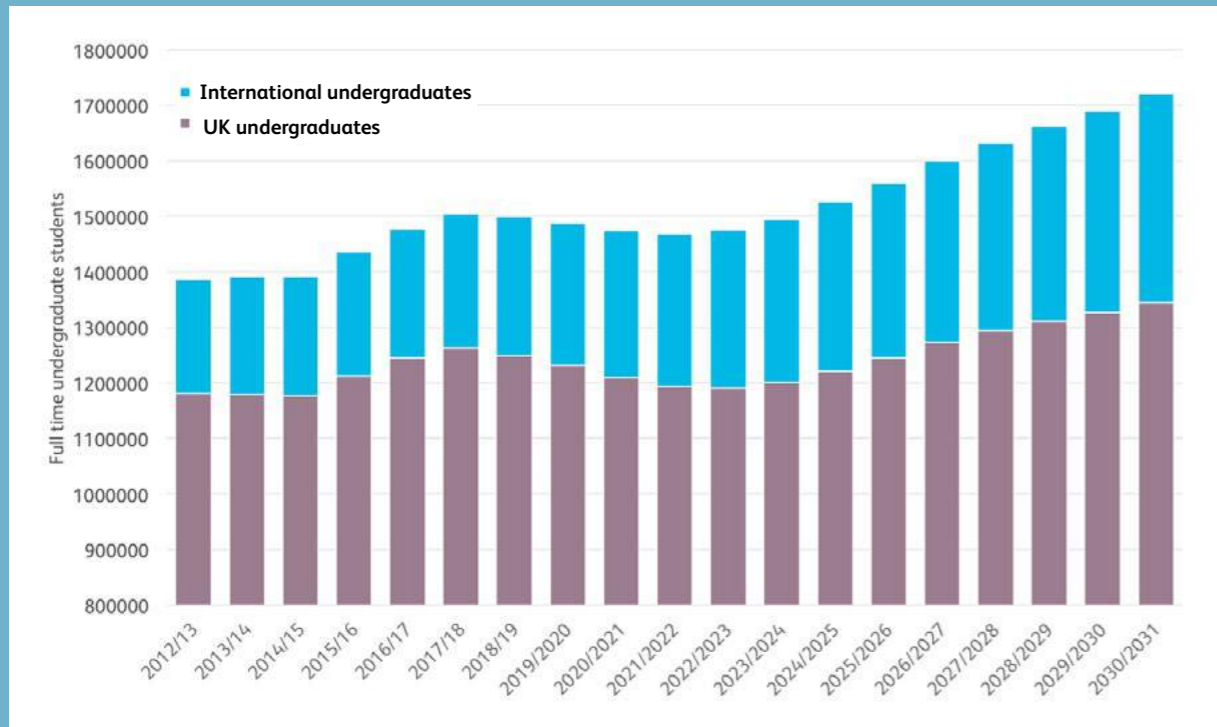
Compared to levels of historic investment in UK student property, institutional investment in residential is in a relatively immature position. But whilst each of the three specialist residential sectors (PRS, later living and student) has a specific occupier type, they're all linked together as occupiers transition through each life-stage.

For example, universities attract young people into regional cities to study, and help keep them there. A recent survey of 70,000 students undertaken by Knight Frank and UCAS showed that 41% of final year students intended to stay in their university city after graduation. The step from purpose-built student accommodation to purpose-built graduate accommodation is obvious, and this separates residential investment in BTR, and other specialist property investment, from the wider market.

Whilst occupier demand for commercial property is finely balanced and in line with wider economic

Continued overleaf >>>

Figure 1. A projection of full-time UK undergraduates



Source: Knight Frank

performance, residential investment occupier demand is far less cyclical, driven by individuals who don't – or often can't – change their need for certain types of property.

Results from the latest Knight Frank tenant survey, which canvassed the views of over 5,000 individuals currently renting, indicate that whilst 37% of renters are in the sector through choice, 68% of current renters still expect to rent in three years' time. An estimated 25% of households will be in PRS by end of 2021.

Younger workers especially are taking advantage of the increased flexibility of renting as a tenure that allows them to move between locations without incurring any of the costs associated with buying and selling a property.

Affordability constraints in the sales market are also curtailing some tenants' plans for house purchase, resulting in a longer stay in the PRS as they save for a deposit. There is also growth in the PRS within the later living market.

