New How: Perspectives

Operating in living

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Contents

Foreword

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1

Foreword

Welcome to our latest report, operating in living.

In the Autumn, we examined investing in living – focusing on UK residential property in its many different forms as tradeable, and indeed much coveted, assets for the investment market.

This time we thought we would share our experts' views and insights into what the boardrooms of developers, investors, funders and operators in the UK living sector are currently dealing with.

A few years ago, I heard the acronym, VUCA. We were apparently living in a VUCA environment: volatile, uncertain, complex, and ambiguous. That was 2016, just after the Brexit vote.

The same sentiment prevails now. Those in the living sector are having to manage multiple different headwinds, including escalating inflation, material shortages and an evolving legislative landscape, including for building safety and the environment.

In this latest report, we consider some of these matters, whilst also putting forward the case for how organisations can manage or help mitigate these factors.

Our experts call for new ways to begin reducing embodied carbon emissions during the construction of buildings, while also investigating how contractors are looking to address the risks posed by rising costs. This is alongside providing guidance on how to ensure fire safety is appropriately prioritised.

The challenges facing the living sector cannot be ignored. Despite this, it remains resilient and has major potential for growth. Indeed, Savills' research reveals that residential property became the largest sector for investment globally in 2021, overtaking offices for the first time.

The living sector is now being seen as capable of delivering institutional-grade returns – a fact increasingly recognised by investors. This should give those operating in the living sector confidence, with its diverse, quality assets providing strong foundations and an opportunity to build on.

The word – opportunity – crops up several times in this report.

Whether with regard to how the private and public sector can partner together to deliver large-scale regeneration through joint ventures, or developers capitalising on the shift to higher quality, sustainable buildings – the living sector has the potential to not only transform the physical landscape, but shape society and accelerate the journey to net zero, while remaining strong commercially.

It is critical that we maximise these opportunities and work together to deal with the current challenges. We hope the insights included in this report support this aim, while reflecting the grit and determination of those people operating in the living sector.

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Avoiding a stranded asset

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2

Avoiding a stranded asset

With those operating in the living sector now facing the risk of older assets becoming stranded – obsolete to funders and residents - Liz Sweeney and Liana Di Ciacca examine the journey to retrofitting stock and embracing ESG.

The use of sustainability linked loans grew rapidly in the real estate finance market during 2021.

Bloomberg revealed that over 40% of revolving credit facilities approved in Europe last year were tied to borrowers' Environmental, Social, and Governance (ESG) goals. This shift means ESG is now becoming fundamental to modern-day real estate strategies and financing.

As a result of this expansion, the ESG market is evolving at pace. This poses those operating in the living sector with a variety of challenges and opportunities when considering financing options.

Dealing with older stock

Europe has a large proportion of real estate assets that were built more than 20 years ago.

As a result, there is a risk that assets may become 'stranded' - considered too old, of poor quality and no longer fit for purpose. This is likely to affect assets such as hotels, care homes and student accommodation. Investors or operators with this type of stock may find it difficult to refinance, with investors potentially preferring to invest in newly-built assets that already integrate ESG.

To avoid obsolescence, those operating in the living sector must consider retrofitting assets in order to reposition or physically futureproof them. By doing so, they can take proactive steps to increasing investor interest and delivering a positive impact - either through developing more environmentally sustainable buildings or supporting communities and wider society.

Retrofitting assets is, of course, easier said than done. Older assets need a significant amount of capex and financing to bring them up to a higher-standard or change of use proposition.

For smaller operators, the cost of upgrading assets to improve specifications may not be financially viable with capital values and rental levels on properties not supporting premiums for retrofitting. Larger operators, conversely, may be looking beyond factors such as energy efficiency and pursuing net zero – taking into consideration the whole life carbon implications of retrofitting buildings.

There are two areas of the living sector that have been significantly impacted by Covid-19 – accelerating plans to either refurbish, retrofit or replace them with ESG-led assets.

The first is care homes and wider senior living sector where the pandemic has accelerated the closure or upgrading of outdated assets. Given social distancing measures, there are key focuses on reconfiguring developments to improve virus control, as well as resident experience and safety.

Bed supply also remains a topic of concern amongst an ageing demographic. The level of home closures and the slower rate of new beds being built means that there is an imbalance between supply and demand – creating competing interests between retrofitting or building new homes.

Many hotel operators will also be considering their assets following pandemic-related closures. The same challenges around obsolescence are relevant here and there is an anticipation that newer or refurbished hotel stock will be more easily refinanced.

What this often boils down to is who is going to pay for this retrofitting, the freeholder, the operator or tenant?

Often, in an investment property, the answer is nuanced. The tenant may have a repairing liability, but the landlord may want more extensive works to be completed than what the tenant is liable for.

In these circumstances it may be a trade-off, with the tenant wanting to extend its lease and so a deal can be done. The costs of upgrades can be wrapped up in a more general lease re-gearing conversation, perhaps with contributions for major works from the landlord.

Owners and operators will not have the luxury of this conversation and may simply have to consider capital investment in their property portfolios now. Clearly, this issue is not going away.

Digging deep to fund ESG upgrades in the short term should mitigate against the risk of a stranded asset and ensures the company will continue to have financing options in the medium to long-term.

Current landscape

With real estate accounting for 40% of carbon emissions, the sector has the potential to play a significant role in combatting climate change, as well as delivering a wider positive social impact.

