PROPERTY LAW UPDATE

Property Update
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3 CPD Points
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“I rate everyone we have dealt with as being first class”

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“Very professional, quick to respond and good at keeping the client informed.”

LEGAL 500 2015

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- 2013 Lawyer Awards – Real Estate Team – 2nd
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RECENT CASE LAW

Gulf Agencies Ltd v Ahmed [2016] EWCA Civ 44 The landlord was a solicitor and a notary public. The property was a ground floor and basement let out to the tenant. The landlord and tenant had poor relations ever since the landlord required the freehold in 2007.

The landlord served a s.25 notice to obtain possession to which the tenant objected. The landlord opposed this on ground (g) i.e. occupation for his own purposes. He intended to occupy the premises as a solicitor’s practice and minicab business which he also owned. The first instance judge rejected the claim and accordingly to the Court of Appeal, showed bias against the landlord.

The Court of Appeal stated that for ground (g) to apply the landlord must show:

(a) A fixed and settled desire to do what he says he intends to do, ‘out of the zone of contemplation and in to the valley of decision’ to quote from the case of Cunliffe v Goodman [1950] 2 KB 237

(b) There was a reasonable prospect of being able to bring about the desired effect including a real chance or reasonable prospect for planning permission for the proposed change of use.

The Court of Appeal decided that the landlord had a clear intention to occupy. This is subjective and the first instance judge had erred. The second test was objective but there was a real prospect of occupation which was not illusory or short term as under current planning legislation there was a possibility of the landlord occupying under Class A2. The case was sent back to be heard by a different trial judge.

Landlord’s intention to occupy: ground (g): s30(1)(g)

Subject as hereinafter provided that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

If the landlord wishes to occupy the premises himself for business or residential purposes, a new tenancy may not be granted. This, once more, is an important ground. As with s30(1)(f), this provision causes much litigation but some things at least appear certain.

The Court will enquire into the landlord’s intention to occupy. The test is an objective one, which is assessed at the date of the hearing, as with Betty’s Café Ltd v Phillips Furnishing Stores Ltd [1959] above. In Cox v Binfield [1989] 01EG69 there was held to be a sufficient intention to occupy even
though the landlord’s plans were ill conceived, financially risky and likely to fail. In spite of these considerations, the intention was a genuine one. Likewise, in **Dolgellau Golf Club v Hett [1998]** EGCS59 the landlord intended to occupy the premises (a golf course) for his own business purposes. This was a valid ground of opposition even though his plans were flawed and doomed to failure.

The meaning of occupation and the people qualified to occupy causes some little confusion. In **Re Crowhurst Park, Sims Hilditch v Simmons [1974] 1WLR583** it was held that ground (g) was satisfied where the landlord intended to use the premises for partnership purposes.

**Patel v Keles [2009] EWCA**

The landlord must have a clear and genuine intention to occupy the premises, but this does not preclude a potential sale at a later date. However, if as here there is a likelihood of sale within a short period then Ground (g) cannot be used.

**Landlord and Tenant Act 1987**

**Part I: Rights of First Refusal**

Part 1 provides that where the landlord proposes to make a relevant disposal and its terms.

**Relevant Disposal: s.l**

This concept causes major problems. It consists of a disposal of any estate or interest, whether legal or equitable including a disposal of an estate or interest in the common parts.

Specifically included are contracts for sale whether conditional or unconditional, disposals by way exchange, sale by auction, options and rights of pre-emption.

Excluded are grants of a tenancy of a single flat, interests under a mortgage, sale of incorporeal hereditament, assignments by a trustee in bankruptcy or under matrimonial law, compulsory purchase orders, gifts to the landlord's family or to a charity, transfers by will or on intestacy, disposals to The Crown, disposals to an associated employer.

**Mainwaring v Henry Smiths Charity Trustees [1996] 2 EGLR 267** made clear that the landlord's duty arises as soon as, or soon after, he proposes to dispose: not on actual disposal. Making the disposal conditional on the proposed purchaser serving s.18 notices (see below) will not exonerate him.

**Kay-Green v Twinsectra [1996] 2 EGLR 258**

Here, there were three buildings held under two separate registered titles. Part I applied on a building by building basis, i.e. even though there were not the requisite majority of qualifying tenants in one of
the buildings, the other two was still subject to the rights. Moreover, mistakes in the tenants request under s.12, see below, including the third building did not prevent them exercising their rights.

Sale also included appurtenances land, e.g. gardens, and the parts of the buildings not occupied by qualifying tenants.

“Qualifying Tenants”: s.4

Part I will not apply where more than 50% of the floor area is occupied for non-residential purposes, excluding common parts.

The Offer Notice

Where the above conditions are satisfied, s.5 requires the landlord to serve an "offer notice" on qualifying tenants. This must contain particulars of the principal terms of the proposed disposal including the price, and must state that it constitutes an offer to sell the interest of a majority of qualifying tenants wish to purchase. Such majority is determined on the basis of one vote per flat let to qualifying tenants. The notice must also specify a period of at least two months in which the offer can be accepted and a further period of not less than two months in which one or more persons may be nominated to take the disposal and deal with the landlord. The landlord is deemed to have complied with his obligations if he serves the notice on not less than 90% of the qualifying tenants or all but one of them where there are less than ten such tenants.

Criminal Sanctions

A most important change to Part I in introduced by s.91 HA 1996. A landlord commits an offence if, without reasonable excuse, he fails to serve an s.5 notice or contravenes any of the restrictions or requirements in sections 6 to 10. The maximum fine is level 5 on the standard scale. Directors of a company may also be guilty if the company committed the offence with their consent of connivance or owing to their neglect.

The Acceptance Notice

Within the first period specified in the offer notice the requisite majority of qualifying tenants may serve an "acceptance notice" under s.6, to the effect that they wish to acquire the landlord's interest. Thereafter, the landlord must not dispose of his interest before the expiration of the second period specified in the offer notice plus a further three months if purchaser(s) are duly nominated by the qualifying tenants.

If there is an acceptance by the tenants but no nomination, the landlord may proceed to dispose of his interest within a period of 12 months from the end of the second period specified in the notice, but
not at a lower price or on different terms. The landlord has the same powers of disposal where there is no acceptance over a 12 month period from the end of the first period specified in the notice.

If the sale is to be by auction, one month is allowed to appoint a nominated purchaser. The tenants may elect to be notified of the sale price within 7 days of the auction, after which they have 28 days to decide whether to buy at this price.

Instead of service of an acceptance notice in reply to the landlord's offer notice, the qualifying tenants may serve a counter-offer under s. 7. This must specify their proposed terms and can be accepted by the landlord, or it may be the subject of a fresh offer substituted for that contained in the original offer notice. If the fresh offer is not accepted, the landlord is free to dispose of his interests within twelve months of the end of the period allowed for acceptance of the fresh offer.

NB. By s.9 either party can withdraw from the proposed transaction within one month of the end of the second period stated in the offer notice without liability for costs to the other side. Withdrawal later may result in such liability.