Later living

There are currently 11.8m over-65s living in the UK, and this cohort is projected to increase by 20% in the

next ten years. Knight Frank's latest survey shows that some 25% of over 55s would consider downsizing or moving into some form of retirement, or purpose-built, accommodation. This equates to potential demand for this type of housing from a population of over half a million. The gap between current supply and projected demand for retirement housing across the UK is stark.

The PRS is evolving. This is prompting new understandings of what it means to rent and let property. Whilst the last five years have been characterised by the rapid shift in size and complexity of demand for private rented and purpose-built accommodation, the next five years will be characterised by changes in the way private rented homes are supplied.



James Pullan
Global Head of Student Property, Knight Frank
knightfrank.co.uk

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Mental health and student accommodation

With 25% of students encountering mental health issues whilst at university, what should accommodation providers do to help their customers?

There's an encouraging trend to normalise our approach to mental health so that we view it as we do physical health – that mental health is something that can be maintained by the individual, with help if needed, and that others can make allowances for.

Despite this, one in four students face mental health issues at university. Whilst the majority of these issues arise because of workloads, 46% of respondents to a Save the Student survey attributed them to their living standards.

Are providers responsible for mental health issues?

Any landlord or accommodation provider has to provide physically safe accommodation to occupiers and visitors. If they don't, it could lead to mental distress, which the provider would be liable for, as well as any physical harm caused.

If private student accommodation is let to an occupier and is physically safe, it's difficult to see how the provider can be held legally responsible for monitoring students' mental health. In a traditional landlord and tenant relationship, the provider is expected to allow the tenant "quiet enjoyment." This means they should leave them to get on with it.

On the other hand, universities have greater pastoral obligations to their students than private landlords. They have more responsibility for providing services, such as counselling, and making allowances for the impact mental health could have from time-to-time on students' responsibilities as occupiers.

What can accommodation providers do to help?

Buildings, including student housing blocks, have to be designed and operated to preserve the occupier's physical health. Increasingly, student accommodation providers are considering how they can promote student mental health as well.

If it becomes apparent that a student has a mental health issue, the provider should bear that in mind before taking any steps in respect of, for example, a breach of the licence agreement or a failure to pay fees. It can't be seen to discriminate against the occupier because of their mental health.

Leaving the hard edge of the law to one side, we're increasingly seeing student housing schemes that are owned and operated in ways that promote mental health, just as much as they promote physical wellbeing.

Student housing is one of the main examples of the benefit of treating "space as a service." Providers are deriving financial and other benefits from making sure student occupiers feel happy and secure during their time in the accommodation. It's common sense for them to do what they reasonably can to make sure students stay on their courses, and are happy and healthy when they're using the accommodation service.

Overcoming social isolation

A major contributing factor to mental health is social isolation, and this could be a particular problem for foreign students.

In previous times, it was assumed that all student issues could be resolved by going to the pub, but today's students are just as likely to appreciate and benefit from onsite sports facilities, gyms, or cafés.

Accommodation providers can help with addressing isolation by encouraging clubs and interest groups, like a cinema group, and ensuring they have access to communal facilities.

Designers and architects of student schemes will already be considering how much of an impact access to light and shielding from noise will have on physical and mental health. They'll also be increasingly making sure that corridors and circulation areas encourage students to mix, and that facilities, such as quiet study areas, don't feel isolated.

For a number of reasons, it's clearly important to design and operate a building with mental health in mind.



Brian Dowling
Partner, Real Estate

Where's your head at?

Natasha Devon MBE on how her new campaign is helping students overcome the challenges of talking about mental health

According to the charity Student Minds, university students (who make up around 50% of young people aged 18-21) have lower levels of mental wellbeing compared with the general population. A contributing factor to this is the impact of living independently for the first time, leaving behind the familiarities and routines of home.

In recent years, the trend for student accommodation has been to make it more individually self-contained, with fridges in rooms and en-suite bathrooms. Yet the anecdotal evidence I hear on the ground suggests this is unhelpful to psychological wellbeing – a crucial element of student (and anyone's) mental health is a sense of community and belonging.

We also know physical activity is key to maintaining mental, as well as physical, health. Fitness facilities in student accommodation are helpful, as is access to nature, with the benefits of exercise magnified when undertaken outside.

I believe people of all ages lack the knowledge and confidence to have conversations about mental health with colleagues and friends. That's why I co-founded a campaign called **Where's Your Head At**.