Many larger operators already have ESG policies in place, with the resources to either drive these forward internally or instruct specialist consultants to support this. Smaller operators do not have the same deep pockets, which does risk a ESG divide between different levels of the market.

Lenders also face the same management capacity and resource challenges. While some larger lenders may not have specific ESG criteria written into their loan agreements, they are keen to know what strategies their borrowers have in place. The danger of this is ESG being seen as a 'nice to have' rather than an obligation from the lender side and requirement for refinancing.

We are now seeing 'green premiums' coming through in the market. A recent JLL report identified that occupiers are willing to pay higher rent for more sustainable buildings – leading to higher occupancy rates and net operating income trajectory. Where this is linked to a financing, it could result in lower interest rates.

Intervention

Lenders are likely to have legacy loans and properties on their books that are at risk of obsolescence.

There is, therefore, a pressure on lenders to lead the way in retrofitting and upgrading assets to better incorporate ESG. This has to be matched by further intervention, with lenders educating and encouraging borrowers – in the living sector and across wider real estate – on the risks of not following this route, highlighting that it will be difficult to obtain financing if not.

Lenders must support borrowers to get their assets up to an acceptable standard – but how, apart from refusing to lend? One solution could be sustainability linked loans. These are facilities that incentivise the borrower to hit certain ESG metrics by way of reduced costs of lending.

Aside from making ESG compliance attractive through better pricing or punishing non-compliance through lending criteria, lenders are now coming under significant pressure from regulators to report the relevant data and demonstrate a requisite level of ESG lending.

The key to achieving this will be in establishing a consistent way of measuring and assessing ESG metrics, as if lenders are expected to play a more interventionist role, there needs to be a consistency and fairness in approach.

Working together for the better

It is clear that the market is driving change, with asset owners, especially in the living sector, now facing the prospect of holding stranded assets that are less appealing to both lenders and residents.

Focusing on the opportunity though, by improving the quality of their buildings and integrating ESG, operators can achieve higher rents and better occupancy rates.

Asset owners, however, cannot do this alone considering the major capital commitment required.

This opens the door to lenders that can secure financial returns and deliver on their ESG strategy through funding this type of activity. It is critical that lenders bring both smaller and larger clients along on this journey by incentivising - or where needed taking on a more interventionist role - borrowers to retrofit their assets and avoid the risk of obsolescence.

Decarbonising construction

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3

Decarbonising construction

Michael Bennett and Amber Wright explain the importance of reducing embodied carbon in construction - putting forward the case for legislative reform and spotlighting how new technologies, methods and contracts are supporting the living sector's move to net zero.

To date much of the government's focus to meet its net zero targets has been on creating more energy efficient homes and buildings. While important, steps must also be taken to improve sustainability throughout the lifespan of a building.

One way to do this is by reducing embodied carbon emissions during the construction of buildings.

Embodied carbon

Embodied carbon is the carbon dioxide (CO_2) emitted through producing materials. For example, embodied carbon may be created in the production of clinker, used to make cement, or by the burning of gas to make steel in a blast furnace.

Embodied carbon is particularly significant in construction, as the production of steel and cement makes up between 16% and 18% of global CO_2 emissions annually. There are currently no mandatory UK limits on how much embodied carbon can be emitted during the construction process.

In February 2022, a Private Members Bill was introduced into Parliament with the aim of monitoring and limiting embodied carbon emissions in construction projects.

When presenting the Carbon Emissions (Buildings) Bill to Parliament, Duncan Baker MP stated that a third of carbon emissions come from construction, with 40m to 50m tonnes of greenhouse gas emitted annually as a result of the construction, upkeep, refurbishment and demolition of new and existing buildings and infrastructure. Baker stated this is known as embodied carbon, "so called because the materials that we build are the physical embodiment of such greenhouse gas emissions".

Regulation

The Bill sought to set limits on embodied carbon emissions in the construction of buildings and to require that the whole life carbon emissions of buildings be reported. The Bill's passage through Parliament was cut short and was withdrawn after its first reading.

While it is rare for a Private Members Bill to progress through Parliament and become law, the Bill's introduction reaffirmed the importance of regulating embodied carbon emissions in construction.

In 2021, the UK Green Building Council launched a 'Net Zero Whole Life Carbon Roadmap'. Over 100 organisations contributed to the Roadmap and one of the recommendations to achieve net zero across the sector is the regulation of embodied carbon for new buildings and major refurbishments.

The Roadmap recognises that the measurement and mitigation of embodied carbon is currently voluntary and recommends introducing limits for embodied carbon across all sectors by 2027.

Many in the industry have shown support for the proposed Building Regulation amendment 'Part Z' and Approved Document Z. The documents were put together by members of the industry as a proof of concept of the regulations that are needed to put legal limits on the embodied carbon emissions of major projects, while outlining requirements on the assessment of whole life carbon emissions.

What else could be done?

Another option that has found favour in several countries is the requirement for developers to undertake carbon impact calculations during the planning process.

The calculations could then be used by a planning committee either as a criteria for granting approval, or by imposing conditions in relation to carbon offset. To ensure ongoing project viability for developers, any such approach needs to be flexible and fair.

New technologies are also being developed all the time that could significantly reduce the levels of embodied carbon. For example, JCB recently announced that it is targeting the sale of hydrogen powered diggers by the end of 2022. There are also options for low carbon concrete and zero carbon steel production that could significantly alter the emissions calculations for a new development.