If the reversion is sold without an offer notice being served then the tenants may require the purchaser to transfer to them at the purchase price (s.12).

As a consequence of the above, the reversioner would be well advised to serve a notice under s.18 of the proposed sale.

The tenants have 4 months from being notified of the disposal to request information as to its terms from the purchaser. The purchaser must reply within one month and the tenants may then purchase from him on the same terms within 6 months.

By s.93, Housing Act 1996 if the landlord does dispose of his interest to a purchaser, that purchaser is guilty of an offence carrying a fine not exceeding level 4 on the standard scale, if he fails to serve notice on the qualifying tenants informing them of the disposal, and that they may have the right to obtain information about it and to acquire the landlord's interest. This notice is usually required by s.3A LTA 1985 and must be given either on the next rent day after sale or within 2 months whichever is the greater.

s.18 LTA 1987, has been amended by the Tenants Rights of First Refusal (Amendment) Regulations 1996. As an alternative to an s.5 notice prospective purchasers can serve a notice on at least 80% of tenants of flats affected asking them if they will exercise their rights. Now, 50% or more of the tenants served must respond positively within two months (and not as previously, 28 days). This amendment is designed to prevent the s.18 notice as an easier alternative to the landlord’s s.5 notice.

**Artists Collective v Khan (2015) PLSCS 313**

The provisions apply to mixed business residential premises if the floor area of business use doesn’t exceed 50%.
Here the premises comprised three shops with eight flats above. The landlord transferred his interest to a company which he wholly owned. The consideration was £225k. The tenants served a notice on the company wishing to purchase at the same price. Wishing to undo the wrong, the company transferred back to the original landlord with zero consideration. The tenants were able to acquire the property at no cost.

Leasehold Enfranchisement

Jewelcraft v Pressland [2015] EWCA Civ 1111

The Leasehold Reform Act 1967 allows a tenant to enfranchise a house and purchase the freehold. In Spurgeon v Tandon Trustees [1982] AC 755 and Day Estate v Hosebay Ltd (2010) the House of Lords and Supreme Court have held that the legislation applies if accommodation can reasonably be described as a house and this will apply if a material part of premises is designed or adapted for residential purposes at the relevant date. In these cases there was a common staircase to the residential unit. This constituted a house.

In the current case, there had originally been a common staircase but at a later stage this had been blocked and a separate access provided at the back. It was still a house.

Solicitors Liability

Orientfield Holdings v Bird & Bird LLP [2015] EWHC 1963 Here the client was purchasing a £25m house in London. The solicitor was aware that there was planning permission for two schools with 1400 pupils in the same street. They did not disclose this in their Report on Title. The sellers’ response to related questions seemed vague. When the purchaser found out about the planning permission they refused to go ahead with completion and eventually negotiated with the seller to forfeit half of their deposit. They subsequently successfully sued the solicitors for their loss. The court refused to accept an argument that the purchasers had not mitigated their loss by completing the purchase. The judge did state that there was no obligation to carry out additional searches unless upon the express or implied instruction of the client.

Forfeiture
Freifeld v West Kensington Court Ltd [2015] EWCA Civ 806

The tenant deliberately sublet a restaurant without seeking consent. The landlord forfeited and the tenant sought relief. The High Court refused this due to the tenant’s behaviour. The landlord received a substantial windfall.

The tenant appealed and the Court of Appeal decided that although the tenant’s attitude was a relevant factor, relief was still possible. Subject to good behaviour, the tenant was given 6 months to sell his interest.
LOCAL LAND CHARGES

The Land Registry has announced that it is working on a pilot scheme to centralise property information onto a digitised register.

The details are yet to be finalised but, if successful, this central register may provide local land charges information alongside the title register at a standardised price, format and timescale.

This pilot scheme will run alongside the current system until December 2013, when the success of the scheme will be reviewed and evaluated.

Seven local authorities are working with the Land Registry to collate local land charge information. The Land Registry also hopes that CON 29 and CON29M information can be compiled on this central register. This would include details on the following aspects of a property:

- Public footpaths.
- Building control regulations.
- Coal Authority search information.

Note: In January 2014 it was announced that the Land Registry intend to go ahead with being the sole provider of local land charge searches but not enquiries.

In February 2015, the Infrastructure Act 2015 received Royal Assent. It has provision for the Land Registry to be the sole provider of local land charges. Enquiries will still be via the local authority. There is suggestion that only 15 years of records of local land charges will be kept.

Note: New CON 29 Enquiries was due to come out in spring 2015 but now it will not be until 2016 at the earliest. Proposed changes include information on Community Infrastructure Levy (see later) and information about proposed railways will be included in the additional enquiries. The Law Society have now confirmed that the new Con 29 forms will be used as of 4th July 2016 and a specimen form will soon be available.

Note: HMLR are now saying that they will provide local land charges no earlier than 2017.

Other Land Registry Changes
In October 2015, Practice Note 9 was amended although the Land Registry allowed the previous version to be used until 18th January 2016. Signatures in relation to deeds must be clearly separately witnessed otherwise the application will be rejected.
THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008 AND AMENDMENT REGULATIONS 2014

The original 2008 Regulations introduced criminal offences with a maximum 2 years prison where a trader makes a misleading statement or a misleading omission to a consumer which to a significant degree causes the latter to enter into a transaction. In 2014 statements in relation to immoveable objects were added to the legislation.

On 29th February 2016 the Law Society produced a practice guide on the Consumer Protection Regulations. Although the point is unclear they say that the regulations will apply to solicitors acting for sellers or landlords in residential conveyancing. If this is so then much of the principal of caveat emptor will no longer apply as solicitors will have to disclose factors that are reasonably in their knowledge which may significantly influence a purchaser or tenant in entering into the transaction. The guidance also states that the solicitor must take reasonable steps to find out information which may be within their knowledge. To some extent this seems to resurrect the old part 2 of the Sellers Property Information Form. Also, where this leaves solicitors disclaimers in relation to not having looked at previous files is problematic.

Much of the information within the solicitor’s knowledge may be considered confidential in which case the seller would have to give their consent to disclosure. If such consent is not forthcoming the solicitor would have to refuse to act.
A. INTERPRETATION OF REPAIRING COVENANTS

Repair and Inherent Defects

This is a particular problem in relation to new properties. A repairing covenant will not involve a liability to remedy inherent defects in the absence on express wording. (As an evidential point surveyors should be encouraged not to describe defects as disrepair). However, the tenant (or landlord) may be liable to remedy the defect if this is the best way of remedying disrepair which arises as a consequence of the defect.

Quick v Taff-Ely B.C. [1985] 3 All ER 3
The landlord was not obliged to replace metal window frames which sweated, causing major condensation, with wooden or UPVC ones. This condensation did not cause any disrepair for which the landlord was liable.

Post Office v Aquarius Properties [1987] 1 All ER 105
The basement of the demised premises was composed of porous material and flooded frequently. At the time of the action the water table had subsided and there was no actual disrepair. The tenant was not obliged to spend substantial sums of money remedying the defect (between £86,000 and £175,000).

