PROPERTY LAW UPDATE

Property Update
Exchange House, Taunton

Speaker: Richard Snape
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3 CPD Points
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DJB is entirely focused on real estate.

Covering commercial property, planning and other related areas we have one of the most experienced teams of solicitors in the country with a total of over 700 years’ PQE. DJB does not use paralegals to undertake legal work.

We act for a diverse range of clients in the real estate sector spanning many industries and our client base includes some of the most significant landowners and occupiers in the country.

Handling any size of property transaction or planning project, the team is comprised of City trained and highly regarded lawyers that operate from the firm’s offices in London, Manchester, Birmingham and Taunton.

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- North West: Commercial Property
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- London: Real Estate
- South West: Real Estate, Planning, Property Litigation

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“I rate everyone we have dealt with as being first class”

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

“Clients feel protected to the greatest extent.”
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BREAK CLAUSES

Vacant Possession


A break clause contained conditions precedent requiring that the tenant would give up vacant possession, pay the rent due and not be in other material breach. On the termination date the tenant had retained keys in order for contractors to access and finish repair works. The break was void.

In NYK Logistics (UK) Ltd v Ibrend Estates [2011] EWCA 683,

The break clause required vacant possession. The tenants gave notice and cleared the premises. Arrangements were made to surrender keys and the tenant agreed to carry out some repairs. The landlord did not collect the keys on the date and the contractors did not complete the repairs until six days afterwards. The tenant had not given up occupation and could not break the lease.

See the Code for Leasing Business Premises. The Code suggests that conditions precedent should not be used with the exception of the basic rent being up to date, the tenant giving up occupation, and any subleases ending.

Riverside Park Ltd v NHS Property Services [2016] EWHC 1313 The tenant was required to give up vacant possession as a condition of exercising the break clause. The premises contained a large number of partitions, floor coverings and kitchen fittings which were not removed. The court decided that as they were not substantially attached and could readily have been removed they were fittings belonging to the tenant who had therefore failed to vacate and could not exercise the break. The court went on to say that even if they had been fixtures there was no provision in the lease whereby they had been part of the demise. They were therefore tenants fixtures which should have been removed.
The Landlord and Tenant Act 1927 gave rise to a practical problem, i.e. that landlords when asked to give consent to an assignment would not reply to any written request either at all, or within a reasonable period of time. The tenant was, therefore, unsure whether consent was being withheld or not.

To meet this difficulty, the Landlord and Tenant Act 1988 was passed. By s1, when a landlord is asked in writing for consent pursuant to a qualified covenant against assignment, sub-letting or parting with possession, he is required:

(1) to give consent (unless it is reasonable not to) within a reasonable time, and to give written notice to the tenant of his decision, also within a reasonable time, specifying any conditions attached to consent; or

(2) if consent is refused, the reasons for refusal (within a reasonable time).

These provisions effectively shift the burden on to the landlord either to give a reasonably swift, unequivocal consent, or to give precise reasons for withholding consent, which the tenant can either challenge, if he consider them unreasonable, or accept. If the landlord fails to comply with s1 the tenant may sue for damages in tort: s1 should not be forgotten and should always be discussed in conjunction with s19 above.

It seems that the parties cannot contract out of s1, but it is possible that the landlord could require an indemnity, e.g. against a guarantor against potential liability.

In the few cases which discuss the subject, a reasonable time for the purpose of replying to a request for assignment or sub-letting is enough time to allow the landlord to check the creditworthiness and suitability of the proposed assignee. Thus, in Midland Bank v Chart Enterprises [1990] 44 EG 8, the landlord was successfully sued on not replying to the tenant’s request after three months. In Kened LTD v Connie Investments Ltd [1997] 04 EG 141 assignment was subject to a satisfactory replacement surety being found. The Court of Appeal found for the tenant. The landlord was not entitled to particulars of the assignment but was only concerned with the character and identity of the assignee. Moreover, an objectively suitable surety should have been accepted by the landlord.

Finally, the fact that the landlord had not notified the tenant of a reason for refusal suggested that it was not in his mind at the time of refusal. There was consequently a breach of s1 by the landlord. Dong Bang Minerva Ltd v Davina Ltd [1996] 31 EG 87, CA

The Court of Appeal have confirmed that the landlord could not withhold consent to assignment by requiring an undertaking as to costs which were estimated as being unreasonably high.
The question of whether consent to an assignment can be refused prior to any undertaking as to costs being given was left open, as was the question as to when time began to run for the purpose of S.1, i.e. whether or not before a reasonable undertaking as to costs had been requested.

