trowers & hamlins

QUARTERLY HOUSING UPDATE

Autumn 2019

Contents

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Foreword

I was clearly premature in speculating in our last edition what a Johnson administration might mean for the housing sector; roll on a few months and now we have a general election to contend with!

It is striking that at the time of going to press, no major party has made housing a priority in their election campaign, something which is a real surprise given how housing has risen to the top of the political agenda in recent times.

So, at the risk of going over ground best covered by others (the National Housing Federation in particular have made an excellent pre-election pitch) here is my own personal wish list for the new government

- Let's have some common sense on the Right to Buy. I understand the political importance of the policy, but it remains the "Elephant in the room" for local authorities wanting to (re)engage in housebuilding. How about a restriction on sales of new build properties for say – the first 15 years?
- How about a long term commitment to grant funding of social rent homes? I speculated in our last edition about the prospect of a return under Johnson to a policy emphasis on home ownership. If that is a political priority so be it, but the sector needs certainty about a development pipeline of its "core" product.
- There is a need to follow through on Government consultations and the Social Housing Green Paper. This edition highlights the sheer number of Government consultations that will shape the sector for the next generation. Let's see some outcomes so that the sector can plan with certainty.
- Could we re-visit VAT charges on housing management? VAT charges on outsourced housing management is a drag on efficient and effective housing management (it creates a massive disincentive for large national RPs to engage with local providers) and it can discourage institutional investors into the sector. A reform of VAT on these contracts is long overdue.

On a more positive note, political uncertainty and Brexit notwithstanding, we are seeing ever increasing interest in the housing sector as a whole, something that we pick up on in this edition both in terms of direct investment and by way of entry into joint ventures. Whatever the nature of the next administration, that is a trend we cannot see slowing any time soon.

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Blurred boundaries in real estate investment: The "institutionalisation" of the "alternatives" sectors

The last 18 months have seen a significant influx of institutional investment into the residential sector (historically badged a so called "alternative" sector for institutional investors). So what is behind that interest and what might we see going forward?

The changing landscape

Rewind 10 years and the institutional investment market was happily focused on offices, retail and industrial – with a little leisure thrown in for the adventurous. Commercial buildings with residential elements were often off-putting to traditional investors, and needed to be carefully ring-fenced so as not to "contaminate" the core asset.

Fast forward to 2019, and the property press is full of headlines hailing joint ventures in Build to Rent, large-scale capital being ploughed into affordable and shared ownership schemes, and an increasing appetite for healthcare and senior living investment. The student accommodation sector has reached the point of active trading of established schemes. Beds are no longer something to be feared – they are being embraced by the investment industry, with even the most traditional of players in the market considering a move into these so called "alternatives" sectors.

This sea-change, which started out as a slow swell, has been looming larger over the last couple of years. This is perhaps unsurprising when we zoom out and look at the investment market today as a whole. Investors are wary of retailer failure and the perceived uncertain future of older retail schemes. There is a limited flow of good office and industrial stock in the market due to wider economic factors (don't mention the "B-word"). At the same time, investment managers' pockets are full of cash which needs to be allocated - and they are accountable for producing returns.

Are the "alternatives" sectors becoming mainstream?

Realistically, it is still early days. Taking Build to Rent as an example, the US have a mature and highly-developed "multi-family" investment market. The UK's fledgling steps to emulate this success are building up a young investment market but with strong fundamentals. It is expected that one in four of us will be renters in 2021 according to a recent report from Knight Frank – Multihousing 2017 PRS Research. The Housing White Paper actively encouraged Build to Rent, with a focus on planning policy and affordable private rent.

With the Government currently distracted by other matters, private investors are nevertheless entering this market in a big way. According to Savills' research in June 2019, investment in Build to Rent totalled £2.6bn 2018 of which £880m (roughly a third) was made up of institutions.

We have seen significant investments in affordable housing (witness Blackstone's investment in Sage Housing, a For Profit RP, and Legal & General's own For Profit RP), as well as Legal & General's ground-breaking deal with Croydon Council.

Similarly, in the senior living world, the fundamentals seem to speak for themselves. Knight Frank's Retirement Living Insight in 2018 reports that the number of over-65s in the UK is forecast to increase by 20% to £12m by 2027, and predicted that 3m retirement living properties would need to be built to accommodate those that would be likely to consider downsizing.

> *"It's always useful to ask the question "if it's such a good idea, why isn't everyone doing it?"*

Many institutions need others to pave the way into new sectors and create track record before they can justify piling vast capital into less mature real estate sectors. There are however a large number of heavyweights who have embraced these "alternatives" sectors with gusto, holding the doors open for more conservative investors to follow.

There is also a perceived "skills gap" amongst many investors who do not yet have the scale of personnel or experience to tackle a major beds portfolio or fund.

> *"This is leading to exciting times in the world of joint ventures and partnering, with investors becoming more dynamic and collaborative in their approach to investment and asset management, and in doing so creating opportunities for the traditional housing association sector and for local authorities."*

What about reputational risk?

Leaving aside financial and market factors, one of the main things to remember is that dealing with beds for individuals carries a higher reputational risk than dealing with workplaces for corporates.

The care sector is an obvious example, where vulnerable people could be involved. Care is heavily regulated and issues can be headline-grabbing, so it's important to keep a close eye on day to day operations. A care home which falls under an embargo affects not only reputation but also income stream and exit strategy, so early and active monitoring is key.