Elmcroft v Tankersley-Sawyer [1984] 270 EG 140, CA
A badly situated damp proof course resulted in water penetration and damage to plaster work. The landlord was liable for the disrepair to the plaster and was required to remedy the defect in the course of this repair.

Stent v Monmouth D.C. [1987] 1 EGLR 59, CA
A badly designed wooden door let in water. This caused the door to warp. As there was disrepair to the door, the landlord was required to remedy the design defect.

Ravenseft v Davstone (Holdings) Ltd [1980] QB 12
Here the premises, valued at £3 million, suffered from rusting to the metal framework and damage caused by the fact that expansion joints had not been used in the original construction. Remedial work costing £55,000, including the provision of expansion joints, not common practice at the date of the original building, and costing £5,000, amounted to repair. See also Re Davstone 1969 where the
landlord having replaced the inherent defective flat roof could not collect the service charge as this only allowed collection for repairs.

Inherent Defects and Actions against Third Parties

The tenant will not have an action in tort against the building contractor, or architect for any inherent defect in the absence of injury to the person or physical damage to other property. Damages in tort are not available for pure economic loss, i.e. the cost of putting right the defect. See D and F Estates v Church Commissions for England and Wales [1989] AC 177, Murphy v Brentwood D.C. [1991] 1 AC 398, Department of Environment v Thomas Bates [1991] 1 AC 499. There may however be a contractual claim by the landlord.

Collateral Warranties

Alternatives to the above are collateral warranties between tenant and contractor, whereby the contractor warrants that they have not been and will not be negligent in carrying out the work. As such warranties are yet to be tested in the courts; a better course is perhaps for the landlord to accept liability for inherent defects through the lease, or at least during the first years of the lease. Defects still need to be defined, however, preferably by reference to whether the landlord has a cause of action against the builder or professional team.

See for instance, Smedley v Chumley and Hawke Ltd [1981] 261 EG 775. The landlord was expressly liable for defects due to faulty materials and workmanship. He was responsible for substantial repair when the raft on which the premises was supported tilted. An argument that there was no mention of repair to foundations but merely to the exterior failed.

Repair as Opposed to Renewal

For older buildings the major issue tends to be whether works can be said to constitute repair or renewal. The tenant may be required to renew subsidiary parts of premises (as in Ravenseft above) as part of a repairing obligation. However, repair does not involve renewal of the whole or substantially the whole, and giving back something more than originally let.

Brew Bros v Snax (Ross) Ltd [1975] 1 QB 612

Works to prevent tilting of premises would cost £8,000. After completion the premises would be worth between £7,500 and £9,500. The works constituted renewal for which the tenant was not liable.
Mullaney v Maybourne Grange [1986] 1 EGLR 70

Replacement of old wooden window frames with double glazing at twice the cost amounted to an improvement beyond repair which the landlord could not pass on to the tenant by means of a service charge.

Craighed v Homes for Islington Ltd [2010] UKUT 47

Where windows were not replaced like for like, due to intervening changes in Part L of the Building Regulations, it was implied that the landlord could improve the windows to modern standards under the repairing obligation and add the cost to the service charge. This, in spite of the fact that the building was listed and potentially exempt from Part L. Contrast this with Mullaney v Maybourne Grange Ltd [1982] where service charges which allowed repairs, but not improvements, to be charged for did not cover replacement of wooden single glazed window frames with UPVC double glazing. The difference between the two cases seems to be due to the intervening statutory provisions. If correct, this may be an extremely useful argument for landlords, e.g. in relation to increased energy performance of buildings.

In relation to this consider R22s which are a type of CFC. These were banned in new air conditioning and refrigeration systems in 2004 but recycled CFCs could be used in existing systems until 1st January 2015. Tenants will no longer be able to repair systems with R22s as a component and will either be faced with terminal dilapidations or the need to replace existing systems. Landlords in relation to communal systems will be able to add the cost of replacement to the service charge. The deal with this and other matters in the future, there should be negotiated caps on service charge.

Consider this in the light of the Energy Act 2011 (see later). By April 2018, with exceptions, a landlord will not be able to let out premises unless it has an energy rating of E or above. This seems to apply to existing and not nearly new leases. Quaere as to whether a tenant who has agreed to apply with statute will have to carry out works to ensure that this is the case and whether a landlord in relation to multi-let premises can add the cost of works to service charge.

Peverel OM Ltd v Peverel Freeholds Ltd [2010] UKUT 137

There is nothing particularly new in this case. However, it is a timely reminder, as the service charge allowed charging for inherent defects, the tenants had to pay for the cost of rectifying structural defects. Moreover, they could not claim against the builder who was responsible as they had no contract with him for negligence. The claim amounted to one for pure economic loss: see Murphy v Brentwood District Council [1991] 1 AC 398.

ACT Constructions Ltd v Customs and Excise Commissioners [1982] 1 All ER 84
Underpinning a building to correct subsidence and comply with modern building regulations thus increasing life expectancy fell beyond repair and maintenance.

Likewise in *Elite Investments v TI Bainbridge Silencers Ltd [1986] 2 EGLR 43* replacement of the roof of an industrial unit (as being the only way to repair) at a cost of £84,000 compared to a re-instatement value of £140,000 for the building amounted to repair.

And see also Ravenseft above, the provision of new expansion joints constituted a fraction of the value of the premises.

**Note:** Effect on rent review. Where there is a long lease, of greater duration than the life expectancy of the building, it may be legitimate for the landlord to expressly expand on the normal repairing obligation. This may have a detrimental effect on rent on review however.

*Norwich Union Life Insurance Society v British Railways Board [1987] 2 EGLR 137*

A 125 year lease of premises provided for repair and “when necessary to rebuild, reconstruct and replace the same”. The tenant successfully argued for a 27.5% reduction of rent on review.

For old buildings there may be various possible methods of avoiding problems. Primarily use of a surveyor is important prior to the lease. In the event of major potential problems the tenant will require a reduction in liability. There are various ways in which this may be done:

- Limiting extent of liability, e.g. only for internal decorative repairs.
- Preparing a Schedule of Condition. Make sure that defects are clearly spelt out and that the tenant is not liable to rectify the consequences of disrepair.
- The Law Society Standard Business Lease. This provides a covenant “to maintain the state and condition of the property” but “not to alter and improve it”.

Presumably surveyors would have to be used to agree the state of the premises on commencements. Moreover, maintaining to a large extent involves repair, although not requiring the tenant to put the premises in repair. Lack of an obligation to improve may cause fundamental problems of interpretation.

**Fire Damage**
The tenant will be liable to rebuild the whole property if damaged by fire: *Matthey v Curling* [1922] 2 AC 180. Thus, where the landlord is bound to insure, the tenant should ensure that he is exempt from liability caused by peril against which the landlord has insured unless the insurance is vitiated by the tenant.

Exemptions should only be available to the extent that the landlord recovers costs from the insurance company.