In *Norwich Union Life Insurance Society v Shopmoor Ltd [1998] 3 AllER 681*, the court made it clear that the landlord must decide any information required to make his decision and then put the questions clearly and precisely to the tenant. Where the landlord had not asked the tenant about the financial standing of the proposed assignee, he could not subsequently use the lack of information as a reason for refusing consent.

This has been taken further in *Footwear Corporation Ltd v Amplight Properties Ltd [1998] 25 EG 171*. The landlord could not refuse consent to a sub-letting for reasons he had intimated to the tenant in a telephone conversation but were not given in writing. The Court said that the policy behind the 1988 Act is that a landlord who has not given his reasons for refusing consent in writing within a reasonable time cannot afterwards justify his refusal by putting reasons forward which he had in his mind but had not sufficiently notified the tenant of.

**Note:** That the case also said that there was no blanket rate that if profits were not 3 times rental, consent to a sub-letting could be refused. In relation to an assignment, post Landlord and Tenant (Covenants) Act 1995, there could be an absolute condition here.

In *NCR v Riverland Properties* the court said that lack of creditworthiness of a sub-tenant was a good reason for refusal of consent as if the head lease were disclaimed the sub-tenant would become the immediate tenant.

In *Proxima GR Properties v Dr T D McGhee [2014] UKUT 0059 (LC)* the Tribunal held that under s1 of the Landlord and Tenant Act 1988 the landlord had to show that the charge for a notice of assignment was reasonable. Moreover the response must be given in a reasonable time. If a landlord tried to charge an unreasonable amount for a notice of assignment then the tenant would not have to pay anything as the landlord would be deemed to have given their consent. In this case £90 was held to be reasonable.

In *No 1 West India Quay (Residential) Ltd v East Tower Apartments [2016] EWHC 2438 (Ch)* here the landlord had responded to a request for an assignment within a reasonable time as originally the tenants had sent the request to the wrong address. He was also acting reasonably in the circumstances in requiring guarantors and also a surveyor to inspect the premises. However, requiring an undertaking as to costs of £1,250 + VAT amounted to an unreasonable refusal of consent which allowed the tenant to assign without consent. In spite of this the landlord was entitled to £350 contractual costs.

In *Singh v Dhanji [2014] AllER(D)131* the landlord refused consent to an assignment of a 15 year lease unless alleged breaches arising out of refurbishment work were remedied. It was held that breaches were not proven but even if they were they would be minor and would not be a good reason for refusing consent.
Repairs and Improvements

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.

In spite of this, in Tedworth North Management Limited & Anor v Miller & Ors [2016] UKUTS22 (LC) replacement of existing windows by new and improved windows did not constitute repair and was not able to be charged by the landlord.
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.1

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 of 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.

Note: Grant of a single flat lease to a tenant is excluded; however, grant of two or more flat leases to the same tenant would constitute a relevant disposal.

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 were 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 a 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 or 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 a 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.

**Artist Court Collective Ltd v Khan [2016] EWHC 2453 (Ch)**

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 High Court decided that the tenants were able to acquire the property at no cost. This decision was subsequently reversed by the Court of Appeal. The provisions do not apply to the unravelling of a previous transaction.
RIGHTS TO LIGHT

In spite of the above the Supreme Court have held in the case of Coventry v Lawrence [2014] UKSC 13 that Shelfer does not give rise to an inflexible principle. The starting point is that an injunction should be awarded and it is up to the defendant to prove that this is unreasonable. If the requirements of Shelfer are met then in the absence of other relevant circumstances an injunction will probably not be available but even this is not definite. In the present case the Courts awarded an injunction to prevent noise nuisance caused by a nearby motor rally circuit. The circuit had planning permission but this did not overrule an unlawful act. Moreover, there was no defence that the applicant had come to the nuisance even though they had built the house after the planning permission had been obtained. There was a possibility, although not on the facts, of obtaining a prescriptive right to commit a nuisance.

Ough v King [1967] 1 WLR 1547 - These can only exist through a defined window.

Most of such rights are created by prescription, either through lost modern grant, or an indefeasible easement may come into existence under S.3 Prescription Act 1832.

Colls v Home and Colonial Stores [1904] AC 179, accepted that the amount of light must be sufficient for the comfortable enjoyment of and land. Thus here, a business premises required less light than a residence. There is no general 45° rule: Theed v Debenhams [1876] 2 Ch D 165.