The reputational factor does of course work both ways. We now live in a world where major institutions must demonstrate that they are leaders not just in business, but also in behaviour and conscience. Delivering accessible and affordable high quality homes, to a population which sorely needs them, has great potential ESG benefits.

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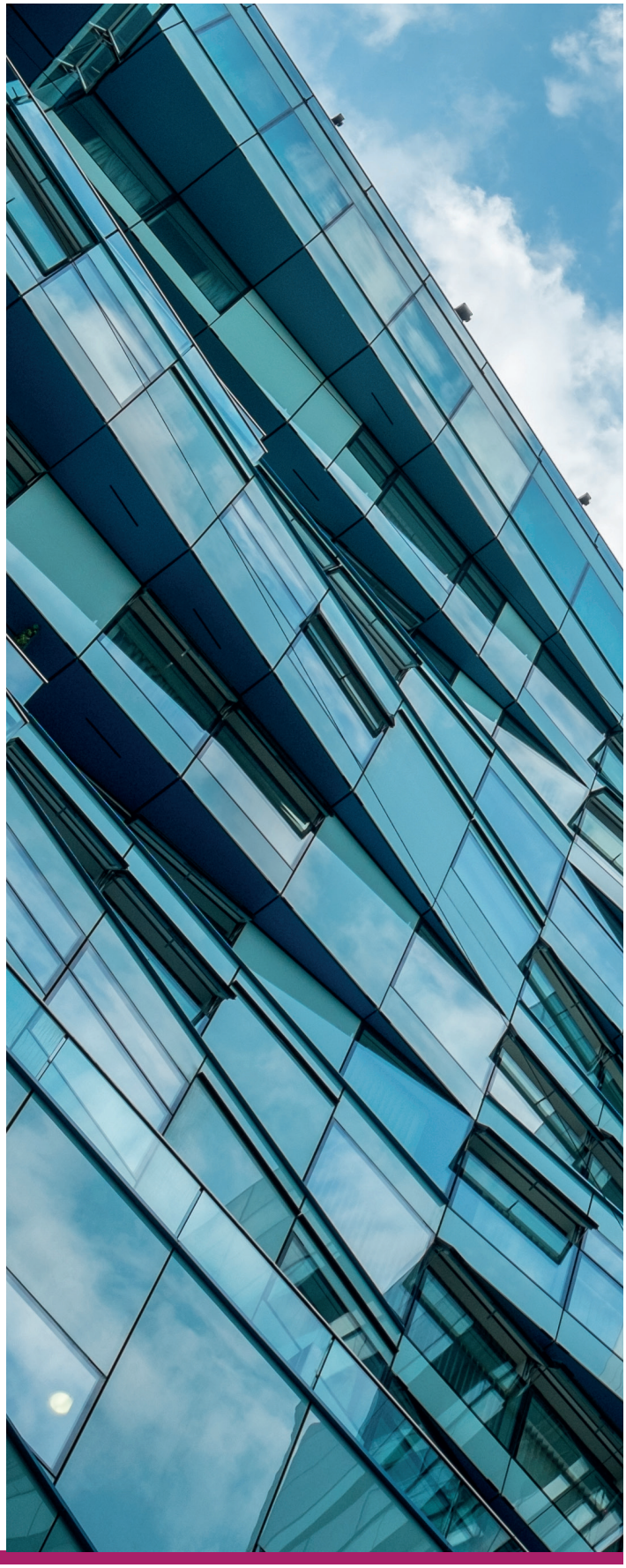

Covert recording

What's the deal when it comes to covert recording in the workplace by either employer or employee? Will it amount to a breach of contract, or is it a perfectly acceptable way of proceeding? The answer is almost certainly neither!

The issue of covert recording has most recently been considered in *Phoenix House Ltd v Stockman (Stockman)* where we acted for Phoenix House. Here the Employment Appeal Tribunal (EAT) considered whether the covert recording by an employee of discussions with a Director amounted to a breach of the implied term of trust and confidence. The EAT pointed out that times have changed now that recording is so easy to do, given that most people have smartphones.

> *"The bigger question in this case therefore asks the important question of whether it is reasonable for an employer to dismiss an employee who has recorded a meeting without the consent of the employer."*

In *Stockman* the employee covertly recorded a meeting with a director, complaining about another director's behaviour. At the employment tribunal, the tribunal found that the recordings were not something that could give rise to a breach of trust and confidence. It pointed out that the making of covert recordings was not set out specifically in the respondent's disciplinary policy as amounting to misconduct or gross misconduct.

The EAT found that it is no longer uncommon to find that an employee has recorded a meeting without saying so, and this recording will not necessarily have been undertaken to entrap or gain a dishonest advantage. The EAT pointed out that a recording could have been done to keep a record, or to protect the employee from any risk of being misrepresented when faced with an accusation or an investigation.

In looking at a situation in which a covert recording has been made, a tribunal will have to assess all the circumstances, including the purpose of the recording. The extent of the employee's blameworthiness may also be relevant and may vary from "an employee who has specifically been told that a recording must not be kept, or has lied about making a recording, to the inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording". What is recorded will be relevant too (whether it's a meeting which would generally have a shared record made, or where highly confidential or personal information relating to the employer or another employee is discussed).

Good employment practice

The decision in *Stockman* sets out clear guidance on dealing with covert recordings. The EAT specifically states that "…it is good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so".

> *"This practice will entail a proper consideration by both sides of whether it is desirable to record a meeting, and how this should be done."*

Considerations for the employee

Stockman has confirmed that, although an employee covertly recording a discussion will generally be guilty of misconduct, their behaviour is unlikely to constitute gross misconduct (though this will also depend on what, if anything, it says in the employer's disciplinary policy).