**The Premises Subject To Repair**

Here there may be major problems of definition. There are various possibilities.

**The Demised Premises**

This is a frequently used term. Beware of situations where the draft lease does not with certainty define the extent of the premises, in particular as to whether shared walls, ceilings etc. fall within the demise.

There may also need to be clarification with respect to future constructed buildings and whether these fall within the definition, likewise similar problems arise with respect to repair of landlords fixtures. Where the premises form part only of a building and the tenant’s liability is not limited to the interior of the premises, precision is required.

In *Tanya Grand v Param Gill* [2011] EWCA 554, the Court of Appeal found that plasterwork in the nature of a smooth constructural finish to walls and ceilings to which decoration could then be added was part of the structure.

**The Interior of the Premises**

Problems arise with respect to layered floors and walls. Interior of the premises should be clearly spelt out as to whether including e.g. interior structural and load bearing walls or merely decorative finish.

**Structural Repairs**

It the landlord accepts repairing obligations in return for a reimbursement covenant or service charge, there must be further expansion of the definition of structure as various possible interpretations exist.

*Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1958] 2 All ER 551
Structural repairs were defined as repairs to the structure as opposed to decorative repairs. Thus, the landlord would be required to carry out all repairs other than decorative repairs. Here, slates on the roof constituted a part of the structure.

Alternatively, structure may be interpreted as including only load bearing elements which give strength and stability.

Finally, a midway position may be met where serious disrepair is the responsibility of the landlord. In particular, external windows seem to cause major problems of interpretation.

**Boswell v Crucible Steel Co. [1925] 1 KB 119**

Sheet glass windows which could not be opened and which formed part of the fabric were within the definition of structure.

**Holiday Fellowship Ltd v Hereford [1959] 1 All ER 433**

Normally, windows will not constitute a part of the structure. Thus, draftsman should take full instructions as to the construction of premises.

**Sheffield City Council v Oliver (2008)**

This case, in the context of social housing, stated that external windows were part of the structural exterior and within the liability of the landlord under Section 11 of the Landlord and Tenant Act 1985.

**Definition of Exterior**

This needs to be clearly defined where the landlord is liable for the exterior.

Exterior includes inner party walls unless the covenant is expressed as one with respect to repair of “structure and exterior of the building of which the demised premises forms a part”. **Camden Hill Towers Ltd v Gardner [1977] 1 All ER 739.** In the absence of contrary provision it appears that exterior includes main access ways and staircases: **Brown v Liverpool Corporation [1969] 3 All ER 1345,** but not side entrances: **Hopwood v Cannock Chase D.C. [1975] 1 All ER 796.**

In **Edwards v Kumaramay [2015] EWCA Civ 20** the landlord was responsible for repair and maintenance of the structure and exterior. The Court of Appeal held that this included any land which the tenant had an interest over. The tenant tripped on a path which the landlord had easements over and the landlord was liable. It might be wise to find out whether any insurance policy would cover such a claim.
Ceilings may also present problems. Where the exterior of demised premises are the subject of the clause, this will include an outer roof only if the ceiling and roof are inseparable: **Douglas-Scott v Scorgie [1984] 1 All ER 1086**.

**Rapid Results College and Angell 1986**

The cornice going around the roof was not a part of the structure and thus could not be collected via the service charge.

**The Standard of Repair**

**Proudfoot v Hart [1890] 25 QBD 42, CA**

Established that the standard of repair depends on the age, character and locality of the premises and the type of occupier. Quaere whether large and financially strong business tenants owe a greater duty.

The case also made clear that a covenant to keep in repair requires the tenant to put in repair if it was in disrepair at the beginning of the lease. A recent example of this can be seen in the Scottish case of **@Sipp Pension Trustees v Insight Travel Service [2015] CSIH 91**

**Anstreuther – Gough – Calthorpe v McOscar [1924] 1 KB 716, CA**

The criterion is that in existence when the lease commenced and not at the date of disrepair.

**Ladbroke Hotels Ltd v Sandhu [1995] 39 EG 152**

The bad construction of a hotel was irrelevant to the assumption that the tenant had complied with repairing covenants on rent review. To ensure its full life expectancy, the premises would require £500,000 worth of repairs. The tenant unsuccessfully argued for lesser repairs which would increase expectancy by 15 years and costs £60,000.

**Postel Properties Ltd v Boots, the Chemist [1996] 41 EG 164**

The landlord can rely on the report of a reasonable surveyor in determining whether to carry out patch up repairs or, in the short-term, more expensive major remedial work.

**B. PRACTICAL CONSIDERATIONS**

(a) **Length of the Term**
Tenants might be justified in arguing that they should be liable for repair under a 25 year lease, but this should not be the case under a shorter term. Repairs might then be more for the benefit of the landlord and not the tenant.

On the other hand, consider O’May v City of London Real Property Co [1983] 2 AC 726 and Wallis’ Fashions v General Accident [2000] EGCS 45. A short term lease may in fact last a comparatively long time period with a series of renewals under Part II LTA 1954 and it is unlikely that the landlord will be able to insist on a change of the repairing obligation on such a renewal.

In Samuel Smiths v Howard de Walden [2007] a judge accepted the tenants’ argument that user covenants in relation to a public house could not be changed on a renewal without the consent of the tenants. The landlords wished to allow the sale of food arguing that this was the industry norm. The tenants objected to this as he felt it would have the effect of increasing future rent on review.

Edwards and Walkden v Mayor of London [2012] EWHC 2527

In spite of O’May, the judge held that a relevant circumstance on a lease renewal was a different tenant had a different service charge liability in the original leases. These were allowed to be standardised.

Note: These cases are extremely important in relation to CRC and Green Leases (below). A landlord cannot change the terms on a 1954 Act renewal to upgrade or meet statutory changes. Unless the tenant is provided with incentives, it will be very difficult to obtain the tenant’s agreement to detrimental changes. If the lease is excluded, the landlord may change the terms or not offer a renewal. In the current market this may not, however, be feasible.

(b) The Nature of the Building

If the tenant leases out a detached building then a full repairing covenant may be appropriate. If there is multiple occupation, a service charge in relation to the common parts may be more desirable. Note, however, that the landlord will be liable for disrepair to the common parts as soon as it occurs. See BT v Sun Life [1995] 4 All ER 44 below.

Where there are hybrid lettings to a small number of tenants, full repairing obligations on the tenants may prove unjust, e.g. the burden of repairing the roof may fall on just one tenant. In many situations a service charge may be more desirable.

(c) Extensive Repairing Obligations

e.g. To remedy inherent defects during a long lease. See Norwich Union v BRB [1987] 2 EGLR 137 above. This may have disastrous consequences on rent review.
(d) Age of the Building

The tenant may be exonerated from anything but maintenance by a covenant in an old building, or may wish to exclude liability for fair wear and tear. Likewise, he may be exempted from curing inherent defects in a new building. However, it is quite possible that nobody is responsible for the dilapidation and either landlord (in a short lease) or tenant (in a long lease) will have to take steps in relation to the dilapidation.