In Newham v Lawson [1971] 22 P&CR 582, a church required relatively little light. In Allen v Greenwood [1980] Ch 119, an injunction was granted preventing the erection of a fence on land near a greenhouse, as the retained light would be inadequate for growing plants.

A right to light is not deprived by the change in the use of the building through which the light comes. In Carr-Saunders v Dick McNeil [1986] 1 WLR 922, one room had been divided into several smaller rooms, although the windows were the same. Each room was entitled to a reasonable amount of light.

The owner of land cannot, however, increase the windows thus requiring more light: Martin v Goble (1808).

Note: The Rights of Light Act 1959 allows registration of a local land charge in order to prevent creation of prescriptive rights. The registration must occur within 19 years and a day of the commencement of the time period. There must be interruption of a right for a year under the Prescription Act 1932, for the claim to have to start afresh.

In Tamares (Vincent Square) Ltd. V Fairpoint Properties (Vincent Square) Ltd. [2007] EWHC B3 (Ch) an injunction was refused in relation to restrictive covenants which blocked rights to light. However, one third betterment value was awarded as compensation. This in spite of the fact that the premises would normally be artificially lit.
HKRUK II v Heaney [2010] EWHC 2245 (Ch)

Normally once work is underway, an injunction will not be granted to deal with breaches. However, in the present case, a landlord went ahead with development which obstructed rights to light in complete disregard of the facts that the work would obstruct rights to light. In these circumstances, the injunction was granted.

The decision in Heaney is particularly controversial after Coventry v Lawrence above. In the County Court case of Scott v Aimiwu (2015) the Judge refused to order an injunction where a residential extension encroached on the light of a neighbouring workshop and outbuildings. Damages, is based one-third of betterment value, would have been £54,000, if based on the reduced value of the neighbouring land it would have been £12,000. The Judge decided that factors such as the behaviour of the parties would be relevant and awarded £31,000.

In Ottercroft Limited v Scandia Care Limited & Another [2016] EWCA Civ 867 the Court of Appeal awarded an injunction in relation to infringement of light by a re-built fire escape. The loss to the neighbouring café premises was only £886. An alternative fire escape would have cost an additional £12,000. In awarding the injunction the Court decided that factors such as the behaviour of the defendant and his non-compliance with an undertaking he had agreed were factors to be taken into account.

Discharge of Restrictive Covenants: s84 Law of Property Act 1925

Millgate Development v Bartholomew Smith (2016) covenants against using land other than for car parking were modified as the developer had built 13 units of social housing on the land and it would be against the public interest to have such housing empty. Contrast this with George Wimpey (Bristol) Ltd v Gloucester Housing Association [2011] UKUT 91 (LC), the developer blatantly disregarded restrictive covenants in the expectation that they would be discharged under s84. This, together with the fact that loss of views could not be compensated, was held to be sufficient not to discharge the covenants.
FRAUD THREATS FOR PROPERTY TRANSACTIONS

Impersonation of conveyancers and conveyancing practices

Those proposing to carry out fraud may purport to:

- be a conveyancer in their own right, or
- work for an authorised practice.

If you do not know either the conveyancer or the conveyancing practice acting for another party in a matter you should check their details to help assess the risk of fraud.

When accepting identification (or any other) information from a person holding themselves out to be a conveyancer you should consider the following:

- Is the individual a conveyancer?
- Is the name of the signatory an identifiable registered individual within a conveyancing practice?
- Are they registered with an appropriate professional body?

The Law Society, the Solicitors Regulation Authority (SRA), the Council for Licensed Conveyancers (CLC), The Chartered Institute for Legal Executives (CILEX) and other professional bodies hold such information (see paragraph 7.4.3). More information is provided in the Conveyancing Handbook under ‘Dealing with non-solicitors’.

Where a party is unrepresented and you are unable to confirm that sufficient steps have been taken to verify that party’s identity, Land Registry requires you to provide certified identification information obtained by you or another conveyancer in respect of that party. This is explained in Land Registry’s Practice Guide 67 – Evidence of identity – conveyancers with specimen forms.

Obtaining identification information at an early stage in the transaction may avoid difficulties or delays at a later stage. You may wish to keep a record of the steps you take. These may assist you if Land Registry or other bodies contact you to make enquiries but see paragraph 4 below on reporting fraud.