It seems that if a recording is used for the purposes of keeping a record, or for seeking to obtain advice, rather than to entrap the employer, then there will be no breach of the implied relationship of trust and confidence. This should of course be seen in the context of sexual harassment allegations and the need to ensure that employers don't prevent whistleblowing. However, if the employee has been explicitly told not to record a meeting then the position will be different.

Should an employer record meetings?

An employer should not record meetings covertly. It is only in very exceptional cases that this can be done without breaching the Data Protection Act 2018 (DPA 2018).

The Information Commissioner's guidance on data protection (the Employment Practices Data Protection Code) states the employers may record their employees in secret only in very exceptional circumstances, such as where it is suspected that criminal activity has taken place. This is unlikely to apply to disciplinary and grievance hearings.

Employers may always record a meeting with an employee's consent. If they do so they should remember that this is personal data and should be processed in accordance with the DPA 2018.

Bear in mind of course that if you record meetings rather than take notes, those recordings will have to be transcribed, and generally become a lot longer than records of meetings that are summarised. This may be a good reason not to record meetings.

Good practice points

It's worth considering the following good practice points:

- all discussions at disciplinary and grievance hearings, whether public or private, must be appropriate, and only deal with the matters in hand;
- consider recording internal meetings with the consent of all parties to ensure that the record is accurate;
- consider stating explicitly in your disciplinary policy that making a covert recording will constitute gross misconduct; and
- ensure that any notes you make accurately reflect what has been discussed.

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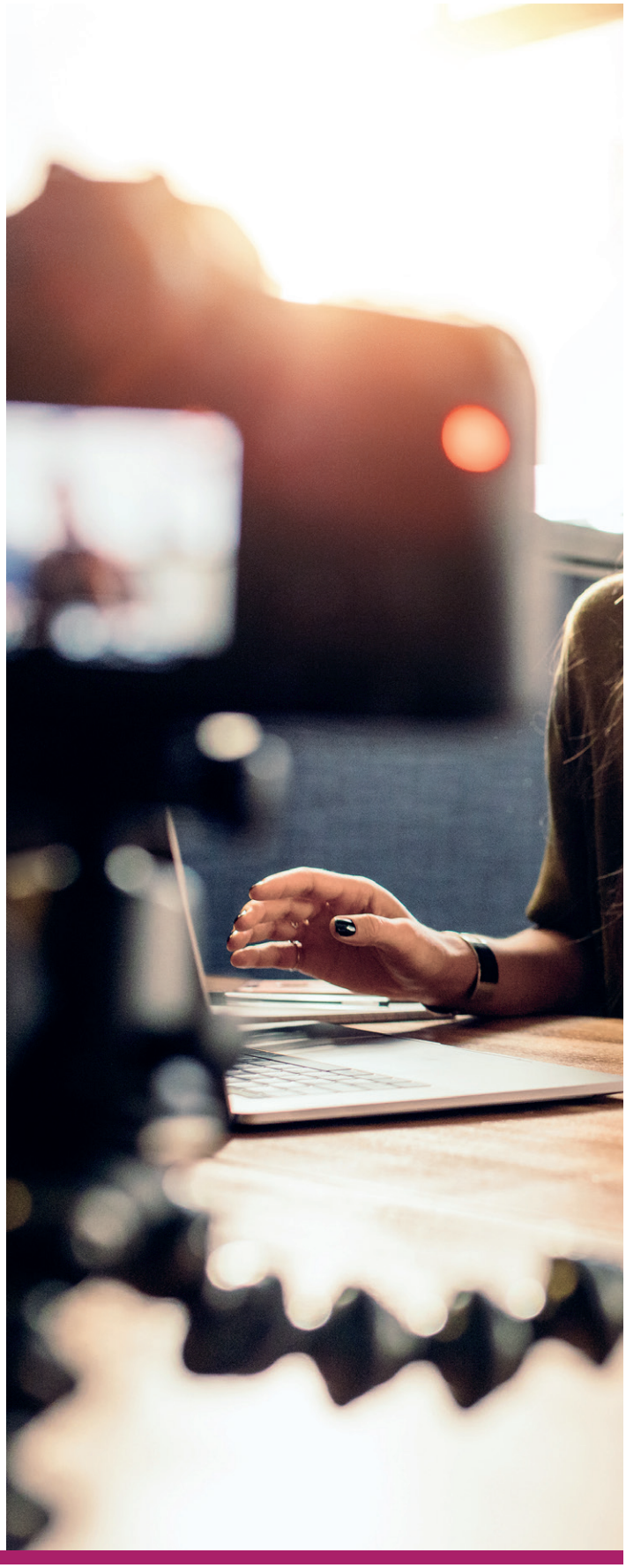

The challenges and controversies of co-living

What is co-living?

Originally synonymous with student accommodation, co-living is a new class of residential accommodation, first gaining prominence in London but now becoming a feature nationwide. Although only accounting for a very small proportion of the overall housing supply, co-living is growing, being crowned as one of the solutions to the current housing crisis. This form of housing offers en-suite bedrooms with shared kitchen and living facilities, with many boasting onsite gyms, shared working areas and even cinema rooms. Predominately targeted at young professionals, this new approach to housing offers an alternative in a housing system which currently offers arguably restricted options of affordability, choice and quality. Co-living offers the benefit of more affordable short-term and flexible accommodation with increased social engagement, with the aim to encourage communal interaction and build community. However it is not without its challenges and controversies.