C. REPAIR AND THE EXERCISE OF BREAK CLAUSES

If exercise of the break clause is subject to performance of the covenants within the lease, this will be a condition precedent to its exercise: Simonds v Associated Furnishings [1931] 1 Ch 379 even though the landlord reserves the right to sue for antecedent breaches: Grey v Friar [1854] 4 HL 565.

The time for performance by the tenant depends on the wording of the clause, i.e. date of notice or termination. Tenants’ advisers should ensure that performance is not absolute but subject to a reasonableness test.

Reed Personnel Services Plc v American Express Ltd [1997] 1 EGLR 229

Reasonable performance of the terms of a repairing covenant as a condition precedent to the exercise of a break clause might include, e.g. applying one coat of paint instead of two, or retaining a good carpet where there is an obligation to replace. The cost of repair was not a factor to be taken directly into account.

In Commercial Union v Label Ink (2000), 24th July, unreported, the tenant had to materially comply with terms of the lease as a condition of exercising the break clause. He had genuinely sought to comply with the terms of the repairing covenants and had consulted experts. Moreover, the amount involved was not great. This amounted to material compliance. The only reason the landlord was complaining was to prevent exercise of the break clause.

However, at the break date January 1st, the Christmas quarters rent owed by the tenant and posted (on December 30), had not yet arrived with the landlord. This was a serious enough breach to prevent exercise of the break clause. The date the cheque is posted, it is deemed paid but it was still 5 days late and the landlord had not waived the breach.

In Sirhowy Investments v Henderson [2014] EWHC 3562 planning permission for a second hand car business was granted subject to conditions that a scheme would be agreed with the local authority in relation to turning facilities to enable car transporters to unload cars without causing obstruction to the highway. Three years after the lease had been granted the council served notice for a breach of a
planning condition. On this happening, the tenant was entitled to serve a break notice if they could show that they had acted reasonably in procuring the scheme. However, the tenants had breached a condition as to exercising the break in that they had to keep the premises in good and substantial repair and as part of a fence had fallen down exercise the break.

Rent Review and Dilapidations

Assumed compliance with terms.

Many rent review clauses contain an express assumption that the tenant has complied with his covenants. It seems that such an assumption would be implied by the court even if the review clause was silent on the point (Harmsworth Pension Funds Trustees Ltd v Charringtons Industrial Holdings Ltd (1985) 274 EG 588). This is consistent with the general principle of law that a person is not entitled to rely upon his own wrong. How this principle applies to the landlord’s covenants is less clear. In Plinth Property Investment Co Ltd v Mott, Hay & Anderson (1978) 38 P & CR 361 Brandon LJ said that an arbitrator directed to have regard to the provisions of the lease had to consider the rights and obligations imposed by the lease and ‘to assume that the rights will be enforced and that the obligations will be performed’.

This dictum would suggest that it should be assumed that the landlord has performed his covenants also. But in Fawke v Chelsea (Viscount) [1979] 3 All ER 568 the Court of Appeal held that in fixing an interim rent under s 24A of the Landlord and Tenant Act 1954, the court should have regard to the actual state of repair of the property. If the tenant was to enforce the landlord’s repairing obligation against him by specific performance, he might achieve occupation of a repaired building at a rent reflecting the disrepair. The likely resolution of this conflict is that the rent should be assessed having regard both to the actual state of the building but taking into account the existence and enforceability of the landlord’s covenants.

Remedies for Disrepair

The landlord’s remedies will primarily be damages and/or forfeiture. A section 146 Notice should be a preliminary to forfeiture and the tenant should be allowed a reasonable time of around 3 months for remedy. If the lease is for 7 or more years and at least 3 years is unexpired then the landlord will have to serve notice under the Leasehold Property (Repairs) Act 1938. If the tenant counter-notices within 28 days then the remedies may only be sought with the approval of the court. This will be
given on grounds such as protecting the value of the reversion or where immediate remedy will be cheaper. The court will decide on a balance of probabilities whether to allow the landlord to proceed: see **Associated British Ports v Bailey 1990**. Where in a lease of docks there was 94 years remaining and all equipment would be obsolete by the termination date the landlord was not allowed to proceed.

The landlord may exercise self-help by entering the premises and carrying out the work himself. This must however be permitted by the lease. **Jervis v Harris 1994** decided that such remedy did not come within the above Act.

S.4 Defective Premises Act 1972 provides that where a landlord is responsible for repair or has a right to repair or a right to view the state of repair then they will be liable to anyone who might reasonably be affected by the disrepair. This would allow third parties to sue for damages. The negative effect of a **Jervis v Harris** clause is that the landlord may incur liability under this provision.

In **Lafferty v Newark & Sherwood Council (2016) EWHC 320**, the landlord had a right to inspect the premises. The tenant fell through the yard and into an underground soakaway. The Court of Appeal held the landlord liable. S.4 gives rise to strict liability. Also, the normal rule that the tenant must give the landlord notice of disrepair only applies to parts of the premises that only the tenant is likely to be able to view.

### Damages for the Landlord

#### Disrepair: Terminal Dilapidations

S.18 of the **Landlord and Tenant Act 1927** limit damage for terminal dilapidations to the diminution in the value of the reversion. See for example **Drummond v S & U Stores [1983] EG** where there is no claim for terminal dilapidations but the new tenant would wish to fit out the premises and put in a new shopfront. In **Culworth v Licensed Victuallers Association [1989] EG** the burden on showing lack of damages lay on the tenant and was assessed at the time of the claim.

In **Mason v Total Finaelf [2003] 30 EG145**, firstly, following **Credit Suisse v Beegas Nominees Ltd [1994] EGLR76**, it was found that an obligation to keep in repair “and in good condition” or in “substantial” repair did not add to the normal repairing obligation.

Moreover, the standard of repair was one of reasonableness in relation to the quality of the actual tenant, i.e. a major oil company.
Where repairs were to be carried out to the satisfaction of the landlord’s surveyor, this may require greater works than those proposed by the tenant’s surveyor. However, the landlord’s surveyor’s requirements must be reasonable. Furthermore in a terminal dilapidations claim, the landlord’s surveyor does not need to inform the tenant of his requirements before the expiry of the lease; the onus is upon the tenant to seek clarification.

Finally, although the cost of repair costs would be £135,000, the diminution in value of the premises was largely measured by reference to the effect of disrepair on trading potential. This amounted to £73,500 and this was the cap on the landlord’s damages.

**Note:** This limitation does not apply to the tenant. The tenant may also seek specific performance and require the landlord to carry out the works. Section 4 of the Defective Premises Act 1972 allows people reasonably likely to be affected by the landlord’s breach to sue in damages whenever the landlord is obliged or entitled to repair.

The issue of ‘supercession’ was to the fore in the recent case of Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd [2013] EWHC 463 (TCC). The case involved two 35 year leases commencing in 1973 and 1974.