Some may argue that adopting new technologies, materials or construction methods is a more effective and realistic option, as the planning stage is often too early to commit to embodied carbon emissions limits considering a building's design at this stage may not contain sufficient detail.

Contracting for embodied carbon emissions

Whether limits on embodied carbon in construction projects become a legal requirement or the industry continues to strive to increase sustainability, drafting to achieve certain environmental objectives is likely to become a common feature of construction contracts.

Contracts can set out clear targets for embodied carbon emissions, how these will be calculated and monitored, as well as allocating the risk and consequences of these targets not being achieved.

Other options to improve the environmental credentials of a project may include:

- Auditing at the tender stage to ensure minimum standards are met by the supply chain in relation to sustainability.
- Contractual provisions requiring a supply chain to meet specified net zero project targets and offering incentives if emissions can be further reduced.
- Requiring a supply chain to adhere to sustainable working practices throughout a project. For example, reducing the carbon footprint of plant and equipment, using sustainable materials, promoting biodiversity and setting carbon limits on staff travel and material sourcing.

Support for sustainable construction

Sustainability is on both the construction industry and government's agenda and it's likely that those operating in the sector are going to come under increasing pressure to reduce the carbon emissions of projects from funders, future purchasers or tenants.

The industry is, however, responding and the advent of new technologies, materials or innovative contracts show the progress that is being made. Decarbonising construction is reliant on accelerating these efforts, while moving on from just making buildings more energy efficient.

Reducing embodied carbon emissions must be considered critical on the journey to net zero.

Managing challenging market conditions

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4

Managing challenging market conditions

John Cleaveley and Amber Wright explore the economic and market headwinds currently impacting the construction industry, with an analysis of how living sector operators and developers can mitigate risk in a volatile environment.

The construction industry is operating in testing market conditions with economic uncertainty persisting well into 2022.

Nevertheless, statistics published by the Office for National Statistics (ONS) show that construction output in March 2022 grew for the fifth consecutive month, increasing by 1.7%. This resulted from an increase in repair and maintenance, and new work. The monthly output in March 2022 was £14,994m which is the highest level since monthly records began.

The outlook remains stormy. Indeed, the sector is still dealing with the disruption caused by Covid-19 and Brexit, with persisting challenges including the unavailability of materials and labour, and increased costs. This may lead to an increase in delays, claims and potential disputes on projects.

Skills and materials shortages

Statistics published by the ONS show that between February and April there were 49,000 job vacancies. These figures match the record high of vacancies set between December 2021 and February 2022. Material shortages also continue to impact the industry.

In a statement on 11 May 2022, the Construction Leadership Council's Product Availability working group stated that, "ongoing challenges continue to affect bricks, aircrete blocks, concrete products, PIR insulation products and gas boilers all of which are on long lead times".

The statement also referred to recent data published from Glenigan indicating a slowdown in starts on sites during the beginning of 2022, this suggests "that inflationary pressures are starting to influence client decisions in some sectors, continuing the trend seen with softening retail sales over the last few months". The statement also points to price inflation as "a critical issue".

The working group expects that energy price movements would remain "unpredictable" due to further restrictions on Russian gas and oil imports in Europe. Other challenges highlighted by the working group were the reported impact on the availability of products caused by the Covid-19 outbreak in China and the "wage inflation" required to secure labour.

The rising costs and long delivery lead in times is putting additional pressure on an industry that continues to deal with the effects of the pandemic, Brexit and is now contending with increased turbulence in the global market caused by Russia's military invasion of Ukraine. The working group states that the "conflict in Ukraine continues to affect certain product areas" and they are considering "the likely extent of disruption particularly in relation to clay, ceramics, electrical products, and raw materials for steel and other production, as well as impact on energy costs".

We are seeing that rising material costs and lead in times are causing some contracts to be abandoned due to affordability or timing issues. Concerns around fulfilling pre-let agreements for lease and development funding agreements is resulting in more conditionality, building cost conditions, funding conditions or viability conditions.

We are also seeing increased prominence in negotiations in relation to force majeure or equivalent extension of time provisions - addressing the risk of potential disruption to a contract because of Russia's military invasion of Ukraine.

In recent years, war or hostility and the potential contractual disruption these may cause has not been considered as a high risk. The increased focus on these provisions is notable. It demonstrates that we are operating in a global marketplace, with the political climate causing market disruption and uncertainty.

Impact

Going forwards, increased material and labour costs are likely to result in higher tender prices and fixed price contracts. This will represent a much riskier option for contractors.

For new contracts, we may see contractors increasingly looking to address risk by:

- Taking on a more robust negotiating position to limit risks they may previously have accepted for fluctuations in material prices and delays in delivery of materials.
- Requesting provisions to enable them to obtain an extension of time and additional costs for delays caused by the availability of certain materials and labour shortages.
- Ordering materials well in advance. This may mitigate the risk of delivery delays and future price rises. Consequently, clients may see an increase in requests for advance payments.
- Advance payments need to be considered carefully due to the solvency risk and security should be considered to protect against this risk such as advance payment bonds. This will add additional costs to the project. Ordering and receiving delivery of materials in advance also poses issues of storage and insurance that will need to be considered.
- An increased reliance on provisional sums to avoid committing to costs that are difficult to predict in the current market.

Ultimately, who takes on these risks will come down to the negotiations between parties and their relative bargaining strength.

Supply chains that have taken on the risk of fluctuation in material cost and delivery delays may be at risk of increased disputes and solvency issues. Statistics from the Insolvency Service show that construction insolvencies were up 85% in the 12 months ending Q1 2022 compared to the period ending Q1 2021.