The campaign aims to change the law so provision for mental health first aid is mandatory in all places of work, in the same way medical first aid is. We've already succeeded in getting the Health and Safety Executive to change their guidelines so that considering mental health in first aid provision is more explicit. A change to the law is currently being debated in Parliament.

Find out more at
www.wheresyourheadat.org



Natasha Devon MBE

_DOUBLE_CHEQUE_

Online payments always carry a risk – but hackers have developed a new type of scam



Dorrien Peters
Partner, Commercial Litigation

PARANOID OR JUSTIFIED?

Nathan Blecharczyk, the American billionaire and co-founder of Airbnb, is quoted as having said that, “with commerce comes fraud.” Sadly, this appears to be universally true and, despite the commonly held belief that we can rely on the security of our trusty email accounts, the reality is that this level of paranoia may be justified.

In a society that’s more dependent on technology than ever before, countless businesses are falling victim to the latest trend in the scam operations of online hackers. Moving away from more ‘traditional’ operations, these online con-artists have taken to the interception of emails containing payment details that are routinely sent between businesses. Once in possession of such an email, the hacker replaces the intended recipient’s bank details for the hacker’s own, which then leads to the victim unwittingly transferring their payment of a legitimate invoice directly into the hacker’s bank account.

In the majority of cases, the money transferred to the hacker cannot be recovered. Furthermore, the original invoice remains unpaid and the victim of the fraud is still legally liable for payment.

The recent decision of **J Brazil Road Contractors v Belectric Solar Ltd [2018] (Case No: C1EQ331C2 County Court at Canterbury 22 January 2018 WL 01993147)** demonstrates the position and is one of only a few reported cases on this type of fraud (despite the frequency of its occurrence).

The customer received an invoice from their contractor but, unbeknown to the customer, the contractor’s email account had been hacked. The payment details on the contractor’s invoice were changed and sent to the customer on a separate email from the same email account by the hacker. Relying on the payment information they’d received, the customer subsequently paid the invoice amount to hacker and not the contractor. Due to non-payment, the contractor later made a claim against the customer for the full amount of the invoice which, in the view of the contractor, remained outstanding.

The customer argued that they were entitled to rely on the instructions for payment as stated on the email from the contractor’s email address, and that the law of agency applied.

The Court found that both parties were innocent victims of the scam but, nevertheless, held that the customer remained liable for payment of the invoice. The customer appealed but the case was dismissed.

In dismissing the appeal, the appellate judge commented that the law of agency didn’t apply in these circumstances. Furthermore, whilst estoppel wasn’t pleaded, in order for an estoppel argument to succeed there must exist a representation by words or conduct of the payee that the content of its email was secure.

WHAT SHOULD YOU TAKE AWAY FROM THIS JUDGEMENT?

Despite being the innocent victim of a crime, if you’re duped by fraudulently amended payment details it’s unlikely that the Courts will release you from your obligations to make payment on the terms agreed between you and a third party. You should therefore exercise caution and be mindful of the fact that email accounts are not secure (unless otherwise stated) and are susceptible to hacking.

PROTECTION TO BE INTRODUCED BY BANKS TO COMBAT FRAUD

As recently as October 2018, The Guardian reported that in an attempt to, “halt the rising tide of bank transfer fraud,” many (but not all) UK banks will soon begin to check the names of UK bank customers against the name on their bank account when money transfers are made. Effectively this will close the current procedural loophole whereby banks only verify the payee’s account name, account number and sort code; any disparity between the payee’s account name against the payee’s name is not currently checked.

The new “confirmation of payee” system requires customers to confirm that the identity of the recipient is correct in the event that the name of the payee and the name of the payee’s bank account do not match. This welcome innovation presents a further impediment to the fraudsters and will, hopefully, lead to a sharp decline in the incidence of such cases.

TIPS FOR CUSTOMER PROTECTION

1. Consider the circumstances of the email. Was an invoice expected at this stage? Have the payment details changed without notice? If so, contact the individual/business directly over the phone to confirm the payment details are correct
2. Insist that payment information is sent via a secured or encrypted email
3. Always exercise caution when dealing with the transfer of money.

The evolution of the housing lifecycle

Why more people are renting and what this means for the housing industry

More people are renting than ever before. According to a government survey, the private rented sector (PRS) is the second largest tenure in England behind owner-occupation, accounting for 20% of households in 2016/17. With the number of PRS households doubling in size in the decade to 2016/17 (to 4.7 million), this growth is set to continue.