Impersonation of solicitors’ firms

There have been instances where fraudulent applications have been made to Land Registry by fraudsters impersonating legitimate firms of solicitors by using forged headed paper, faxes and emails. Email addresses that are non-distinct, for example Hotmail addresses, are more difficult to trace.
If you receive communications from Land Registry, including any acknowledgement of an application, and you are unable to identify the client name, the property or the application reference you should contact Land Registry. It is possible that your firm name or its headed paper has been forged or misappropriated and used fraudulently by a third party, or even a member of your staff.

See paragraph 4 below on reporting fraud.

**Misuse of websites**

Web sites have been fraudulently set up purporting to be sites of solicitors and/or new sub-offices of legitimate firms in order to perpetrate fraud. Some firms periodically search the internet to establish if they are being targeted in this way. If you become aware of an unauthorised web presence for your practice you should notify the relevant agencies.

**Seller and buyer frauds**

Certain properties and owners are particularly susceptible to fraud. Most fraudulent activity falls into distinct categories.

- Intra-family/associate frauds which are perpetrated by family members, friends or partners.
- Third party frauds where tenants or those who have access to tenants and are able to divert post perpetrate the fraud.
- Third party frauds that constitute ‘organised crime’.

**Contact details**

Client contact details may suggest an increased risk of fraud, such as:

- where the only contact details provided for any party are a telephone number, mobile number and/or an email address
- where a family member or associate is gifting the property and you are instructed by and meet only one party to the transaction, and only have contact with the other party by post, telephone or email
- where the address is not the subject of the transaction without obvious reason
- where the address changes occur mid-transaction without obvious reason.

There may be entirely valid reasons for all of these examples.
Vulnerable registered owners

Land Registry has identified that certain categories of owners may be more susceptible to registration frauds. These vulnerable registered owners include, for example, elderly owners who are in hospital or have moved into a care home. These types of owners often own properties without a legal charge. Attempts could be made to sell or charge their property by use of identity fraud.

Owners who live abroad are also particularly vulnerable to this type of fraud.

Some clients may be particularly at risk from fraudulent activity because, for example:

- they no longer live in the property and there was an acrimonious break up with a partner
- they let the property or it is empty
- they have already been the victim of identity fraud
- they are a personal representative responsible for a property where the owner has died and the property is to be sold.

Vulnerable properties

Land Registry has identified that certain types of properties may be particularly vulnerable to registration frauds, such as:

- unoccupied properties, whether residential or commercial
- tenanted properties
- high value properties without a legal charge
- high value properties with a legal charge in favour of an individual living overseas
- properties undergoing redevelopment.

Keeping addresses up to date

In order to minimise risk where there are vulnerable registered owners or vulnerable properties Land Registry advises registered proprietors to keep any addresses they have registered for service at Land Registry up to date. See Land Registry Public Guide 2 Keeping your address for service up to date

Clients intending to leave their property empty for a significant period of time, such as for redevelopment purposes, should consider registering some other address(es) for service (see paragraph 4.2.1).
Note: The Land Registry suggests a Form LL Restriction might be registered to prevent dispositions without the consent of a solicitor. There is now a Form RQ which allows restrictions to be registered at no cost.

Mitigating fraud threats

Client identity

You should be aware that exercising reasonable care in viewing documents intended to establish identity may not conclusively prove that the person or company is the person or company they are purporting to be. In addition it may not be possible for you to conclusively establish that such person or company is either the registered proprietor of the relevant property or entitled to become so registered.

Even where you have followed usual professional practice the court may hold that the steps taken exposed someone to a foreseeable and avoidable risk and amounted to a breach of duty of care. See Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] 1 AC 296.

Conveyancing anti-money laundering

Conveyancing transactions are regulated activity under the Money Laundering Regulations 2007. You must therefore take steps to:

- identify and verify your client by independent means
- identify and, on a risk-sensitive approach, verify any beneficial owners, and
- obtain information on the purpose and intended nature of the business relationship.

This last requirement means more than just finding out that they want to sell a property. It also encompasses looking at all of the information in the retainer and assessing whether it is consistent with a lawful transaction. This may include considering whether the client is actually the owner of the property they want to sell.

You should also comply with Money Laundering Regulations and Law Society general practice information.

For further information about fraud prevention see the Law Society’s anti-money laundering practice note.

You may keep a record of any steps you take.

Address for service at Land Registry

Since July 2008 Land Registry has inserted an entry in the register indicating whether the registered proprietor has changed their address for service (see paragraphs 4.2 and 4.2.1 below), to alert people to the change. For example, the entry may state: ‘The proprietor’s address for service has been
changed’. People proposing to commit fraud have been known to change the address for service registered at Land Registry as a precursor to fraud. If you see this on your client’s register and are not aware of the reason for it you may ask your client why it was done.