In March 2022, there were 419 company insolvencies in the construction industry, which is the highest figure recorded in the previous two-year period.

Whilst supply chain insolvency is an inherent risk in construction projects, this risk is increased in the current climate. Therefore, to avoid future issues, risk should ideally fall on the party best placed to manage and bear it. However, there may be some debate as to which party this is.

Increases in construction costs are easier to manage in a market where such assets are commanding record prices and yields, with forward funding and sales yet to be concluded - as the build price fluctuations can be offset against higher sales proceeds than was expected in the appraisal.

Where developers have prepared a pre-let or have already funded the development, these rising costs come off the bottom line, or require a renegotiation on rents or interest coupons.

Likewise, for owner and operators developing for their own use, the burden of increased build costs simply affects profits or, rather, the end user will have to pay a higher price for their living asset - be that an elderly person taking a care home bed, or a fresher pitching up to their university accommodation. These consequences ripple through the market.

Some contractors will argue that it is frequently the employer that can bear the risk in terms of financial consequences. Conversely, it may be argued that contractors are better at managing these risks in the first instance.

It will be interesting to see how this is resolved in contract negotiations and whether fluctuation provisions will become more prevalent or at least some form of sharing the pain. Certainly, we are seeing that construction costs are part of a conversation around viability at an early stage.

Delivering successful regeneration through joint ventures

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5

Delivering successful regeneration through joint ventures

Joint ventures can provide local authorities with the means to work with a private sector partner to successfully develop or regenerate land, while securing a financial return. Dan Hargreaves and Andrew Millar outline potential joint venture models, the opportunities for both the private and public sector, and key considerations before entering an agreement.

Local authorities continue to face significant pressure on budgets, and many are continuing to explore a more entrepreneurial approach to deliver transformational developments or regeneration projects.

One option for local authorities looking to successfully develop or regenerate land is to enter into a joint venture with a private sector partner. This is often structured as a corporate joint venture and presents opportunities for the private sector developer and authority, which uses its land to lever long-term investment from the developer.

Typically, a local authority will transfer land assets to the joint venture vehicle, in return for a loan note, with the private sector partner providing funding of equivalent value to the land, in addition to bringing its skills and access to finance.

If successful, the local authority will not only complete its development, but also generate a revenue receipt from its capital asset that can be used to fund future phases or other projects.

Another advantage of this model is that the local authority retains equal control over the development while sharing risk and reward. This is alongside accessing private sector expertise and investment.

A successful joint venture requires all parties to balance their individual interests, clearly set out the objectives of the project, commit sufficient resource and work collaboratively. The parties should appoint experienced advisers that understand the commercial drivers and issues involved.

Considerations

- With the private sector partner delivering works and services under the joint venture, the local authority will need to notify the market of the opportunity and run a competitive procurement to select its preferred partner in accordance with the Public Contract Regulations 2015. Best value and subsidy control requirements will also need to be satisfied.
- The choice of joint venture vehicle, in practice, comes down to whether a company limited by shares or a limited liability partnership ("LLP") is most appropriate. Both structures allow members to ring-fence their liability and create bespoke corporate governance arrangements.
- The tax transparency of an LLP (i.e. the members are taxed not the LLP and SDLT partnership relief should be available on the land transferred into the vehicle) will usually see it as the vehicle of choice, although guidance, particularly around control over management, is required to avoid an LLP having to comply with rules about collective investment schemes.
- There are a number of funding considerations, starting with the initial contributions. As this usually involves the private sector partner contributing cash of equivalent value to the land transferred by the local authority, the timing of, and methodology for, land valuation is therefore of critical importance.
- The members must agree whether they are willing to contribute further funding, or whether third party funding is required. Where third party funding is taken, especially on larger schemes, it is common to see land held in and developed, on a phased basis, by different SPV subsidiaries of the main joint venture vehicle. This allows different funders to lend to, and take security over, different phases.
- The joint venture agreement will need to include detailed provisions relating to the distribution of profits at agreed stages. For example, to address what is the agreed priority of payments, whether a distribution be made before all/some loans are repaid and, if relevant, the ability of either member to retain funds in the joint venture to recycle for future phases.
- An appropriate control and governance structure will allow the members of the joint venture to maintain control whilst balancing, and sharing, risks and rewards.
- Aside from the financial risks and reward, a local authority will want to include controls over future development, whilst benefitting from a developer's specific skills and knowledge. Understanding each other's drivers and red-lines, and the local authority's legislative constraints, is necessary to allow each party to make the right compromises and concessions.
- Further points to consider will include: the make-up of any board or executive committee; identifying the decisions that are reserved for the approval of all members; the term of the joint venture (which must accord with the duration of the development) and the ability of members to transfer their interests; the implications of being in default under any contractual obligations; and, critically, what happens in the event of a deadlock, where the parties cannot agree on a course of action. In such circumstances it is particularly important to a local authority not to lose control of the land it contributed.

The issues might be familiar, but each joint venture has its own commercial challenges and as a number of high-profile joint ventures have failed, careful consideration and appropriate advice is always required before local authorities commit themselves to a corporate joint venture.

Fire safety obligations and the cost of getting it wrong

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6

Fire safety obligations and the cost of getting it wrong

Charles Arrand considers the Regulatory Reform (Fire Safety) Order 2005, with a focus on both the potential business and human costs of failing to discharge obligations under the Order.