Provision for affordable housing

As the co-living schemes currently on the market are operating as 'sui generis' (rather than within a residential use class for planning purposes), normal polices on affordable housing cannot be applied. Co-living is not normally accepted as a suitable form of affordable housing as these developments commonly consist only of bedrooms. This means that in many places across the country, co-living schemes fall outside policies requiring the provision of affordable housing, whilst others are unable to provide conventional on-site affordable accommodation due to space standards.

The draft London Plan, as well as a small number of London authorities, have sought to address this by adopting specific policies requiring co-living developments to pay a financial contribution towards affordable housing provided via that borough's affordable housing programme. More authorities will no doubt follow suit. The door is not closed to on-site affordable co-living space, but it appears the move is for co-living development to fund conventional (off-site) affordable housing.

Space standards

Co-living is often criticised for the small bedroom space provided to residents. The minimum space standards as set out in the London Plan for a studio flat in London is 37 sq. m. These restrictions do not apply to co-living developments with shared amenities for residents. Most local authorities have no policies dealing with co-living space standards and, where policies are in place, there are no minimum space standards for co-living housing. With a current gap in the standards, you can find developers offering a double en-suite room of 9.2 sq. m.

The language adopted within the draft London Plan leaves scope for interpretation, stating that the rooms should be "appropriately sized to be comfortable and functional for a tenant's needs...". But there is no further guidance in respect of what can be classed as "appropriately sized" and at which point the space allocations are no longer acceptable.

The GLA commenting recently on a co-living scheme in Redbridge said, "While it is accepted that the residential space standards are not strictly applicable to the type of housing proposed, the applicant had been strongly encouraged to meet them wherever possible throughout pre-application discussions".

> *"While co-living residents have access to a variety of communal facilities, it is questionable whether the current lack of regulation of this accommodation is sustainable."*

The Collective and the New Wandsworth Scheme

The pioneer of the co- living trend is The Collective, who opened their 11- storey, 546 bedroom, Old Oak scheme in West London May 2016, boasting the title of the world's largest co-living space. Following on from the Old Oak scheme, their newest endeavour is that of the 292 room Trewint Street scheme in Earlsfield. This scheme includes a pedestrian and cycling bridge, a café and amenities including a cinema room, library, workspace, gym and roof terraces.

Outside of London?

The concept of co-living has been one predominately championed in London, it is clear that this approach is beginning to filter into other cities. The most recent example is a proposed development in Salford set to provide 1,500 apartments which would be a mix of co-living and student accommodation.

With the revised draft of the emerging Greater Manchester Spatial Plan being published for consultation in January, it will be interesting to see if co-living is a subject on the agenda and whether there is an appetite to encourage or constrain this new trend in housing.

"Other cities across the county, particularly those with thriving student communities will no doubt soon have to grapple with the challenges, and opportunities of co-living."

What next?

It is clear that further guidelines are required if the concept of co-living is to be able to operate at its full potential in London and other cities. The problems stem from the concept of co-living not neatly fitting into any of the normal planning use classes, so falling outside policies on affordable housing provision and minimum space standards. Without any national guidance or legislative change, it will be up to individual local authorities to decide how to treat co-living planning applications in their areas. For co-living developers, this will create uncertainties provided by conflicting local authority planning policies, or perhaps no policies at all.

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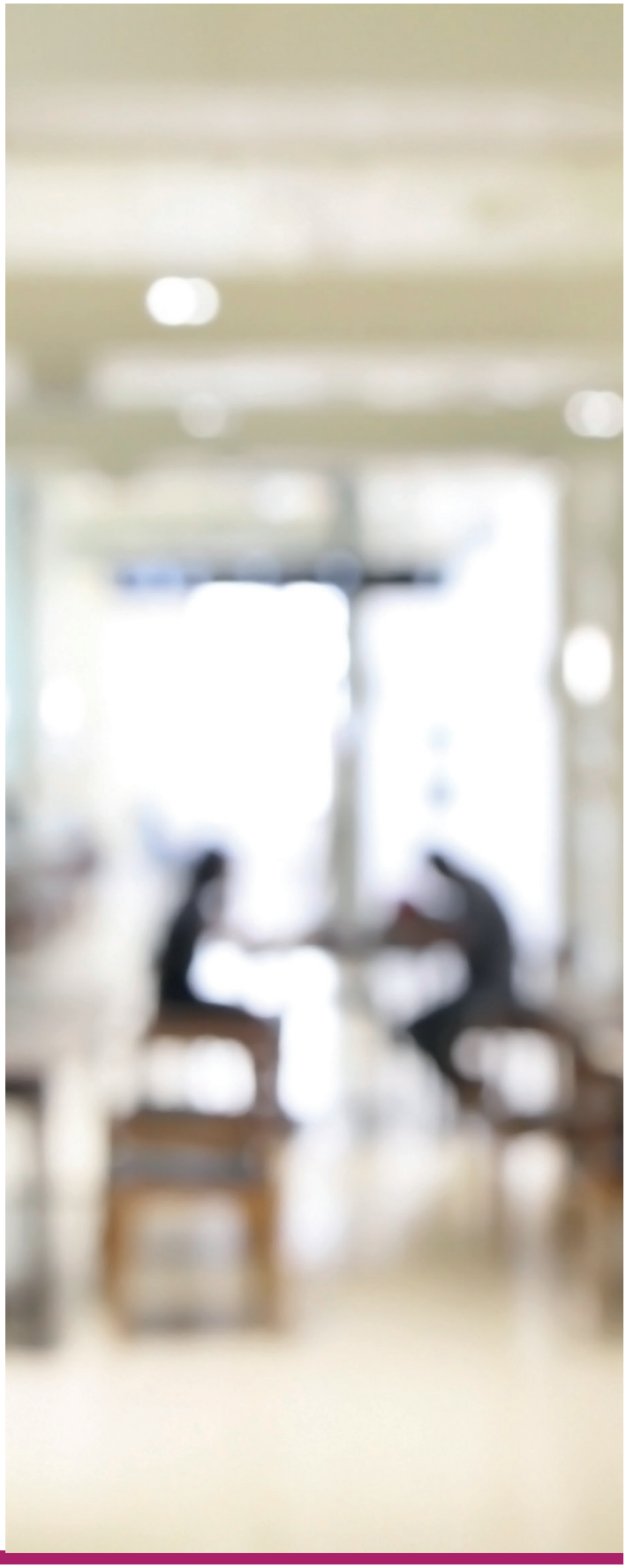