**Surrounding circumstances**

Further factors you may consider include the following.

- Where the registered proprietor is a company, does a search at Companies House indicate that the company was incorporated after the registered proprietor was registered as the owner?

- Have you met your client face to face?

- Have you seen the original identity documents or only copies?

- Is the registered proprietor’s date of birth inconsistent with their being the owner?

For example:

Someone purports to be a registered proprietor and offers identification information, but there is an inconsistency between their date of birth and information on the register.

The date appearing immediately before a proprietor’s name in the proprietorship register is the date of registration of that owner:

(13.10.1970) JOHN SMITH and JANE SMITH

In this example the proprietors have been registered since 1970 and must have been at least 18 at that time. Consequently, if, in cases where you are seeing the client face to face, the person presenting the identification information appears too young, this may be a case of impersonation.

In the case of **Nouri v Marvi [2010] EWCA 1107**, a solicitor was held liable when he had failed to spot a licensee who was in occupation had forged signatures and was pretending to sell on behalf of the licensor.

**Note:** In May 2012 the SRA produced a Warning Card in relation to fraud. Suggestions include checking letterhead and email addresses are identical, being careful in relation to out of area branch offices, firms without a landline telephone number or with callback, bank account details which are different from the name of the firm or in a different part of the country.

**SRA Warning Card on Bogus Law Firms**

Some examples of factors giving rise to suspicion are:

- Errors in letter heading – in one case the bogus office had letter heading which misspelt the name of the town in which it was supposedly based
• No landline telephone number – note that numbers beginning with 07 are mobile telephone numbers

• Inconsistent telephone or fax numbers with those usually used by the firm

• Telephone calls being diverted to a call-back service

• A firm apparently based in serviced offices

• Email addresses using generic email accounts – most law firms have addresses incorporating the name of their firm. If in doubt, check the genuine law firm’s website to identify its contact email address. You may well notice a difference.

• Sudden appearance in your locality of a firm with no obvious connection to the area, probably not interacting with other local firms at all

• A firm appearing to open a branch office a considerable distance from its head office for no obvious reason

• A firm based in one part of the country supposedly having a bank account in another part of the country – this is a strong indicator and has been seen several times.

• A client account apparently overseas – this is a breach of rule 13.4 of the SRA Accounts Rules and is a major red flag

• A strange or suspicious bank account name – such as the account not being in the name of the law firm you are supposedly dealing with either at all or by some variation.

If you become concerned, you should consider checking some of the above points yourself. Because of the possibility of the theft of the identity of a genuine solicitor, it is worth trying to speak to the solicitor concerned. For example, if the solicitor is supposedly at one particular office but is also based at a head office of the firm, you could speak to the head office preferably after verifying its genuine nature, perhaps by contact with the senior partner.

You should check the Find a solicitor website since there are sometimes bogus law firms which have not sought registration with the SRA and will not appear there; but bear in mind also that the nature of identity theft is that fraudsters may have obtained some form of registration by fraudulent misstatement to the SRA and therefore an entry on ‘Find a solicitor’ should not be taken as verification that the firm is genuine.

In the case of Schubert Murphy v The Law Society 2015 [EWHC 1346] a firm of solicitors have been given leave to sue the Law Society. They had relied on Find a Solicitor and paid £735,000 to a bogus seller. In fact, the property which was supposedly being purchased was actually a property in the process of being repossessed. The supposed sellers solicitor had their identity stolen. They had
recently retired and the fraudster had claimed that they had changed their name by deed poll. Find a Solicitor was updated accordingly.

**Law Society and Land Registry Guidance on Fraud and Property Transactions**

Where you do not see a client face-to-face, the Money Laundering Regulations 2007 provide that you must undertake enhanced due diligence. Not undertaking face-to-face checks may increase the risk of the transaction being exposed to investigation by the law enforcement agencies and/or the SRA.

For further information see paragraph 4.9.1 of the Law Society’s Anti-Money Laundering Practice Note.

Non face-to-face transactions increase the risk of fraud and these risks may be mitigated in the following ways.

- If you are accepting instructions from one client on behalf of others or by a third party, rule 2.01(c) of the Code of Conduct requires you to check that all clients agree with the instructions given. For example, an unwary conveyancer might deal solely with the son or daughter of a registered proprietor and have no contact with the person who is the owner.

- Where you know or have reasonable grounds for believing that your instructions are affected by duress or undue influence, you should bear in mind also the provisions of rule 2.01(d).