Fire safety is regulated by the Regulatory Reform (Fire Safety) Order 2005 (the Order), which applies to almost all buildings, places and structures other than individual private homes.

Fire safety cases carry a significantly elevated level of risk due to the number of people potentially affected by an adverse event, particularly in establishments containing vulnerable people.

General obligations

Fire safety is regulated by the Order, which requires any person who has some level of control in a premises to take reasonable steps to reduce the risk from fire and make sure people can safely escape if there is a fire.

Under the Order, anyone who has control of a premises or anyone who has a degree of control over certain areas or systems may be a 'responsible person' and must complete the following:

- Carry out a fire-risk assessment identifying any possible dangers and risks;
- Consider who may be especially at risk;
- Eliminate or reduce the risk from fire as far as is reasonably possible and provide general fire precautions to deal with any possible residual risk;
- Take other measures to make sure there is protection if flammable or explosive materials are used or stored;
- Create a plan to deal with any emergency and, in most cases, keep a record of findings; and review findings when necessary.

Local Fire Services enforce the Order, carrying out inspections after a fire or as part of routine checks.

Liability

The consequences of getting fire safety wrong are potentially catastrophic; both in terms of the human cost to individuals, and impact on businesses. The financial costs associated with a breach of regulations can also have a major impact on an organisation.

Though fire safety cases were specifically excluded from the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Regulations Definitive Guideline ("the Guideline") when it was introduced in 2016, the Court of Appeal has determined that the Guideline provides a useful analogy, and reference is often made to it in fire safety cases.[1]

Of particular note is the requirement within the Guideline for the court to consider "whether the offence exposed a number…members of the public to the risk of harm. The greater the number of people, the greater the risk of harm," and to consider adjusting the fine significantly upwards if so.

A relevant consideration is that the potential impact of risk on vulnerable groupings is viewed as a serious aggravating feature of any offending. Fires in settings where accommodation is provided for significant numbers of people always create the risk of multiple injuries and fatalities. In certain such settings, such as care homes, the population at large may fall into the vulnerable classification.

In March 2021, following the Fire Safety Consultation, the government announced proposed amendments to the Order that would see the introduction of unlimited fines for breaches of it. The impact of this in the context of fire safety enforcement could be as significant as the introduction of the Guideline, which has seen an unequivocal increase in fines for Health and Safety cases.

[1] R v Sandhu [2017] EWCA Crim 908

Bupa case

Private healthcare provider Bupa has recently been ordered to pay a purported record £1.04m penalty (fine and costs combined) after admitting fire safety failings. London Fire Brigade, prosecuting, said it was the "highest ever fine for fire safety breaches in the UK, highlighting the seriousness of Bupa's failure to protect a vulnerable resident in its care".

In March 2016, 69-year-old wheelchair-bound Cedric Skyers sadly died when his cigarette set his clothes on fire in a garden shelter at Bupa Manley Court, Brockley. Mr Skyers was unsupervised when a care assistant saw the fire from a first-floor window and called 999. Staff attempted to put the fire out, but sadly Mr Skyers died from his injuries. It was subsequently discovered that Mr Skyers' clothes had become flammable as a result of the emollient creams used to treat him.

In this case, investigators found that, while a smoking risk assessment had been carried out for Mr Skyers, Bupa had not assessed his use of emollient creams in that context.

Apparent burn marks indicative of previous incidents were found on Mr Skyers' clothing after his death. Care home staff stated they had been unaware of this and, had they been so aware, would have completed more regular checks.

Bupa pleaded guilty and is reported to have accepted that it had failed to: ensure staff understood the risks from the use of emollient creams; warn residents using paraffin-based products not to smoke, or, require precautions to be taken; instruct staff not to leave a resident using paraffin-based products smoking unsupervised; and carry out a suitable and sufficient individual smoking risk assessment.

Care providers should ensure that they assess the ability of residents to smoke safely, checking clothes for burn marks if necessary. Consideration should also be given to fire retardant clothing, smoking aprons and personal alarms.

Bupa said it had introduced Comprehensive Risk Assessments for residents that smoke, as well as staff training on paraffin based emollient creams and smoking aprons and supervision as a result.

At first glance, and without background understanding, this tragic accident may look like an unlikely 'freak' incident; but that is far from the case. While residents wishing to smoke present a number of challenges for care providers generally, Fire Services, the Care Quality Commission (CQC) and others have issued guidance addressing the use of paraffin-based emollients for smoking residents.

Under the microscope

The tragic fire at Grenfell Tower in 2017, and the Public Inquiry into it, has put fire safety at the forefront of discussion, including for those responsible for implementing and enforcing legislation.

The size of the fine in the Bupa case sets no legal precedent, but is an important reminder of the consequences of failing to discharge duties, as the prosecuting fire service was keen to emphasise; 'If there can be anything constructive to come from this, we hope that it will be that anyone who has a legal responsibility for fire safety in a building – whether as a landlord, property manager, care home provider or any other setting – takes note and makes sure they are complying with the law.'

It is clear that all businesses need to ensure fire safety is appropriately prioritised. Failing to do so could mean significant financial penalties being imposed on those caught by the Order, but most importantly put people at risk of injury or even death.

For those operating in the living sector, the consequences of getting it wrong have never been greater.