The report by Knight Frank in this magazine lends support to this phenomenon.

It is perhaps of no surprise then, that The Institute of Fiscal Studies has found that the number of home-owning 25 to 34-year-olds fell from 55% in 1997 to 35% in 2017, whilst average property prices in England rose 173% in the same period.

Within the PRS, the build-to-rent sector (BTR) is also on the rise. According to data released by the British Property Federation, between Q4 2017 and Q4 2018 the number of completed BTR homes increased by 29%, the number under construction by 39%, and the number completed, under construction and in planning across the UK increased by 22%.

The biggest BTR market under construction is aimed at young professionals. As it gains momentum, BTR is evolving and diversifying from serving 25 to 34-year-olds to tailor for tenants at all stages of their life. There's increasing focus on families, with a number of schemes in the pipeline including houses. At one end of the lifecycle is a generation of students used to living in professionally-managed purpose-built accommodation with facilities and amenities. At the other end of the lifecycle is rental accommodation for senior or retirement living.

Planning policy has been one of the major market hurdles for BTR – but the government is catching up.

A blueprint for change

The revised National Planning Policy Framework (NPPF), published in July 2018, encourages residential development to have a mix of tenures, types and sizes to reflect local housing demand.

BTR is now recognised as a distinct asset class. It's defined in the revised NPPF as typically "100% rented out" purpose-built housing on the same site, professionally managed under single ownership and management control, and offered on longer tenancy agreements.

The revised NPPF also defines affordable housing for rent, expected to be the normal form of affordable housing provision for BTR. It's known as affordable private rent (APR).

Continued overleaf >>>

Published in September 2018, specific BTR guidance requires councils, as part of their plan-making process, to undertake a local housing needs assessment. This takes into account different types and tenures. If a need for rental homes is identified, councils should have a policy setting out their approach to promoting and accommodating BTR.

The small print

- APR homes shouldn't be distinguishable in size or quality from market rent homes, and they should be distributed throughout a scheme
- APR, as well as market rent homes, should be managed within a scheme by a single BTR landlord, with no need for a registered provider. The management process includes rent levels, apportionment of homes across the scheme, marketing, and agreements for lettings, management and service
- Councils must take a reasonable position in negotiating eligibility to occupy APR homes. Names can be suggested from housing lists, but direct nominations are frowned upon
- Alternatively, a dataset for the scheme can be assembled. Although the final decision over eligibility should be made by the BTR operator, identifying candidates and agreeing on them could be complicated
- Within any scheme, 20% of properties should be APR homes priced at 80% of the market value (including service charges) for the same or equivalent property. Councils can set a different proportion of APR homes if justified by evidence from the local housing need assessment and the policy set out in the local plan. Guidance on viability (updated in July 2018) also requires councils wanting to set a different APR proportion, or different discount levels, to justify the changes through a viability assessment at the plan making stage
- Developers are expected to comply with BTR policy requirements. The guidance on viability does allow developers, in exception, to propose alternatives for individual schemes, such as variations to the proportion of APR homes, the depth of discount, and the ability to review rent levels over a scheme's lifetime
- The proportion of APR homes provided and the level of discount offered can be varied across a scheme over its lifetime. Any trade-off must be consistent with the overall affordable housing contribution agreed at the outset and an annual statement must be provided to the council to show that the scheme continues to meet it
- Schemes are expected to remain within the PRS, and the APR homes provided and maintained in perpetuity. The full or partial break-up of a scheme shouldn't result in the withdrawal or loss of affordable housing. The guidance recommends a clawback arrangement to recoup the capital value of affordable housing provision if APR homes are withdrawn at any time, and there's a formula for calculating the amount of clawback payable
- Councils can use covenant periods to retain market rent homes within the PRS, but the guidance doesn't fix a minimum period. Councils must decide how to structure any clawback arrangement where market rent homes are converted to another tenure before the end of a covenant period.

In practice

The revised NPPF and the BTR guidance show support at national level for BTR. The policy recognition of BTR is welcome and the guidance provides some clarity. So far so good – at least in principle.

However, this is only guidance. Will councils be encouraged to embrace BTR? In practice there's wiggle room for reluctant councils at local level.

The BTR guidance leaves the scheme-specific details to be negotiated, agreed and set out in a section 106 agreement. Complicated and lengthy negotiations won't be welcomed by developers working to tight timescales and margins. Placing onerous restrictions on BTR will impede investment and delivery. Schemes must be easy to manage, give stable revenue, long-term rental streams and steady income growth.