What's next for procurement in the post-Hackitt era?

The Hackitt Review recommended sweeping changes to procurement practice across the building industry to ensure that building safety is prioritised. The Government's *Building a Safer Future* consultation proposes radical change to construction and a host of new dutyholder roles, but was silent on any reforms to procurement law or practice. Where does this leave procurement in the UK, and what will need to change to support the proposed law reforms?

The 2018 Hackitt Review emphasised the importance of procurement in determining whether both high quality work and safety was prioritised in the construction of high risk residential buildings (HRRBs). Chapter 9 of the Review noted that "the procurement process kick-starts the behaviours that we then see throughout design, construction, occupation and maintenance" of buildings, and recommended a number of changes to procurement and contracting practices to produce "safer building outcomes". These included requiring that contracts for HRRBs prohibit safety being compromised for cost reduction, and requiring that tenders for those contracts set out safety proposed which must be tested during the tender review stage:

The review also criticised the practice of lowest price tendering and low contractor profit margins, which led to both building safety being compromised and risk being pushed downwards in the supply chain, but stopped short of making any express recommendations in these areas.

Given this impetus for change, it was surprising that the Building a Safer Future document, while accepting most of the Hackitt Review's recommendations, said nothing about reforms to procurement practice.

In the Queen's Speech this October, a new Building Safety Bill was promised, followed a few weeks later by the initial findings of the Hackitt Inquiry. Give the political pressure on government to respond meaningfully to the Grenfell Tower tragedy, it's likely that a bill will be introduced at some point next year. However, it's still unclear whether the Government intends to provide further guidance on procurement practice, or whether the building industry will be left to find its own solutions. Many industry leaders have seen this as a missed opportunity, particularly around discouraging the use of lowest-price tendering both in the construction and maintenance of HRRBs and the sector more generally.

In the absence of any express guidance, the Steering Group on Competence for Building a Safer Future has released its interim report Raising the Bar, setting out an ambitious programme to improve professional competence across the building industry. The Steering Group proposes a series of national standards and competence frameworks for a range of professional disciplines, and a national registry of accredited individuals within each profession, supported by an industry-led Building Safety Competence Committee and a Government Oversight Body.

In respect of procurement practice, the Steering Group report that "poor procurement practices can lead to decisions that compromise all aspects of building and life safety", and that key procurement activities "are too often carried out by individuals who are not fully qualified or fully competent which leads to poor decision-making and focus on price rather than building safety".

With this in mind, a new procurement competence framework has been suggested to cover every stage of the RIBA Plan of Work and identify the capabilities and knowledge needed to use procurement to prioritise building safety. The competency framework will be developed by the Chartered Institute of Procurement and Supply with oversight from a government body, probably the UK Accreditation Service. All HRRBs would require a Procurement Lead, who will be assessed against the competency framework, eventually leading to a register of accredited persons to undertake this role.

> *"The Steering Group recognises that this will require a culture change in the construction sector, and that further work will be needed to raise awareness of the new competence requirements and ensure compliance."*

There are a number of procurement-related issues raised by the Building a Safer Future proposals that are potentially problematic, and remain without clear answers.

It is unclear how procurement teams will be expected to navigate the procurement of the new Dutyholder, Accountable Person and Building Safety Manager roles proposed in the Government's law reforms, or how liability for these roles will be formalised in building contracts and appointments. Accordingly, it is uncertain if industry professionals will be willing to accept criminal liability for undertaking Dutyholder and Accountable Person roles, and/or whether these liabilities can be adequately insured. Given the widespread concern about a skills shortage in the construction industry, the new competency frameworks will need significant resourcing to meet the demand for trained and qualified professionals to take up these roles.

There is, of course, an ongoing concern about the "lowest price culture" in the construction industry more generally. Alternative pricing models are in use to attempt to move procurement decisions away from lowest price contracting. However, in the absence of a clear steer from government, there is a concern that (as the Steering Group note) "despite the best intentions of everyone involved in the various working groups… the culture of low prices and undercutting of competitors will continue."

With landlords facing huge costs to ensure that new HRRB projects comply with the new Gateways system, and that existing buildings comply with in-occupation safety requirements, appointing a Procurement Lead will be yet another expense for an already cost and skillls constrained industry. It's clear that without sufficient resourcing and a generous implementation timetable, the good intentions of these various proposals will become unworkable or prohibitively expensive.