It was not disputed that the tenant did not comply with its repairing obligations under the leases. At trial the landlord produced a costed schedule of dilapidations, and the total damages sought were £2.172 million (including 30 weeks loss of rent). The tenant, by contrast, asserted that the remedial works attributable to want of repair amount to around £700,000. However, the tenant contended that it was not obliged to pay more than £240,000 being the diminution in the landlord’s reversionary interest under s.18(1) of the Landlord and Tenant Act 1927. The tenant’s argument was that even if it had left the premises in a good state of repair that would have been by reference to 1973/4 standards; the building would not have been lettable without the substantial upgrade and improvement works which the landlord would have had to carry out.

The starting point is to consider whether, if the tenant had handed back the premises in accordance with its repairing obligations under the lease, the landlord would have been able to relet or sell the building without significant discount.

If not, then it is necessary to look at what the landlord would have to do to be able to relet the premises at a fair market price; in other words, what ‘extra’ work must the landlord do to make the premises lettable in today’s market? In looking at that ‘extra’ work, the court must have in mind two points: Firstly that the landlord cannot recover the cost of this ‘extra’ work from the tenant and secondly that this ‘extra’ work may make some of the tenant’s repair works redundant – and so the landlord has suffered no loss if the tenant fails to carry out such ‘redundant’ repair works.
In *Hammersatch Properties (Welwyn) Limited v Saint-Gobain Ceramics and Plastics Ltd* [2013] EWHC 1161 (TCC) the tenant claimed that the property was obsolete and even if repairs were carried out, the property would be unlettable.

The parties’ experts differed in their valuation of the property in and out of repair. The tenant argued that the difference in the two values was only £100,000; the landlord argued that in repair the premises could have been sub-divided with only a minimal amount of work and could have been relet in full within 36 months.

The court concluded that the property in repair was worth £3,061.251 (calculated by looking at the letting values minus the cost of works and sub-division) and that in its current state of disrepair, the property was worth £2.1million. The court rounded down the £3,061.251 to £3million holding therefore that the diminution (for which the tenant was liable) was £900,000.
ENERGY ACT 2011


S49 of the Energy Act 2011 requires the Secretary of State to introduce legislation on minimum energy performance standards by 1st April 2018 for rented property at the latest. Consultation has now been produced and although not definite, it seems to clarify some issues.

Firstly, the minimum standard will be an E rated building. It is estimated that around 20% of buildings of rented property will fail on this. Secondly, the legislation will apply to all new leases (with exceptions below), as long as a Green Deal assessment would allow for a Green Deal loan within the Golden Formula, i.e. the savings to energy bills would at least meet the cost of work. Thirdly, for existing lettings there will be a backstop of 1st April 2023 when they will come within the legislation. Fourthly, if leases of such a duration that it will expire after green deal loans are no longer available, the legislation will not apply.

Exclusions are as follows:

1. The regulations will only apply to buildings where there is an EPC. There may be lettings in place before the introduction of EPCs in 2007 which therefore escape the regulations.
2. Where EPC regulations exempt landlords from providing an EPC, the minimum efficiency regulations will contain the same exemptions, e.g. a short term letting of a building prior to its demolition.
3. Lettings under 6 months subject to a maximum of two such lettings to the same tenant.
4. Leases where the length is more than 99 years.
5. Lettings where the landlord cannot obtain the necessary consents for the efficiency works. Necessary consents can include:
   - Planning or buildings regulation approval
   - Consents from lenders or superior landlords
   - Consent from a sitting tenant to allow the landlord access to do the works.
6. Where the works cause a material net decrease in the property’s capital value.
7. Where the property does not qualify for any works which satisfy the Golden Rule under the Green Deal. This is subject to the landlord obtaining three Green Deal assessments which show this.

There are still some major issues to be determined, for instance whether any non-compliant leases will be illegal and thus unenforceable. There will also be major issues in relation to post 2018 rent reviews and dilapidations claims. In relation to the latter s18 Landlord & Tenant Act 1927 might limit the tenant’s liability if the landlord has to bring the building up to minimum energy standards in order to re-let it. The tenant may also possibly find themselves liable, especially for leases terminating post April 2023 and April 2020 for residential properties, due to the statutory compliance provisions within the lease.

The energy efficiency of buildings (private rented property) (England & Wales) regulation has now been produced. They will apply to any commercial lease of more than 6 months and less than 99 years duration and to residential assured, assured shorthold and protected tenancies and to any other tenancy designated by the Secretary of State. Any exemption in relation to detracting from value will have to be confirmed by an independent surveyor and will only last for 5 years. The penalties will be a maximum fine of £5,000 or 5% of rateable value for commercial property where the breach has occurred for less than 3 months and a maximum £2,000 fine for residential property. The fine will be doubled after 3 months.

**Note:** Guidance suggests that the reduction in capital value referred to above should be at least 5%. Any exemption will only last for 5 years and any reduction must be confirmed by an independent surveyor.

**Note:** Because of changes to building regulations in April 2014 premises which obtain a new EPC may find that they have a lower rating than previously.

**Note:** The provisions will apply to lease renewals.

**Energy Performance of Buildings**

As of 9 January 2013 the Energy Performance of Building (Amendment) Regulations 2012 state that a listed building will not need an EPC if any proposed work would unacceptably alter the appearance.

From 9 January 2013 any commercial property which is frequently visited by the public must have an Energy Performance Certificate displayed in a prominent place if such a certificate exists. Public bodies with premises where there is a surface area of more than 500 square metres must have a Display Energy Certificate. By 9 July 2015 this will go down to 250 square metres.

By April 2018 at the latest, the Energy Act 2011 will require an EPC of at least an E-rating before a property can be let out. This will not apply if the recommendation report does not enable it to go
beyond an F-rating. A Green Deal loan will be expected to be taken out if the landlord cannot pay for any improvements.

Note: How this consultation will deal with the demise of the Green Deal loan is yet to be seen.
HOUSING AND PLANNING BILL 2015 – 2016

Right to Buy

In April 2012 the Right to Buy maximum discount was raised to £75,000. It rises in line with inflation and is currently £77,900. In March 2013 the maximum discount in London rose to £100,000 and is currently £103,900. The Welsh Government has introduced an ability for Welsh local authorities to suspend right to buy for up to five years. Carmarthenshire County Borough Council has implemented this. As from 6th April 2015 the qualifying period has been reduced from five years to three years.

The Government announced that the Housing and Planning Bill 2015-2016 would have provision whereby housing associations would be subject to right to buy. The Government intends to introduce this voluntarily and 5 housing associations are already taking part. In the future housing associations will be subject to the same right to buy provisions as local authorities. The government will make good any reduction in value and the money received is intended to provide for new housing.

Note: that insurers have been enquiring as to how much right to buy firms have been conducting in the past. This is because of a large number of cases pending where firms are threatened with litigation for not explaining the nature of right to buy to the clients.