Flexibility is essential over the lifetime of a scheme, in limiting development and operational costs, and coping with changing market conditions. Developers may need to break up a scheme, sell individual homes or the whole scheme to owner occupiers or multiple landlords, or convert APR homes to another tenure. In the case of APR homes, a clawback mechanism is proposed. Guidance on market rent homes isn't clear, and developers and investors will need to take into account the price of not being locked into a covenant period when assessing a scheme's financial viability. As for lenders, the guidance is silent on whether and how they may be exempted from any covenant or clawback arrangements.

To capture consumers for their full lifecycle, schemes must provide lifestyle, experience, community and brand. Including APR homes will have an impact on a scheme's financial viability. APR homes, by definition, achieve a lower rental rate than market rent homes, and have the potential to dilute a scheme's brand, affecting the marketability and price of the market rent homes.

The affordable housing provision is presumed to be APR, but developers may be able to agree other forms of affordable housing or a commuted payment with the council. Paying a commuted sum upfront in lieu of the provision of APR homes on-site may be an attractive option, and one which maintains the status quo. While in theory, the new planning guidance goes towards promoting the necessary changes to effectively meet new housing demand, in practice, success will depend on developers and councils finding mutually agreeable solutions to the PRS conundrum.



Vanessa Horn
Associate – Professional Support Lawyer

Viability assessments aren't going away

If a development isn't viable, it won't get built – we look at smoothing the role of the planning process



Viability is complex and time-consuming, and the numbers can be crunched in a variety of ways using various methods.

For housing development, the planning policy expectations towards affordable housing and infrastructure (education, open space, health, transport, water, management, green and digital) place demands on development that must be taken into account when considering if it's viable to construct.

The National Planning Policy Framework and the National Planning Guidance on Viability emphasise that viability should be assessed and considered at the planning policy-making stage, rather than when a local planning authority (LPA) is considering an individual planning application. The framework and guidance also ask for consistency in the approach to viability assessments, including standardised inputs, along with transparency of the data.

This doesn't mean that we've seen the end of viability assessments with individual planning applications. Last autumn, we heard a speaker from the Ministry of Housing, Communities and Local Government acknowledge that this emphasis on viability at the plan-making stage didn't rule out assessment for individual sites and schemes.

What you need to do

- **Get more involved at the plan-making stage.** The viability data assessed at this stage will be scrutinised for an individual application. Where there are up-to-date planning policies setting out the required percentage of affordable housing provision and contributions for housing schemes, planning applications should comply and will be assumed viable
- **If you want to submit a viability assessment for a scheme at the planning application stage, justify the particular circumstances for why this is required.** The planning system and development isn't immune to the uncertainty of the wider economic climate. Such factors, where relevant, may justify a viability assessment on a planning application.

What to remember

- **The price paid for land won't be an appropriate justification for failure to meet relevant policies in the plan.** If you've paid above market value for land, this is a developer risk. It won't be taken into account when assessing viability. A benchmark land value will be used.
- **Although the guidance refers to standardised inputs for viability assessments, some inputs, such as build costs, will always vary scheme by scheme.**

- **The LPA don't have to consider assumptions in a viability assessment when making a decision if they aren't credible.** The weight to be attached to the viability assessment as a material planning consideration is a matter for the decision-maker, and the courts are unlikely to get involved.
- **The guidance doesn't limit the size of a scheme, where viability can be assessed.** This is correct even where a LPA's own policies may state viability will only be considered on certain sized schemes (e.g. strategic sites).

Can you keep confidential information out of the public domain?

- **The presumption is that all the viability information will be made publically available, except for confidential or commercially sensitive information, such as ongoing negotiations over land purchase and information relating to compensation payments (e.g. rights of lights).** We're currently waiting for the publication of the government's executive summary template, which was due last autumn. This will be a public document and we hope it provides clarity.

What about viability on build-to-rent schemes?

- **The national guidance acknowledges that there are different economic (and therefore viability) considerations in respect of Build to Rent schemes.** These are about longer term investment and income streams, and the numbers can be crunched differently to schemes where units are to be sold.

The use of viability assessments at the planning application stage is embedded into the planning system. It can reduce the burden loaded onto new housing development for the provision of the full policy required quota of affordable housing and infrastructure requirements.