Pending the tabling of the draft Building Safety Bill, landlords can prepare themselves for the changes by informing their Boards and executive teams about the likely impact of the changes, reviewing their procurement policies, particularly focusing on alternative pricing models to lowest price. Landlords should also review their standard forms of construction contract, bearing in mind Dame Judith's endorsement of partnered methods of procurement as a way of developing collaborative working relationships with contractors.

Finally, landlords should aim to get a head-start on the proposed reforms by undertaking stock condition surveys on their existing portfolios, to identify potential building safety issues and collate important building safety information.

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Where next for partnerships and joint ventures?

Partnerships and joint ventures remain a cornerstone "in vogue" as a model for property development and/or regeneration. There is still a huge amount of interest from both the public and private sectors in partnership working. However, market softening and the ever ongoing uncertainty of Brexit continue to be a real challenge.

We are seeing currently seeing a number of partnerships and joint ventures hitting rocky water; failing to hit viability hurdles and/or being unravelled and reconfigured; others are increasing the numbers of affordable homes on the back of additional GLA/Homes England funding. So do partnerships and joint ventures remain a tenable delivery structure?

A match made in heaven?

In boom periods, tensions between joint venture partners are often brushed under the table as the profits roll in. In tighter economic climes, the choice of partner becomes ever important.

Obviously, there is a question of financial 'robustness' to consider. Even the largest of organisations, both public and private, are not immune from financial strain. Do not let your partner see you as a 'soft touch' to bolster their own financial uncertainties. Equally, if not more important, consider again the type of partner that you are looking for, whether that be an investor, house builder, contractor housing association, for profit RP or a local authority or some other partner. What do you really need from any partner? Is it funding, expertise, access to land or supply chains, or something else?

And what about a cultural fit?

> *"Do not underestimate the importance of 'regime' and 'ethos' and consider if this flows through an organisation."*

We have seen more than one partnership unfold over the last couple of years where the ethos of the partners was based very heavily on individuals' relationships, and in the absence of those individuals, cultural differences of the organisations made it very difficult for them to continue to work together.

What happens if the dynamic of a partner organisation changes or key personnel leave? Parties may want to consider if they want "exit options", in the event of change of control or key personnel defections, but bear in mind requests are likely to be reciprocal.

Gold plated or solid gold?

Whilst obviously entering into a joint venture or partnership is a commercial negotiation, it is important that all partners take on board that it is a partnership, i.e. two or more organisations working together. Quite simply, you cannot have everything on your wish list.

As margins tighten, and boards scrutinise prospective deals, it is inevitable that parties will want to get the best deal they can. However, overtly aggressive negotiation and heavily negotiated "pre-nuptial" joint venture agreements often mean the partnership can start on precarious footing, with one partner feeling they have "lost out" to the other before the hard work has even begun.

In our experience, partnerships and joint ventures are most successful where all partners get a fair reward for the inputs they have made. That is part of the reason why net cost/open book financial models have been widely adopted.

It's an old adage, but "treat [partners], as you would want to be treated" really does apply in successful relationships.

New entrants and new markets

While some of the more traditional partnerships are stalling, we are seeing an interesting trend, although not one yet with a huge take-up. That is the involvement of a wider team in the partnership relationship, so for example architects or other professionals are being given a stake in return for their input to the profit. It is not for all, as for smaller consultants, their contribution may not equate to a worthwhile share in partnership profits.

Where we are seeing increasing use of this type of relationship is with SMEs, where traditional contractor organisations are expanding into development. We have worked on a number of projects where contractors have taken no, or minimal, contracting return, but are rewarded with an upside in outturn profits. Models such as this have the advantage of helping partnerships and joint ventures cashflow until receipts start coming in, as the build cost payments do not include the usual contractor margins.

Even within the more mainstream, there are alternative partners to the traditional housebuilder and housing association partnership models. As we have previously discussed, the public sector is increasingly looking to explore partnership models – both on a procured and non-procured basis. Local authorities are looking more and more at partnerships and joint ventures as a delivery model and Homes England have not been shy to talk about their commitment to, and indeed have participated in a numbers of joint ventures.

But consider, also, partnering with:

- another housing association; who may bring development capacity, funding, land or geographical insight;
- an investment fund or a for-profit RP; you don't have to look far for funds that want to investment in housing, particularly BTR and affordable housing. For example Coastline Housing in Cornwall have recently partnered with Legal & General Affordable Homes to increase affordable housing supply in the county.

So do partnerships and joint ventures remain a tenable delivery structure? Our view is a definite "yes", but those looking for potential partnerships and joint ventures, in the current economic environment, need to think outside the traditional box.

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Leasehold reform – Part 2

In December 2017, the Government pledged to carry out a wide ranging review of leasehold practices in England with the publication of their consultation, *'Tackling Unfair Practices in the Leasehold Market'*. This consultation set out a number of measures designed to address problems within the sector and since then, both the Law Commission and the Government have issued further consultations.

Part 1 of our review of leasehold reform (published in the summer edition) concentrated on the Law Commission led reforms. This article focusses on the consultations issued by the Ministry of Housing, Community and Local Government (MHCLG).

Implementing reforms to the leasehold system in England

In October 2018, MHCLG asked for views on how the reforms proposed in December 2017 should be implemented. A summary of the responses to the consultation and the Government's proposals was published in June 2019.

In particular, the response provided details on how the Government propose to implement the following changes:

- the ban on the use of leasehold for new houses (subject to some limited exceptions, including shared-ownership);
- ground rents limited to a peppercorn in future leases (again with limited exceptions);
- measures to ensure that the charges that freeholders pay towards maintenance of communal areas are fairer and more transparent; and
- measures to improve how leasehold properties are sold (deadlines and capped fee for providing information).