- In the case of a third party charge created to secure debts of another, you should consider contacting the purported lender independently. If there is a purported representative for the lender, then consider contacting that representative for confirmation of the transaction. In these circumstances there is a regulatory requirement for separate representation.

Risks of fraud are increased if documents are provided to clients for execution other than in the presence of you or your staff.

In order to protect or to mitigate risk for you and your firm, you may keep a contemporaneous record of the steps you take, including the reasons why you took a particular decision and the consideration you gave to risk.

In February 2016 the Land Registry amended their Practice Guide 67 on identity fraud. Passports must now be copied in colour and paralegals will not be able to certify identity.
Case Law

**Lloyds TSB Bank Plc v Markandan & Uddin (a firm) [2012] EWCA Civ 65** a fraudster purported to sell a property and stole the identity of a firm of solicitors in Luton. They claimed to be operating from a non-existent branch office in London. The purchaser’s solicitors required evidence of the existence of the office and were given a well forged letter purporting to be from the SRA. A mortgage advance of £700,000 was paid over as a consequence. The firm was successfully sued in breach of trust for paying the advance over. There was held to be no contributory negligence defence available as the claim was not one of negligence.

**Davison Solicitors v Nationwide Building Society [2012] EWCA 1621** - Here, a firm of solicitors was acting for the purchasers and mortgage company. The seller’s purported solicitors had fraudulently set up a fake branch office which featured in both the Law Society and SRA websites. The purchaser’s solicitor checked both of these and sent the mortgage advance accordingly. It was held that there was no breach of trust as such a breach would only occur if the solicitors had acted unreasonably. Likewise, there was no breach of undertaking to discharge the charge as this was not an absolute requirement but also depended on reasonableness.

Section S61 of the Trustee Act 1925 allows the Court to wholly or partially exempt liability for breach of trust where the trustee has acted honestly and reasonably. This was held to be the case here. Moreover, certain breaches of undertaking have not, as a matter of causation, given rise to the loss.

In this case the actual solicitor who had their identity stole contacted the SRA and it took the latter 5 months to change their website.

**Ikbal v Sterling Law [2013] EWHC 8291.** An empty property was sold by an imposter seller. A genuine law firm seems to have been infiltrated by fraudulent staff. The sellers stated that the Code for Completion by Post would not apply. Transfer of money occurred but there was no receipt of transfer. It took several months for the buyer’s solicitors to chase up the lack of receipt. It was held that the firm had acted honestly and the lack of receipt of transfer had not caused any loss. There was no liability in breach of trust but there was a common law liability for not chasing up the transfer within day and the damages in relation to this. How this may apply post the next case is doubtful.

However, in **Santander Plc v RA Legal (2014)** 25th February, the Court of Appeal have held that there is no, but for, test in relation to causation. This is a factor which should be present but will not necessarily exonerate a solicitor who has been very negligent. The Code of Appeal had noted that RA had departed from best practise in a number of ways, i.e:

- The Certificate of Title sent to the lender confirmed that the investigation of title had been concluded. This was incorrect as no inspection of a transfer containing certain covenants had taken place at that stage.

- Completion was delayed by some days and no instructions were sought regarding return of funds.

- No undertaking was sought to hold the completion money to order when this was transferred a
day prior to completion.

- There was no adoption of Code of Completion by Post end of requisitions.
- There is no proper consideration of inadequate replies to requisitions.
- Possession was not given of the property following completion.
- There was a failure to appreciate that something serious had occurred for some time despite the failure to obtain a DS1.
- The lender was not told that its money was at risk for some months.

Moreover, the burden of proof is on the defendant to show that they have acted reasonably.

**Tidal Energy v Bank of Scotland [2014] EWCA Civ 847.** This was not a land transaction but a transfer under the CHAPS system where the wrong bank details had been given. The bank was not liable as it did not undertake that the recipient would receive the money and there is no use of names but merely sort code and account number in a CHAPS payment.

**Purrunsing v A’Court [2016] EWHC 789 (Ch)** a fraudster purported to sell a property which he did not own. He instructed separate solicitors to act for buyer and seller. The purported seller’s solicitor was found to be negligent as they had taken no steps to verify ownership of the property and had no evidence as to the fraudster’s ability to sell. They merely relied on a statement that he did not live in the property. The purchaser’s solicitor had already acted for a previous potential purchaser where the client had required the solicitor to ask for evidence of the employment status of the seller. On this the fraudster promptly withdrew. The buyer’s solicitor was also liable for not drawing attention to the previous abortive transaction and the lack of evidence of the ability to sell.