Acting now on building safety

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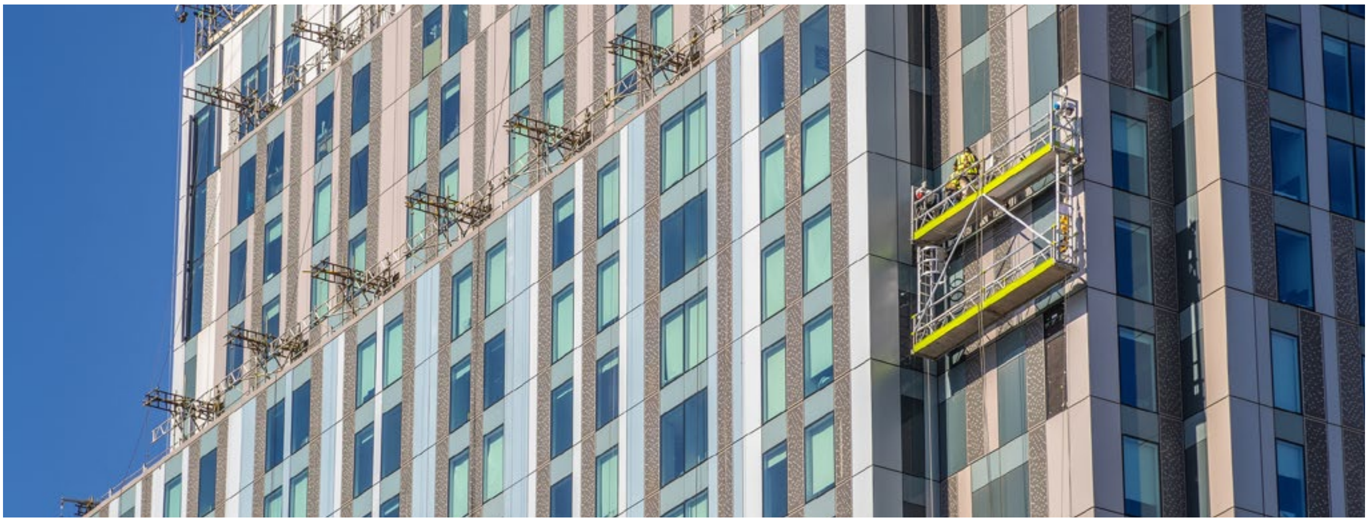
7

Acting now on building safety

Aaron Harlow and Ian Hardman examine the tough new measures that are being taken to force the real estate industry to pay to remove cladding - protecting leaseholders from costs.



The Department for Levelling Up, Housing and Communities (DLUHC) has requested that residential property developers fund and undertake all necessary remediation of buildings over 11m that they have had a role in developing. This includes buildings both 11-18m and 18m+.

The proposals will see the sector pay to fix historical problems, "freeing hundreds of thousands of innocent leaseholders from shouldering an unfair financial burden while also enforcing a common-sense approach to avoid unnecessary work," – as recently described by Secretary of State for Levelling Up, Michael Gove.

A vast number of firms may now find themselves facing large contingent liabilities that they may have accounted no provision for – some reports estimate that cladding remediation works could be in the region of £5m - £6m per case.

The DLUHC also wants developers and manufacturers to commit to payment towards a fund to remediate unsafe cladding on 11-18m buildings where direct remediation has not occurred or cannot occur. The DLUHC has stated that the remediation costs are currently estimated at £4bn.

Building safety is a priority for the government, with the DLUHC looking for developers and manufacturers to agree to solutions now or face government-imposed solutions such as blocking planning permission and building control sign-off on developments that will prevent the building and selling of new homes.

The DLUHC has announced that over 35 developers have signed a pledge committing to remediate "life critical fire safety works" in buildings over 11m that the developers were involved in developing and refurbishing in the last 30 years in England. These developers have also agreed to reimburse any funding received from the government remediation programmes in relation to these buildings.

The government has also confirmed that the Building Safety Levy will be chargeable on all new residential buildings in England. This has widened the scope of the Building Safety Levy, which will be implemented as part of the Building Safety Act through secondary legislation. This change is expected to raise an additional £3bn over 10 years from developers.

On 13 April 2022, Michael Gove wrote to the Construction Products Association stating that as a consequence of manufacturers failing to come forward with proposals to date, 'I have instructed my officials to do whatever it takes to make sure that construction product manufacturers are held to account through the powers that I am establishing in the Building Safety Bill. My new recovery unit will pursue firms that have failed to do the right thing, including through the courts.'

While some firms have made provision in their accounts for building safety repairs, others may not be so prepared and the extent of liability and future costs in relation to this issue may be hard to predict.

We may also see a rise in claims against those in the supply chain that were responsible for the design and build of these properties. The Building Safety Act also includes new provisions to extend the limitation period for breach of the duties contained in the Defective Premises Act 1972 and liability under s.38 of the Building Act 1984 - when this provision is in force.

Therefore, designers, contractors and developers may have a greater exposure to claims if the work they have carried out is subject to the extended limitation period.

This all puts pressure on an industry already operating against a challenging economic backdrop.

Over the last few years, the industry has been impacted by Brexit and pandemic-related issues, price rises, material delays and labour shortages.

So, what are the options for companies in the industry facing financial difficulties?

There is no doubt that the earlier a company can act to head off financial difficulties, the better. The range of options available to it will be from individual negotiations with particular creditors, right up to more formal restructuring options.