Strengthening consumer redress in the housing market

This consultation sought views on the structure and use of a redress for consumers of housing, as many feel there are gaps in the current redress system. A summary of the responses to the consultation were published in January 2019 and the Government proposes to:

- introduce a Housing Complaints Resolution Service as a single point of access for all redress schemes;
- form a Redress Reform Working Group to look at ways to improve in-house complaint handling for certain parts of the housing sector;
- strengthen access to redress, including bringing forward legislation to underpin a New Homes Ombudsman (in relation to which a separate consultation is running); and
- address the gaps in redress services by extending mandatory membership of redress schemes.

Making home ownership affordable – discussion paper

On 28 August 2019, MHCLG issued its discussion paper on proposed changes to shared ownership. The consultation invited comments on three aspects:-

- making it possible to buy further shares at smaller increments (for example 1% increments);
- removing the pre-emption clause and introducing a landlord's time-limited Right of First Refusal; and
- introducing a standard model for all providers.

This consultation ended on 29 September 2019.

MHCLG Committee Report

Following its inquiry, the Housing, Communities and Local Government Committee (HCLGC) published a report on leasehold reform. The Government published their response in July 2019 and agreed some of the measures proposed by HCLGC (some of which are already being dealt with in other consultations). There are a number of proposals, but some of the more significant are:

- provision of clearer information on buying and selling leasehold properties;
- consideration of the HCLGC's views that commonhold should be the primary model of ownership for flats;
- a standardised 'key features' document to provide clarity for consumers of leasehold properties and the use of standard forms for invoicing service charges;
- a new consultation process and a major works costs threshold; and
- consideration of the HCLGC's recommendations on permission fees, major works and other charges.

The HCLGC also made recommendations to the Competition and Markets Authority (CMA) that they investigate the miss-selling in the leasehold sector. The investigation by the CMA is now underway.

Working Group

The Regulation of Property Agents Working Group, chaired by Lord Best, was tasked by the Government to review the regulation of property agents.

On 18 July 2019, the Working Group issued its report and the proposals include the introduction of a new regulatory framework which will cover all those carrying out property agency work, and a new independent regulator to deal with enforcement of the framework.

Some of the main features of the new regime are:-

- a requirement to have a license to practise from the new regulator;
- a single set of principles set out in a code of practice with clear standards of behaviour;
- mandatory qualifications for all property agents; and
- the regulator will have a statutory duty to ensure the transparency of leaseholder and freeholder charges.

Industry pledge

Finally, an industry pledge was introduced by James Brokenshire on 28 March 2019 to crack down on “toxic” leasehold deals. Many leading property developers and freeholders have already signed the government-backed pledge.

Over the next few years, it is clear that there are to be significant changes in leasehold and so developers across the sector will need to ensure that they are ready to implement these changes.

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Charging ahead – Government consults on EV infrastructure

Earlier this summer, the Government launched its consultation on proposed legislation to require the installation of electric vehicle (EV) charging infrastructure in residential and commercial buildings in England. This has implications for landlords for both new-build and existing buildings.

Widespread availability of EV charging is a key component of the Government's 'Road to Zero' strategy. The consultation aims to transpose the requirements of the EU Energy Performance of Buildings Directive into UK legislation. It also provides clear direction on the role of developers and landlords in funding and installing the necessary charging infrastructure across the built environment.

The arrangements are underpinned by changes to Building Regulations, which will require the installation of EV charging infrastructure in new buildings and buildings that are undergoing material change in use or major renovation. Separate legislation is proposed to require the installation of chargepoints in certain non-residential buildings, even where works are not being carried out.

Residential buildings

For new-build, the consultation proposes that chargepoints are installed for each dwelling that has a dedicated parking space. In blocks of flats, this means a chargepoint will be needed for every dwelling with an associated car parking space. This requirement also applies to any buildings that are undergoing a material change of use to become dwellings - provided that the relevant works impact the car park or electrical infrastructure (either of the building containing the car park or the car park).

If an existing residential building has more than 10 car parking spaces and is undergoing "major renovations" (see below), then the landlord will also be required to install EV charging cables to every parking space.

Commercial buildings

Similar considerations apply to commercial buildings. Any new building (or an existing building undergoing "major renovations") with more than 10 car parking spaces is required to have an EV chargepoint and EV charging cables for one in every five parking spaces.

For existing buildings with over 20 car parking spaces, the proposals require at least one chargepoint in the building. If there is a further commercial case for more EV charging points, the Government expects that businesses may choose to install more capacity (although there is no obligation to do so).

Major renovations

The proposed obligations for existing buildings link to the definition of "major renovations". This is defined (as in Building Regulations) as a change where more than 25% of the surface area of the building envelope undergoes renovation. It is proposed to further restrict this to major renovation works that include the car park or electrical infrastructure (of the building containing the car park or the car park).

Exemptions

The consultation proposes exemptions to these requirements. These include circumstances where the installation results in a requirement for additional electrical capacity which pushes the costs of each chargepoint over £3,600. There is also an exemption from installing chargepoints as part of major renovation works if the cost of the installation is over 7% of the total renovation costs, and general exemptions for listed buildings and buildings in conservation areas.

What next?