Rachel Lee
Associate, Real Estate

NICE

work if you can get it

Planning policies should promote physical activity, says public health organisation

The National Institute for Health and Care Excellence (which has the rather wonderful acronym 'NICE') is known to most of us as the body that approves new drugs for the NHS. But NICE does a lot more than test out new pharmaceuticals. The body also sets quality standards for the NHS, public health and social care. For the first time, these standards have expanded to include town planning.

A new draft quality standard for encouraging physical activity within the general population proposes that:

- Local authorities and healthcare commissioners have physical activity champions to oversee the development and implementation of local strategies, policies and plans
- Local authorities develop and maintain connected travel routes that prioritise pedestrians, cyclists and people who use public transport
- Local authorities involve community and voluntary groups in designing and managing public open spaces
- Workplaces have a physical activity programme to encourage employees to move more and be more physically active
- Schools and early-years settings monitor and update travel plans annually to increase active travel.

The first three of these proposals directly affects planning policy, particularly transport planning

and the design of new settlements and residential schemes. Through these proposals, this new quality standard aims to encourage planners to prioritise pedestrians, cyclists and users of public transport when designing spaces to incentivise people to leave their cars behind and get around under their own steam.

In short, they believe it would be NICE if places were designed with the aim of getting us all up and about.

It'll be interesting to see if the proposals are adopted by local planning authorities, particularly given the current shortage of resources in council planning departments – often cited as one of the reasons that local plans take so long to put together. Appointing physical activity champions and setting up connected travel routes will cost money, which is in scarce supply in local government at the moment.

It's also questionable how practical these proposals will be outside of urban conurbations. Promoting cycling and walking is possible, practical and desirable in cities and towns, but much harder in areas where the nearest supermarket is a twenty-minute drive away.

The final standard is expected to be published in June, and at that point, we'll all find out if being NICE is as powerful as people say.



Nicola Gooch,
Partner, Real Estate



KEEP CALM AND CARRY ON BUILDING

The government has ambitious plans for housing delivery - but is there enough weight behind the words?

In a recent interview in The Times, Housing Minister Kit Malthouse discussed his intention to increase housing delivery in the UK. He describes this challenge as an “urgent moral mission.” Most eye-catchingly, he says: “If we want to achieve 300,000 homes a year, we need to have one million homes in production, and four to five million in planning.”

The Housing Minister’s intentions are clear – and remarkably consistent with his many predecessors. But it’s less clear precisely how these numbers are to be achieved.

Pace of change

The current Conservative government has consulted on a large number of planning reforms. But they’ve been much slower to get the changes onto the statute book. We’re still waiting for a number of promised regulations, including those that would allow for the introduction of starter homes on a wide scale.

For example, the changes that have been introduced so far, most notably the revised National Planning Policy Framework (NPPF), contain a number of mixed messages or, even worse, omissions. Examples include championing large increases in housing numbers while simultaneously strengthening greenbelt protections and neighbourhood planning.

It also doesn’t help when the Secretary of State refuses large-scale residential consents, which would otherwise be approved, such as the Thornsett tower development in Purley, or a new housing estate in Kensington & Chelsea.

Steps to success

It’s hard to argue with the government’s aspirations. But at the same time, it’s difficult to see how these housing targets will be reached without the following:

1. A willingness to move away from localism, and towards a more directed approach. Local politics too often lines up against large-scale housing delivery, particularly in the south-east (which houses the highest level of demand). Being able to look at these decisions from a more strategic (and, perhaps, a more regional) perspective may help address this issue.

2. The government subsidising social housing delivery. All of the rhetoric about greedy developers not wanting to deliver affordable housing completely overlooks the fact that they are the only ones required to do so. Over recent years, central government has cut public subsidy for affordable housing to the bone. The cap on local authority borrowing has also prevented councils from raising finance for development schemes on the open market. This combination has led to a massive drop in local authority development projects – particularly residential ones. If we’re to have a hope of getting up to 300,000 homes a year, this has to change.

3. A willingness to invest in the support network and infrastructure necessary to deliver such an ambitious building programme. This doesn’t just mean physical infrastructure, such as transport, education and utilities – the following are needed too:
 - Funding for further education colleges (to train more builders, carpenters and skilled engineers)
 - More money for local authorities, so they can recruit and resource their planning departments properly, and not have to sacrifice their policy teams in favour of development control (or vice-versa)
 - Investing in and subsidising alternative or innovative methods of construction, and generally smoothing away the stumbling blocks that delay starts on site.