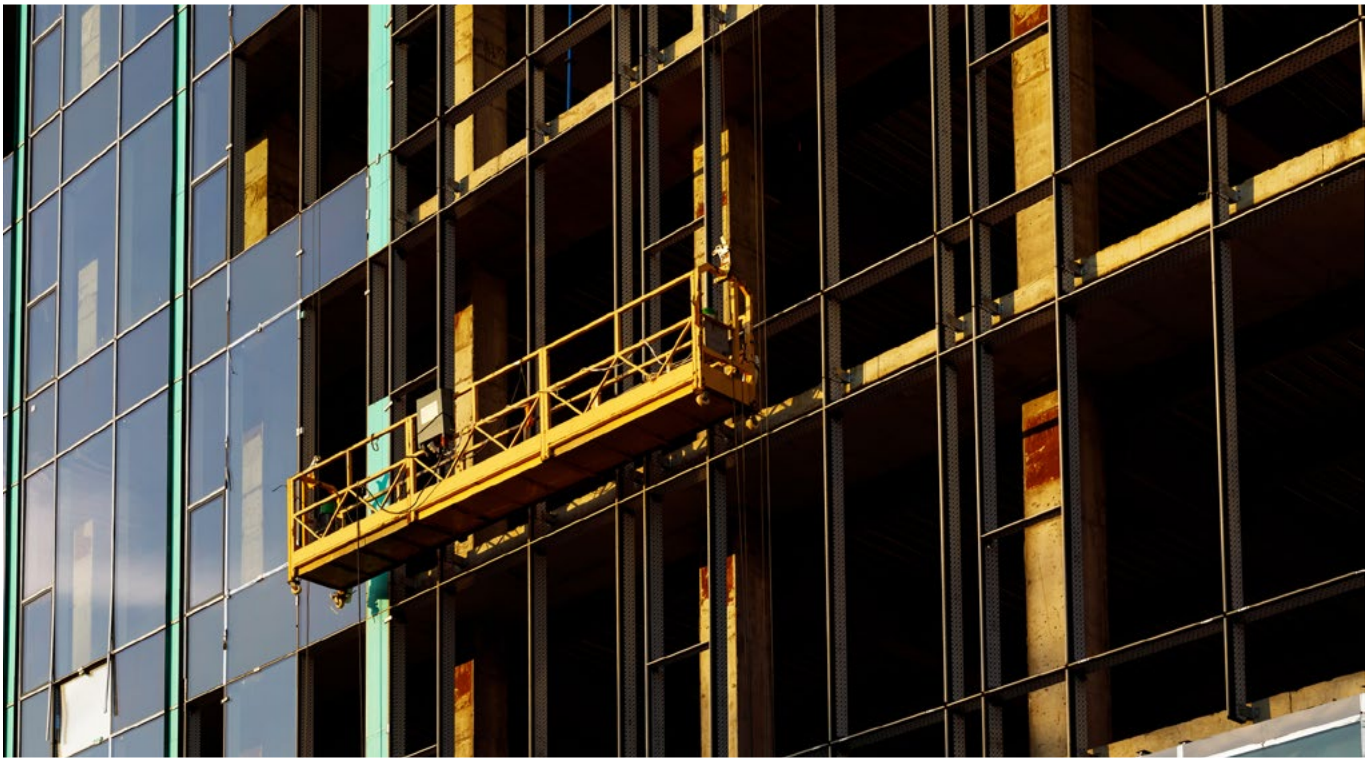
Planning is key with consideration to the issues that may come out of the woodwork to send a business off course; a litigation fighting fund is always a good contingency to allow some protection against unexpected disputes.

Equally, setting aside funds to take care of future remediation costs would allow businesses breathing space when the unanticipated happens.

For companies with more concrete financial difficulties, a more holistic restructuring option could include a Company Voluntary Arrangements (CVA) that can allow a company to pare down its liabilities to create a healthier business fit to trade on in the future.

Shoosmiths has recently acted on a number of CVAs, assisting companies in continuing to move forward with their operations alongside winning new building contracts.

It is crucial that businesses plan for the financial impact these changes will have, while ensuring that the appropriate action is taken to meet the new obligations. In the worst case scenarios, building a strong understanding of the different restructuring options available can be the difference in a firm being able to continue to trade or failing completely.



Green for go – the importance of collaboration

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8

Green for go – the importance of collaboration

Building on Shoosmiths' recent insight paper, unlocking net zero strategies for business, James Wood-Robertson charts the routes to decarbonisation, while discussing the role of collaboration and partnerships in achieving net zero.

After the much-anticipated COP26 climate summit, where governments across the world made their net zero commitments in a bid to tackle the challenge of limiting global warming, the prospect of setting targets became even more crucial.

You have heard in the other articles how ESG considerations can impact bank finance and how the construction industry is focusing on embodied carbon, here we talk about how living sector businesses can tackle net zero.

Setting targets is often the easy part. Shoosmiths highlighted, in its recent paper in collaboration with Cornwall Insight, the potential routes to decarbonisation that businesses have at their disposal to meet their targets:

Pressure for businesses to adopt net zero is both bottom-up and top-down

The key drivers for businesses to make net zero commitments are investor pressure and legal and regulatory requirements, particularly for large corporates.

Societal pressure and customer expectations of businesses to do right by the environment and climate act as bottom-up drivers. The net zero journey provides opportunities for businesses to show leadership in their solutions and pathways to tackle climate change.

At its heart, sustainability is an approach that seeks to reconcile economic development with the protection of both society and the environment, alongside the needs of society today and that of future generations. In terms of reconciliation, we are increasingly seeing economic development and the protection of the environment becoming one and the same driver in terms of real estate development.