The consultation closed on 7 October 2019 and the proposed next steps should be published by January 2020 (assuming the Government isn't preoccupied with other matters). As legislation is on the way, landlords should consider EV requirements going forward. This isn't just an issue of additional costs, but also practical considerations in respect of cable routing, electrical capacity and future access requirements for new-build and renovation works.

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Fluid boundaries: erosion and accretion

A cursory glance at a map of the country's coasts and rivers alludes to the huge number of properties which abut some form of waterway and will likely be subject to a boundary doctrine which has only grown more unpredictable in its application.

In acquiring a property bordering the coast or a river, conveyancers and developers will immediately consider the elevated flood risks and escalating insurance costs that can often come with such sites. However, this can overlook the potentially unstable nature of the property's boundaries and their potential to change both gradually and abruptly through the dynamic and inexorable processes active in such areas.

> *"Whether the immediate effects of these processes are detrimental or even beneficial, the legal doctrines governing the re-allocation of the natural "shifts" of land boundaries must be considered when deciding whether to acquire a property in immediate proximity to a waterway."*

At one end of the spectrum is the well-known process of erosion with its most severe displays visible at various points along the Norfolk coast. The extent of it is highlighted by HM Land Registry's MapSearch tool which reveals a number of property boundaries which already contain more sea than land. However, what is less well-known is its rarer counterpart "accretion" the process through which alluvial deposit of matter gradually increases the volume of land present.

The legal Doctrine of accretion and diluvion accepts the inevitable change of properties bordered by bodies of water and holds that, where such a change is gradual, the registered land boundaries will automatically adjust in reflection of land gained and lost by the adjoining properties. When the change is sudden and dramatic, such as that induced by a violent flood, the Doctrine of avulsion states that the boundaries will remain as shown on the title documents. Although, one could argue that the ultimate effect of this rule on a landowner will likely be minimal since the floodwater eventually drains away, it is worth bearing in mind that floods do have the potential to permanently change the direction and size of watercourses.

When conducting due diligence into a riverside or coastal property, the operation of these doctrines can be a crucial and potentially concealed factor where the Land Registry holds only older Title Plans, as section 61 of Land Registration Act 2002 states that the boundary shown in the register does not affect the doctrine's validity meaning that potentially extensive swathes of land could have been eroded over the intervening decades. Yet it is worth conveyancers being aware that, under s61(2) LRA 2002, agreements concerning the operation of this doctrine can be registered at the Land Registry as a safeguard. In the absence of such protection, the acquisition of more recent aerial photographs of the site and a comparison against the older plan could provide important information regarding the historic and future changes that the site will undergo.

The unpredictable application of these doctrines highlights the potential for contention in waterway-abutting boundaries and the need for investigation into the physical changes undergone by such sites. A property's vulnerability to erosion or other similar physical processes is an area that is distinctly absent from any Flood, Environmental or Ground Report that is typically encountered and, though only an issue in specific areas, it is an undeniable concern to have a regularly re-adjusted boundary.

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Non material amendments

The courts have recently provided an answer to an often debated issue, whether non-material changes to reserved matters approval (RMAs) can be made via section 96A of the Town and Country Planning Act 1990 (the Act).

R (Fulford Parish Council) v City of York Council and Persimmon Homes (Yorkshire) Ltd [2019] EWCA Civ 1359 centres around the approach that Local Planning Authorities should adopt.

In the past, approaches on this issue have been inconsistent. Some Local Planning Authorities acknowledge the need for developers to make non-material changes to RMAs in this way, whereas others decline to deal with these applications as section 96A of the Act applies to "planning permissions" but not RMAs.

> *"The perceived distinction between planning permission and RMAs in the eyes of some Local Planning Authorities has resulted in a lack of a uniform approach and has led to dissatisfaction and confusion in the sector."*

This appears to stem from the legislative code which separates the definitions of 'planning permission' on the one hand and an 'approval' on the other. If RMA's were not considered to be a planning permission, then RMA's would site outside the scope of non-material amendment under section 96A.

In *Fulford v York Council*, the Parish Council declined to deal with Persimmon Homes' application under section 96A of the Act. The Parish Council argued that there was a fundamental distinction between a planning permission and a RMA, suggesting that "…if you successfully apply for apples, you do not end up with oranges".

For this reason, it suggested, section 96A did not apply and could not be applied to this type of application.

Whilst the Court of Appeal acknowledged that a RMA is not of itself a planning permission, it held that the use of the wording 'planning permission' referred to in section 96A should be more widely interpreted.

In situations where planning permission is granted subject to conditions, those conditions form an intrinsic part of the permission. The definition, it was held, should be interpreted to include an application for an amendment to an approval (or conditional approval) of reserved matters, as well as the underlying outline planning permission.

> *"This is a reassuring decision for developers who would otherwise be faced with not being able to make necessary non-material changes to schemes as they evolve, and is particularly key for those developments consented in outline where detail is set out within the RMA."*

This is particularly important where the time period for submitting further RMA's has expired. The decision is also indicative of a shift in the way judicial decisions on planning are made, towards a practical solution based approach.

Although a sensible and welcomed decision, it is worth noting that 'non-material change' is not defined by the Act. Developers and Local Planning Authorities will no doubt interpret applications on a case by case basis to decide whether proposed scheme amendments can be classified as a 'non-material change'.

Finally, it is worth noting that while the Court of Appeal have clarified the position regarding section 96A applications, they chose not to comment as to whether the same principles apply to minor material amendment applications to RMAs made via section 73 of the Act, so, for the time being Developers will have to be cautious in taking this approach, as the legal power of a Local Planning Authority to vary RMAs using section 73 remains unclear.

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