The sentiment is admirable – but will asking the sector to ‘keep calm and carry on building’ be good enough?



Nicola Gooch,
Partner, Real Estate

Blockchain and UK student housing



Brian Dowling
Partner, Real Estate

Student housing investors and proptech enthusiasts alike want issues around the use of blockchain to be solved - but there's still some way to go.

An equity stake in a single student housing scheme in North Carolina, USA, was recently described as being 'tokenised.' A stake was offered up to individual investors at a minimum buy in of \$21,000.

Property lawyers often get told off for using arcane phrases. But when it comes to blockchain and real estate, the tech industry is just as guilty.

Investors therefore have to trust that their lawyers understand what a tokenised stake is, why they wouldn't want to encounter the Byzantine Generals' Problem halfway through the Ethereum stream, and what questions this would raise about their cryptographic hash.

More instantly understandable is the need for industry regulation and standards. If the blockchain trend catches on, investors need to be sure that all legal issues have been checked and resolved to a universally-agreed degree.

Blockchain may one day be used to instantly transfer stakes in UK student or PRS real estate. But this would have to be backed up by certain assurances, such as:

- That the property is owned by the right person
- That it's fully let
- That the management agreement and the form of tenancy or licence agreement for student occupiers are legally robust
- That a certain percentage of the units are subject to nominations rights in favour of a local university.

It would defeat the object if investors had to verify this for themselves, particularly when investing at a relatively low financial level.

A similar low-tech hack exists in the form of certificates of title. These are essentially an assurance by an insured, qualified lawyer that an agreed set of important facts are true, in respect of the certified asset.

To allow for tokenisation, there needs to be reform of laws and regulations on real estate investment trusts (REITs), investor protection and land registration. But the student accommodation industry also needs to consider what common legal and management standards should apply to a completed and let student scheme being marketed in this way.

Real Estate Law in 2019

Key legal developments for this year

The real estate sector continues to face considerable disruption. Developing technologies, changes to tax, the introduction of new legislation, not to mention Brexit, all present challenges and opportunities for owners, investors and occupiers alike.

Here's what we think you need to look out for over the coming months.

Planning

- We'll continue to see tension between the nation's need for housing and the reluctance of most suburban householders to have any more of it anywhere near them. The government and local councils will continue to demand more affordable housing as the 'price' for planning permission
- After the autumn household creation statistics undermined the government's declared method of assessing housing need, we expect to see a lot of councils seek to lower their local plan housing numbers. The methodology now looks set to be revised almost before being used
- The government continues to target first-time buyers in its policies, but more needs to be done to incentivise elderly people to downsize into specialist retirement accommodation or care homes. This would release homes onto the market without the need for development on greenfield land. Demographics tell us that the retirement market will remain a growth area
- As we predicted last year, Sir Oliver Letwin discovered that the big housebuilders aren't land banking planning permissions, but rather building out the larger ones at a rate that local markets can absorb
- The government is consulting on allowing redundant shops to be turned into homes. We expect to see many councils fighting to preserve them
- We'll see at least the seventh attempt to reform the Community Infrastructure Levy in its eight-year lifetime. We don't expect it will be the last.

New accounting standards will affect occupiers

- The new lease accounting standard (IFRS16) has come into force. All leases, including most that were previously off balance sheet, are now classified as finance leases and need to be recognised on a company's balance sheet.

A new mandatory service charge code

- The new RICS professional statement for service charges in commercial property came into effect in April. Many of the provisions aren't new, but it's the first time they have been mandatory. The statement aims to improve general standards, uniformity, fairness and transparency in the management of service charges.

Farewell CRC energy efficiency scheme

- 2019 will mark the closure of the unpopular Carbon Reduction Commitment (CRC) scheme. This will be replaced by an increase in the climate change levy.

Electronic execution

- The Law Commission's consultation on the electronic execution of documents closed in late 2018. It will be interesting to see which proposals, if any, are implemented. For example, will we see the introduction of witnessing of signatures via a webcam or video link?

Tax

- We could face another Budget in the spring, as well as further changes to Stamp Duty Land Tax. We expect to see alterations to the legislation around what's residential and what's mixed-use property, as well as an additional charge for "foreign" buyers purchasing UK residential property
- There'll be inevitable changes to the VAT legislation, bearing in mind this is an EU tax. It remains to be seen what and how.