Successful approaches will be shaped by location, scale, and exposure to different vectors

There is no 'one-size- fits-all' strategy for businesses to achieve net zero and there will be different options for different businesses. However, one common thread is that collaboration and partnerships with other companies and organisations as well as stakeholders, investors, customers and suppliers is key to achieving net zero.

It will also require larger companies and industries to support their supply chains and SMEs in their net zero journeys. The challenge in delivering sustainable cities requires collaboration and a joined-up approach, not just between developers and occupiers, but also with other stakeholders and, in particular, local authorities.

Green supply is attractive, but beware of greenwashing

Choosing a green electricity supply can be a straightforward way for a business to decarbonise their energy supply and boost their environmental, social and governance credentials.

However, not all green electricity tariffs and products are as ‘green’ as companies are led to believe.

The governance of green tariffs therefore needs to be reviewed to ensure net zero is embedded in all business energy supplier operations.

Real estate’s role needs to reflect this also and ensure its symbiotic with other stakeholders to enable greater decarbonisation of supply chains and deliver sustainable cities, rather than simply being a means to provide green credentials to an occupier.

Businesses need to be assertive and proactive

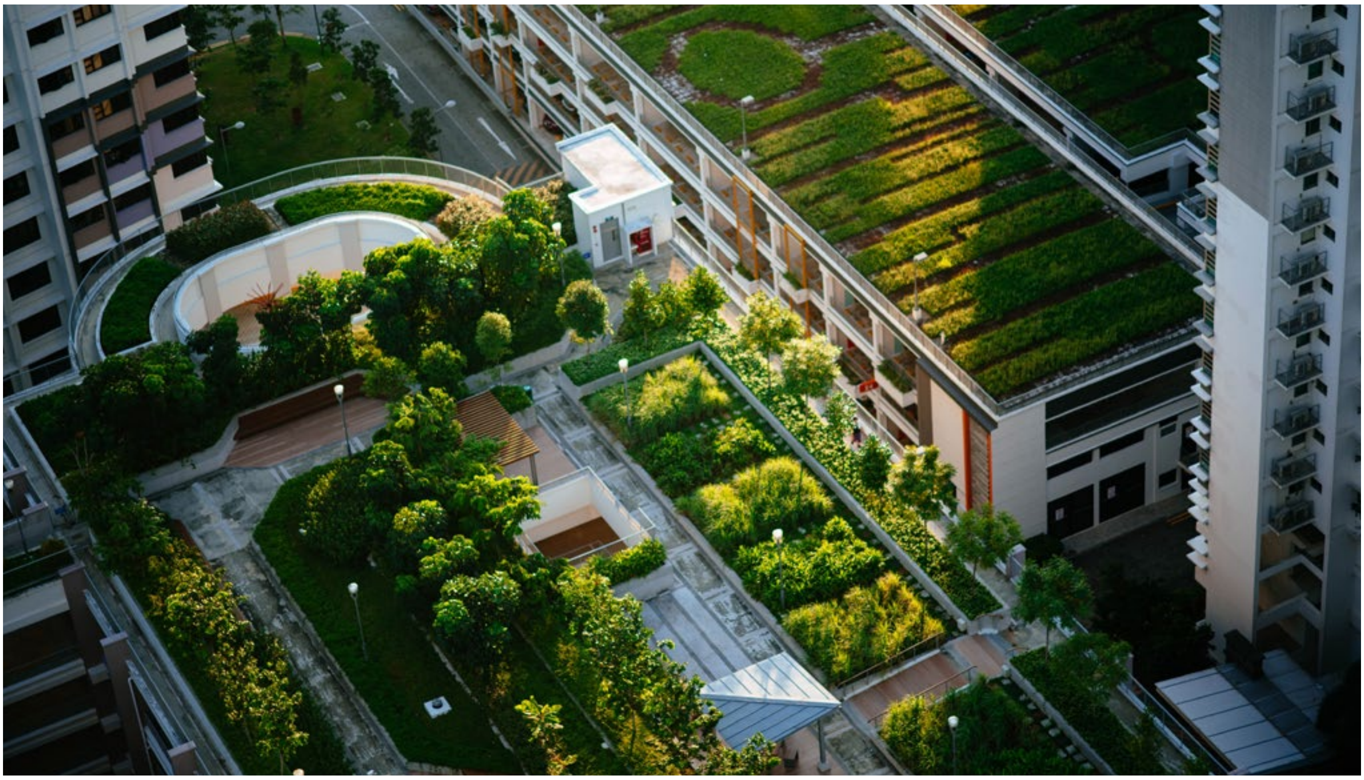
Ideas on net zero strategies and best practice need to be shared and businesses need to seize the opportunity to make a positive impact. Achieving net zero is not the finish line, companies must maintain net zero and even go beyond that to become net positive.

Future real estate developments can help provide solutions to climate problems and have the added benefit of being able to start with a green print to address these specific challenges rather than trying to retrofit or shoehorn a part solution.

While the net zero challenge is one we all face, organisations are in different circumstances starting from different positions – hence why there is a vital need for a collaborative approach to reach these shared targets.

Companies have a duty – both legally and morally – to take measures in relation to limiting global warming, and through best practice sharing and cooperation further progress can be made.

Our insight paper, Unlocking net zero strategies for business, sets out in detail the various routes to decarbonisation and strategies that businesses may take.



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