**Note:** Some firms are now raising enquiries to confirm that the seller’s solicitor has checked their client’s identity and requiring the seller’s solicitor to state if proceeds are to be paid out of jurisdiction.

**P & P Properties v Owen White & Catlin & Anor [2016] EWHC 2276 (Ch)** here a fraudster purportedly sold a property that was not occupied and not subject to a mortgage for £1.03m. The purchaser who was subject to the fraud sued both their estate agent and their solicitor. The claims were unsuccessful.

The estate agent is not responsible for checking title. The solicitor was not in breach of a duty of care as they had acted reasonably and there were no suspicions as the ownership. Moreover, the solicitor was not in breach of warranty of authority. He was not claiming that he had been given the owners authority to act but merely been instructed by the person he had seen. The court also said that the seller’s solicitor would not in breach of trust towards the purchaser. Purrunsing was based on a previous edition of the Code of Completion by Post which did not apply to the 2011 version.
Chief Land Registrar v Caffrey [2016] EWHC 161 The borrowers produced discharge documents to their solicitor and claimed that the bank had their own solicitors who had signed the documents. In fact the signatures were forged. The solicitors did not take steps to verify the information or contact the bank. The Land Registry raised requisitions about the authority to sign and the borrowers provided a forged power of attorney. The mortgage was discharged and the Land Registry was sued for an indemnity by the bank.

The Land Registry then tried to sue the borrower’s solicitors for negligence and for misrepresentation. The courts decided there was no claim by the bank against the solicitor. The solicitors were under a contractual duty to send the documents to HMLR and had no duty to verify the documents even if this was easy to do so. They did not have a duty to check documents provided by a third party. The bank had a cause of action against HMLR and HMLR’s act had caused the loss, not the solicitors. It was, however, held that the Land Registry were reasonable to rely on the solicitors checking the validity of the discharge. HMLR were held to have a valid claim in default of the solicitors not attending the hearing.

The court stated that the solicitors did not have a duty of care to HMLR and the latter’s claim would be based on subrogation having paid an indemnity to the mortgage company. The solicitors had fulfilled their obligations as their duty was to comply with the clients instructions. However, any persons sending documents to HMLR may be representing that they have the authority to act and have checked that the bank was independently represented. The solicitors were therefore liable in misrepresentation. The judge came to this conclusion reluctantly as the solicitors had not defended the claim.

Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ 330 A fraudster charged a property which they did not own in favour of Swift 1st and the charge was registered. The true owner, on realising this, successfully applied to have the charge removed. Swift 1st successfully argued that the original registration was due to a mistake and was therefore a rectification for which the Land Registry had to pay indemnity.
CHANCEL REPAIRS

The Church must register chancel repairs by 13 October 2013 for them to be binding on third party purchasers for value. If the land is unregistered the Church should register a caution against first registration. Some registrations have now occurred. However, in April 2013 the Heritage Lottery Fund will become responsible for providing charitable funding for the maintenance of churches in England. Previously this was the responsibility of English Heritage who have said that they will not pay for the maintenance of the chancel if chancel repairs liability was available. The Heritage Lottery Fund does not intend to adopt the same attitude.

Note: Although problems may still arise in relation to people who purchase prior to 13 October, and in relation to gifts, inheritance, and re-mortgaging, a purchaser for value will be free of liability in registered land unless a unilateral notice has been registered against title and with the proviso that registration occurs within priority search periods.

Note: Liability is joint and several

Note: Registration of the unilateral notice does not mean that chancel repairs liability exists and it is always open to the property owner to object and require cancellation via form UN4.

Chancel Repairs and Leases (an extract from the Law Society)

The Law Commission could trace no legal precedent. In any case it is possible for the terms of a lease to make the tenant liable to cover such costs incurred by the landlord. However, the Tithe Act 1839 said that where there was a liability (to repair a chancel) attached to a tithe rentcharge which merged in the lands out of which it was payable, it became a charge on the lands. That was one of the ways in which chancel repair liability became attached to the ownership of land rather than the right to receive tithes. "Lands" was defined in the Tithe Act 1836 to include leasehold property but only where the lease was at least 14 years long originally and the rent was not more than two thirds of the net annual value of the property. In other words, chancel repair liability can affect leasehold property but not on short leases or tenancies at a rack rent.