Proof of Title

Council properties will rarely if ever be registered individually. If the title is registered therefore the council will supply official copies of the title to the estate. They will also draft the TP1 or Lease. If the title is unregistered then the council are not required to deduce title in the usual manner. Instead they will supply a certificate of title in form PSD 17 which will be acceptable to the land registry and will enable them to grant the purchaser absolute title, provided of course there are no registrations already affecting the land. An Index Map Search should therefore be done.

Implied Rights and Covenants - Right to Buy - Freehold

Schedule 6 Part 1 of the Housing Act 1985 ("the Act") implies certain rights and covenants into every conveyance/transfer made under the right to buy provisions. The implied rights are rights of support and rights to use services (drains, pipes, cables etc). In addition this part of the Act states that each conveyance/transfer shall include any rights of way as are necessary for the reasonable enjoyment of the property. Note the crucial difference - rights of support and to use services are implied and so are
included automatically whereas the Act merely directs that the conveyance/transfer should include any necessary rights of way which the council is able to grant therefore if they are not actually expressed then they are not included. In any case only those rights which were in use at the time of the transfer and which the council was at the time able to grant (i.e it owned the land over which they are required) are covered by this part of the Act and upon a future resale it may be impossible to tell whether the council did own the land at the time therefore when the property is first purchased from the council the purchaser's solicitor should insist that all necessary rights are expressed.

The conveyance/transfer should also, according to the Act, include a covenant by the purchaser to comply with any covenants affecting the land and to indemnify the council against any future breach.

Implied Rights and Covenants - Right to Buy - Leasehold

Part 3 of Schedule 6 of the Housing Act 1985 ("the Act") implies covenants by the council where the property is a flat to maintain and repair the structure and common parts of the building and any shared services and in the event of destruction by any risk against which it is normal practice to insure to rebuild the building and the flat itself. The cost of repairs and maintenance must be paid for by all the tenants in the service charge. The Act also states that the lease should include rights in favour of the tenant to use and common facilities or services within the block.

The Housing Act Charge

In order to ensure that the discount is repaid upon resale with the discount period a charge will be registered in favour of the council on completion of the tenant's purchase. This is a financial charge and will only be removed during the discount period if the council supplies a DS1 (which of course they will only supply should the amount owing to them be settled in full). If at the time of the sale the discount period has expired then the charge will be removed automatically when the transfer is registered. In accordance with the Housing Act 1985, if the tenant buys with a mortgage, the council's charge is automatically postponed in favour of the mortgagee's charge. This is of course essential as the mortgagee will insist on having a first charge on the property. Note however that this only applies where the amount of borrowing is the same or less than the purchase price. If an amount is borrowed over and above the purchase price then in order to proceed the council must agree to postpone their charge in favour of the lender, otherwise the lender would only have a 2nd charge. The council will usually only agree to this if the money is to be used for improvements to the property and they will require sight of evidence in the form of estimates for works. If they agree they will provide either a Deed of Postponement or a simple letter which can be presented to the land registry - both are equally effective. If the council will not agree to postpone then the borrower must reduce the amount he borrows.

Pre-completion Searches

For registered titles an OS2 (as it will be a transfer/lease of part) and a bankruptcy search should be done as normal. A copy of the bankruptcy search must be sent to the council prior to completion (and
it must be valid on completion). This is because an undischarged bankrupt does not have the right to buy. For unregistered titles there is no need to carry out a full land charges search. The certificate of title supplied certifies that there are no entries affecting the property (other than any disclosed by the council) and a search against the council would reveal an enormous number of entries (as of course it is not specific to the property).

Exchange & Completion

There is actually no contract in a right to buy transaction and consequently no exchange. Completion generally takes place on a Monday. Once notified of the intended completion date the council will send to the buyer's solicitor the engrossment transfer/lease for signing. They will also advise of any outstanding rent arrears as these must be settled before completion can take place. The buyer's solicitor must send the council a copy of a clear bankruptcy search against the buyer which should reach the council a few days in advance and which must be valid on completion.

Sales within the Right to Buy Discount Period

The right to buy discount, or a portion of it, is repayable if the property is sold or otherwise transferred (except via an assent) within the discount period. That period is 3 years for right to buy applications made prior to 18th January 2005 and 5 years for applications made after that date. If the discount period is 3 years and the property is sold within the first year then the discount must be repaid in full. During the second year two thirds must be repaid and during the third year, one third. If the period is five years then the amount of the discount which is repayable is reduced by one fifth for each complete year that elapses, however rather than being a set sum, the amount to repay increases proportionately to the percentage increase in the value of the property at the time of the sale compared to when it was purchased. To clarify, imagine a property is valued at £100,000 at the time it is purchased by the tenant, and the tenant receives a £10,000 discount (10%). If after one complete year he sells the property for £110,000 then the total discount due for repayment is £11,000 (10% of the new value of the property). This is reduced by one fifth as a complete year has passed since the purchase meaning the actual amount due to the council is £8,800. If two complete years had passed it would be reduced by a further fifth, to £6,600 and so on. The idea is to ensure that the council (and so ultimately the taxpayer), as well as the tenant receives some of the profit.

The council's interest will be protected by a legal charge (see The Housing Act Charge below) which will need to be removed following completion of any resale in the same way as any other charge.

Re-mortgages and Additional Borrowing during the Right to Buy Discount Period

During the discount period if the purchaser wishes to remortgage or take an additional secured loan the consent of the council must first be obtained. This is because the Housing Act Charge will need to be postponed in favour of the new lender's charge. The same applies if the purchaser wishes to take out additional borrowing with the original lender. The council will normally only agree to postponement if the remaining equity after the additional borrowing has been repaid would be
sufficient to repay the amount of discount still outstanding at the time.

**Right of First Refusal on Re-Sale**

If the application to buy the property was made after 18th January 2005 then the lease/transfer may also contain a covenant which states that if the property is sold within 10 years of the date of completion it must first be offered to the council. They are not obliged to purchase but if they do they must offer the full market value (less any of the discount as may still be repayable). If the council choose not to exercise their option the property may then be sold on the open market. If buyer a property where the right of first refusal exists the buyer's solicitor should insist on seeing some evidence that the property has been offered to the council and that they have declined.

A problem in relation to right to buy is that there could easily be conflicts of interest where family members are purchasing. Make clear the nature of the discount and consider separate representation.

**Springette v Defoe [1992] 2 FLR 388** - The parties, two elderly cohabitants, held joint tenants at law on the purchase of a former council house. The female cohabitant obtained rebate of 41% on the purchase due to her previous occupation. This was treated as equivalent to a monetary payment. The man claimed a common but uncommunicated intention that they should share equally in the property. The Court refused to accept this. In words of Steyn L.J. ‘Our trust law does not allow property rights to be affected by telepathy. Any rebuttal of the resulting trust must be on express intention.’

The conveyancer should perhaps ask the question whether the client would want an express tenancy in common if they realised that a rebate was equivalent to a monetary payment.

**Home Ownership Schemes**

This was previously known as the Starter Homes Initiative.

