

TC Young Solicitors

SFHA Finance Conference 2021

Legal Update

Lauren Little, Partner
Eileen Barr, Solicitor

Issues re: Funding

- **FCA: LIBOR to cease as at 31 December 2021**
- **Recommended alternative RFR: SONIA**
- **Compounded SONIA – next to no credit risk, backward looking, observation period, cash flow**
- **CAS**
- **Term SONIA – not the recommended RFR but is published and in use in some cases**
- **Base rate**

Issues re: Funding

- What happens if you don't transition?
- Synthetic LIBOR “reasonable and fair approximation of what LIBOR might have been but not representative”
- Transition Agreements
- Treasury Management Advice
- Not bespoke
- Issues eg fallback where cost of funds exceed LIBOR = borrower protections should migrate over

Funding Works

- **91% of social housing meets Scottish Housing Quality Standard**
- **89% meets Energy Efficiency Standard in Social Housing**
- **But well-known issues with traditional tenemental stock and ongoing housing standards**
- **Participation of owners – how to make this easier for the benefit of all occupiers in the block**

Time to Pay

- Time to Pay (“TTP”) = a form of credit
- Providing credit = FCA authorisation
- Many RSLs have FCA authorisation for debt advice but not TTP
- Certain RSL (housing authority) exemptions to requirement to obtain FCA authorisation including:

Time to Pay – Exemptions

- This type of credit which is repaid in up to 12 months and by up to 12 payments = exempt if no interest or charges are levied
- RSL giving credit where owner grants a standard security = exempt if *“free of interest and without any other charges except those that recover costs directly related to the securing of the credit”* (“security costs”)

Time to Pay - Exemptions

RSL can give credit if:

- secured
- granted to a restricted public (e.g. factored owners) who receive information re: main features, risks and costs of the credit
- on more favourable terms than would otherwise be available in the market and
- advertisement is fair, clear not misleading
- granted under an enactment with a general interest purpose

Time to Pay – HM Treasury Consultation on Buy Now Pay Later

- Consultation launched on BNPL
- Recognises growth in such schemes relates to on-line shopping but
- Also covers short term credit – i.e. exemption (1) above: repayment in 12 instalments within 12 months on an interest free basis
- Reluctance to take a “heavy-handed” approach to regulation; but

Time to Pay and Common Charges

- Appetite for some form of proportionate regulation
- Watch this space
- Potential challenges for RSLs:
Availability/suitability/usefulness of exemptions versus need to carry out works in mixed tenure blocks
- Query whether a specific exemption for social housing providers is needed?

Time to Pay and EESSH /SHQS

Key issue:

- Should (charitable) RSLs be giving TTP?
- At all? At low/no interest?
- Do they have a choice?
- Government wants all properties (including mixed tenure) SHQS and EESSH Compliant – and more?
- Do the titles oblige owners to pay?
- Some owners can't / won't fund the payment – and may not be legally required to do so – so need assistance from (charitable) RSL BUT

Time to Pay and EESSH /SHQS

- Government /FCA (and EU) policy since credit crunch: *“Lender should not provide credit without being satisfied following proper due diligence borrower can repay” (affordability test)*
- Detailed affordability tests – mis-selling / sanctions - and in any event
 - How much assistance can/should charitable RSL give owner (not charitable beneficiary)?

Time to Pay and EESSH/SHQS

- In what circumstances can/should it be giving that assistance?
- Commercial funder DD demonstrates borrower cannot afford so approaches RSL for assistance
- Would RSL DD be different – even at low/no interest? – Do they have skills to assess?
- Should RSL provide credit that they know may be unaffordable?

Time to Pay and EESSH/SHQS

- Even where exemption (2) above used, obligation to give “fair, clear and not misleading” information” on main features, risks and costs of the credit = does this involve affordability tests and advising on results?

Time to Pay and EESSH/SHQS

- Discussions with Scottish Government
- If RSLs have limited ability to provide assistance to owners how to address this and achieve Scottish Government's aims re housing quality standards? What alternatives are there?
- Housing to 2040 – common standard for all housing tenures

The Housing (Scotland) Act 1987 (Tolerable Standard) (Extension of Criteria) Order 2019

- **By February 2022 all homes must have:-**
 - **Interlinked smoke alarms in the main living space and circulation areas;**
 - **One heat alarm in the kitchen; and**
 - **Carbon monoxide detector.**
- **If you fail to comply – possible that insurance policies could be invalid – if concerned, policy should be checked**
- **SHR monitoring compliance**

Procurement Reform post-Brexit

- Green Paper on Procurement Reform e.g.: consolidating rules, new procurement procedures, amendments to evaluation rules and challenge provisions;
- However, procurement = devolved so danger of different regimes
- May lead to confusion among suppliers working across the country
- May require different policies/processes for RSLs belonging to corporate group with English entities

FOI – Key Points

1. COVID-19: Legislation and how you work
2. Changes to the law?
3. FOI and English housing providers

FOI and COVID-19

- In response to COVID-19 Pandemic, changes to FOISA introduced
- Slowly repealed over time
- As of 01 October all relevant changes repealed

FOI and COVID-19

- **Need to think about new ways of working introduced by COVID-19**
- **Use of Teams, WhatsApp etc. – are these being included in searches for information?**
- **Homeworking – where is information being held?**

Changes to FOISA?

- **Post-legislative scrutiny of FOISA undertaken in 2020**
- **Recommended changes to various aspects of FOISA**
- **Scot Gov to consult on changes to FOISA based on recommendations**

Changes to FOISA?

Recommendations include:

- Widening who is subject to FOI
- Setting aside confidentiality clauses for FOI purposes
- Strengthening publication obligations
- Requiring certain key information to be recorded

FOI and English Housing Providers

Social Housing White Paper outlined UK Government's commitment to introduce:

- **Publication duties; and**
- **A 'FOI style' access to information system for social housing tenants**

for English social housing providers

FOI and English Housing Providers

Publication duties will cover:

- **A range of tenant satisfaction indicators, including: health and safety, complaint handling and anti-social behaviour**
- **Financial information including: senior management remuneration, management costs and breakdown on how income is spent**

FOI and English Housing Providers

- Access to information scheme for tenants and their representatives
- Will require disclosure of information relating to management of social housing
- Will have timescales for responding
- Exemptions system will be implemented - similar to FOI
- Right to internal review and appeal via the Housing Ombudsman

FOI and English Housing Providers

Relevance to Scotland?

- RSLs with English group companies should anticipate how changes might impact group
- Increased awareness of access to information in social housing sector may result increase of requests

Data Protection – Key Points

- End of Brexit transition period and data transfers
- Consultation on changes to legislation

Data Transfers

- Restrictions on transferring personal data outside of UK
- ‘Adequacy Decisions’ will allow for free transfers of data. If no decision in place need to take other protective actions
- UK/EU Adequacy Decision agreed in summer 2021 – but subject to review
- Intention to pursue adequacy decisions with other nations in future
- Other options for transfer where no adequacy decisions in place

Changes to Legislation

- Consultation ongoing until 19 November
- Launched as a result of Brexit
- Intended to: clarify aspects of current data protection law; accommodate new technologies (AI); reform ICO's regulatory role and make data protection compliance more efficient

Changes to Legislation

Number of changes proposed, including:

- **Cost cap/fee regime for subject access requests**
- **Altering thresholds for reporting data breaches**
- **Removing the requirement to have a DPO**
- **Requiring individuals to raise complaints direct with organisations before reporting to the ICO**

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Lauren Little

lfd@tcyoung.co.uk

Eileen Barr

eeb@tcyoung.co.uk

www.tcyoung.co.uk

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