Continued overleaf >>>

Residential Property

- If the political and macroeconomic environment leads to a more widespread decline in house prices and loss of confidence in the property market, the government's attempts to improve the home buying and selling process will likely catch the interest of the mainstream press and the elected representatives. The re-emergence of gazumping and gazundering will add fuel to the fire
- 100% mortgages, the dangers of another 'sub-prime driven crisis' and mortgage affordability issues are also likely to feature heavily, particularly if interest rates creep up
- The government's review of the leasehold system, particularly with regard to new build houses, is likely to feature heavily, as will the 'ground rent scandal'
- In December 2018, the Law Commission launched a consultation to reform the commonhold regime. The reforms are intended to support the expansion of the hitherto unpopular commonhold structure as an alternative to leases. The stated intent is to provide a commonhold regime which accommodates homeowners, developers, mortgage lenders and the wider property sector
- The Law Society and the Conveyancing Association are advocating the introduction of Property Log Books to improve the conveyancing process. Sharing information early on in the transaction will speed up the process, but will the Log Books simply be Home Information Packs (HIPs) by another name?

Construction

- Research has found that meeting government targets of 80% cuts in greenhouse gas emissions by 2050 will require considerable sums to be spent on retro-fitting the UK's energy-inefficient housing stock. Whilst this may present an opportunity for construction and development clients, those engaged in work involving public funds should ensure they maximise these opportunities by taking proper advice on procurement, state aid and other such matters
- The use of cash retentions in the construction industry has moved on with the publication of a Private Members Bill Construction (Retention Deposit Schemes) Bill 2017-19 (the Aldous bill). The Bill is looking to bring legislation that secures moneys so that they will be available to be returned, subject to the other party having right of recourse against the moneys. The objective is to ring-fence the retention moneys to be secured and available to be released on time. After the Act comes into force, any clause in a construction contract which enables a payer to withhold cash retentions shall be of no effect unless upon their withholding they are deposited into a retention deposit scheme.
- Further legislation is to be introduced under the Small Business, Enterprise and Employment Act 2015. This legislation will prohibit contractual clauses which prevent one party from assigning its right to payment to a third party. There will be exemptions from the regulations, which will not apply to contracts to acquire a business or an interest in a firm, or to contracts entered into by a parent company of a project, a utility project or a financed project.

Implications of Grenfell Tower

The government has introduced The Building (Amendment) Regulations 2018 to prohibit the use of combustible materials in the external walls of buildings over 18m that contain one or more dwellings. It has also reaffirmed its commitment to provide £400 million to councils and housing associations to replace unsafe cladding on 159 publicly-owned social housing blocks.

The ban won't apply retrospectively to developments, and the government has offered no money to deal with the 295 privately-owned buildings currently clad with material unlikely to comply with the promised legislation.

This reality didn't dampen the initial hard line adopted by Secretary of State for Housing, Communities and Local Government, James Brokenshire MP. In an open letter to MPs, he stated that he had "written to all relevant private sector building owners reminding them of their responsibilities towards making their buildings safe, including reminding them that local authorities have powers to enforce these improvements if building owners do not take action. We rule out no options if industry, individual building owners or developers do not come forward with their own solutions."

The intimated imposition of financial and planning penalties on non-compliant landlords and developers, in the absence of primary legislation, raises the prospect of inevitable legal challenge in the courts. However, the implications of the Regulations may be wider than first anticipated:

- The Regulations will have to be met in relation to all works where the external wall is involved; this will include both work on new buildings but also refurbishment work
- The ban will also apply to buildings which are not currently within the scope of the Regulations, but in respect of which a change of use is sought (to bring the building within the Regulations) necessitating improvement works to be undertaken.

Nevertheless, with the Grenfell Tower public inquiry set to continue into 2020, the surely unpopular spectre of hundreds of privately-owned buildings not meeting the standards (and not necessarily being required to do so by the Regulations) may force the government to make funds available for removal and replacement works on privately-owned buildings.

If pressure for such a move was to mount, the government has already provided a potential mechanism through which public funds could procure such work by announcing its intention to abolish the Housing Revenue Account borrowing cap. This will allow local councils to operate without borrowing restrictions in order to build social housing, and many developers may see an increase in the number and size of (at least partly) public-funded social housing development projects. The improvement work to bring privately-owned buildings in line with the Regulations may (at least in part) have to be funded in a similar way at local council level.



Adrian Barlow
National Head of Real Estate

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