As of 2016 the government will enable first time buyers of new build properties who are under the age of 40 to buy with a government provided discount of 20%. The major conveyancing implication is that there will be clawback on the discount if the property is sold within 5 years. There will therefore be a second charge and restriction on the Register.
Other Schemes

Help to Buy London

As of April 2016 the maximum equity loan for help to buy London properties will be 40% and not 20%.

Help to Buy ISA

Help to Buy ISA’s commenced in December 2015 and apply to first time buyers of dwelling properties. For every £200 the potential purchaser places into an ISA the government will place £50. The minimum investment is £1,600 and the maximum is £12,000 per purchaser. When they wish to buy a property they will cash in the ISA and the conveyancer will have to apply for the government share which will be paid towards the deposit. A conveyancer who wishes to take part will have to agree a Conveyancing Adherence Agreement which can be filled in via the Lender Exchange. They will have to draw down any money which must be used towards a deposit and cannot charge more than £50.
The Law Society has produced guidance on flood risk and conveyancing. This was amended in late 2014. This was amended in February 2016.

**Conveyancing Transactions**

**When acting for a buyer, tenant or lender**

In all conveyancing transactions, when acting for a prospective buyer, tenant or lender in residential and commercial transactions, you should mention the issue of flood risk to your client and, if appropriate, make further investigations.

The main ways of learning more about the risk of flooding are:

- conducting searches
- making enquiries of the seller
- instructing a valuer or surveyor to carry out physical inspection, survey or valuation generally and to provide advice on the impact of flood risk

It may not be sufficient to rely on the results of any one category of investigation alone.

Different clients, including lenders, will have different appetites for risk.

You should consider advising your clients before they enter into a binding commitment to buy, lease or finance property that they should:

- Establish the terms on which buildings insurance, including flood risk cover, is available.
- Discuss the level of risk to which the property is exposed with their building surveyor or, if necessary, a flood risk assessment consultant.

Where appropriate you should discuss with your client whether they are instigating their own investigations. As a result you may wish to make further enquiries of a commercial company. You may wish to record these discussions and your clients’ decisions.

**When acting for a lender**
You may have additional obligations when acting for lenders. Lenders are increasingly likely to investigate the potential flood risk of prospective security either as part of their valuation process or by searching. Lenders may impose additional requirements in their instructions to you as a result of their investigations.

**In residential transactions**

You will often be required to advise your client to arrange insurance cover usually starting from the date of contractual commitment.

If the lender is not arranging buildings insurance, which is almost invariably the case, the obligations in section 6.14.2 of the CML Lenders’ Handbook or section C 28 of the BSA Mortgage Instructions are likely to apply in most cases.

Lenders may impose additional requirements. For example, you may be required to ensure that the excess payable does not exceed an amount notified to you by the lender or as is set out in part 2 (6.14.1) of the CML Lenders' Handbook.

You may wish to record the lender's requirements.
THE WATER ACT 2014

In the UK flood risk insurance was previously provided under “the Statement of Principles on the provision of flood insurance” as per the agreement between the Association of British Insurers and HM Government.

The statement binds insurers to offer flood insurance to homes and small businesses where the risk of flooding is lower than a 1 in 75 year event and where the property is already insured. For properties at a greater risk, insurance is available on the condition that flood defences are planned to be built to reduce the risk below that limit within 5 years.

The agreement does not cover properties built after January 2009.

As the Statement of Principles will come to an end on July 1st 2013, the Insurance Industry wants to see more commitment from the Government on spending on flood defences before it commits itself any further.

In January 2013, the ABI published a research paper based on a sample of 124000 properties at significant risk (> 1 in 75 year event). The results showed that 78% of properties in this sample are currently paying an under-priced premium averaging £290 per year.

One in six properties (commercial and residential) in the UK are estimated by the Environment Agency to be at risk of flooding and 500,000 of these to be at “significant risk.” The ABI estimates that by 2035 this figure will rise to 835,000 properties.

So far homeowners have been protected by the current Statement of Principles which imposes restrictions on the risk-based premiums that insurers can apply.

But what will happen after July 1st 2013 when the Statement of Principles comes to an end?

The Commons Select Committee for Environment, Food and Rural Affairs recently pointed out the urgency for the Government to reach an agreement with the insurance industry on this matter. Until then, many home owners may have to brace themselves for rising home insurance premiums in the next few years.

Undertaking a flood search when buying a property therefore seems like an increasingly compelling standard part of the conveyancing process.

In late June 2013 the Government and the ABI announced that they have reached agreement as to the extension of the statement of principle.
The Statement of Principle has now been extended to 31 July 2013. The new TA6 Forms have a series of questions about types of flooding and about high premiums and excesses. The Law Society also now suggests that the purchaser obtain quotes prior to exchange.

The Water Act 2014 received the Royal Assent on 15th May 2014.

Part 4 of the Act allows the government to introduce secondary legislation (if this is needed) to regulate the provision by insurers of flood cover for householders at high risk of flooding.

On 27 June 2013, the government published a consultation paper on securing the future of flood insurance, seeking views on its proposals to ensure that domestic property flood insurance continues to be widely available and affordable in areas of flood risk in the United Kingdom. The consultation closes on 8 August 2013.

The following are excluded from flood Re:

- Small and medium business premises
- Council and housing association properties
- Properties which the insured does not occupy. This includes buy-to-let and leasehold flats.

Blocks of flats of 3 or less will come within the legislation if one of the flats is occupied by the freeholder.

Implementation was originally planned for July 2015. The Flood Re Regulations were produced on 11th November 2015. It appears that where the provisions apply there will be a maximum premium of £250. It is now due to come into force on 6th April 2016.

Originally Band H council tax premises were excluded but on 24th March 2015 the government announced that this would change.

On 2nd July 2015 draft regulations were produced. Implementation is expected for 1st April 2016 on approval by both Houses of Parliament. The suggested limit to excesses in insurance policies is £250.

As of 8th March 2016, we are still waiting for a definite commencement date. It appears that premiums within Flood Re will be capped at £250. As yet we do not know what will happen to excesses.
CAPITAL ALLOWANCES

A business which spends money on capital assets for use in its business cannot claim a tax deduction for the expenditure but may claim a capital allowance which gives tax relief for the reduction in value of capital assets used by the business. The provisions let the business write off the costs of the assets over a number of years against the taxable income. Buildings do not usually qualify but plant and machinery do. HMRC has guidance on what they will accept as plant and machinery.

When a property is sold with fixtures you will need to work out what part of the sale proceeds are attributable to the assets which qualify for the allowance. Similarly, the purchaser will have to work out the value.

Since April 2012 if a buyer wishes to claim allowances in respect of the property, the parties must enter into an election to fix value. The election means that the seller will not suffer clawback on already claimed allowances but will cease to claim further allowances. The buyer will claim these. From April 2014 a buyer will only be able to claim allowances if the seller has pooled its expenditure.

If a lease is granted allowances in relation to fixtures remain with the Landlord unless there is a premium and an election. Tenants can claim allowances in relation to their fitting out.

A detailed look at this will require advice from an accountant.
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