Chancel repair liability still an issue for conveyancers

Chancel repair liability is the liability of an owner of land to pay for repairs to the chancel of a parish church. Owners affected include individual homeowners as well as ecclesiastical organisations, universities, colleges and others. Land does not have to be near a church building in order to be liable.

Certain overriding interests, including chancel repair liability, ceased to be overriding at midnight on 13 October 2013. These overriding interests are:

- a franchise
- a manorial right
- a right to rent that was reserved to the Crown on the granting of any freehold estate (whether or not the right is still vested in the Crown)

- a non-statutory right in respect of an embankment or sea or river wall

- a right to payment in lieu of tithe

- a right in respect of the repair of a church chancel (chancel repair liability)

Chancel repair liability can be protected by entering a notice on the register (in the case of registered land), or by registering a caution against first registration (in the case of unregistered land).

However, if chancel repair liability was not protected by notice or caution at 13 October 2013, this does not mean it ceases to exist.

**Registered land**

For registered land, where a notice has not been entered, liability for chancel repair will continue until the first transaction for value (not a dealing at nominal value or a gift or transfer on inheritance) after 13 October 2013.

Parochial Church Councils (PCCs) (in Wales, the Representative Body of the Church in Wales) are responsible for the financing the church and maintaining the church buildings. This includes, where appropriate, requesting contributions to the costs of repairing the chancel. PCCs may still apply for a notice to register chancel repair liability until the first transaction for value after 13 October 2013 takes place.

The information made available to the PCCs by the Charity Commission earlier this year gave more information to members of PCCs about its decision-making process as to whether to apply to the Land Registry to protect such interests.

**Unregistered land**

In the case of unregistered land, chancel repair liability will continue to exist in the same way; as a legal interest. If any chancel repair liability is not protected by a notice or caution at the time of first registration, the new owner will take the estate free from this liability.

**Post 13 October**

An application to lodge a unilateral notice (UN1) for chancel repair liability could be made during the priority search period (OS1). However, if you have lodged an OS1 after 13 October 2013 for a transfer that will take place after 13 October, then the property will be acquired free of the rights claimed in any unilateral notice that has been lodged after your OS1 provided that you lodge the application to register the transfer within the priority period. If you complete the transfer but do not make an application to register within the priority period the property would then be bound by the liability.
General principles (an extract from The Charity Commissioners)

A PCC is a charity (even if it is not registered with the Charity Commission) so its members are subject to the same general duties as charity trustees, including the duty to exercise their powers in the charity’s best interests. Where a chancel repair liability exists, the right to enforce that liability is an asset of the PCC which must be appropriately managed. This does not mean that it has to be enforced in every case. However, the PCC members must actively consider whether it should be registered and enforced, taking account of their PCC’s particular circumstances to reach a decision.

Decision making

By looking at judgments made by the courts, we have identified the framework for trustee decision making which, if followed, will help PCC members to fulfill their legal duties.

In short, the framework for decision making by charity trustees means they must:

- act within their powers - this means:
  - only making decisions which advance, or support activities that advance, their charity’s purpose for the public benefit
  - using the correct procedures - these may be those set out

- under the general law

- specifically in the charity’s governing document

- under the established rules and procedures for dealing with issues of the kind under consideration

- act in good faith and only in the interests of the charity

- adequately inform themselves

- take into account all relevant factors (their ‘duty of consideration’)

- disregard any irrelevant factors

- make decisions that are within the range of decisions that a reasonable trustee body would make

- avoid conflicts of interest.

By following these principles when making decisions about whether to register or enforce chancel repair liability, PCC members can protect themselves and the charity. They can also reduce the likelihood of their decisions being successfully criticised or challenged.
Relevant factors

- The relevant factors when making the decision will vary according to the particular circumstances of the PCC. However, the following are likely to be relevant in all cases:
  - the financial costs of surveying, identifying, registering and enforcing the liabilities compared to the value of the potential asset;
  - the likelihood of the need for chancel repairs;
  - the impact on the ability of the PCC to carry out its objects (mission) and to raise funds in the parish;
  - the impact on the ability of the PCC to raise funds from other sources (some funders may refuse a grant for the repair of the chancel if they found the charity had not maximised a potential asset available to it).

PCCs need to demonstrate they have considered and balanced all relevant factors when making their decision, in the best interests of their charity.

Conflicts of interest

In some situations, members of a PCC may live in properties which are subject to chancel repair liability. In such cases, the PCC must ensure the conflicts of interest are properly managed. A guide to conflicts of interest for charity trustees is available on the Commission’s website.

Liability of PCC members

In general terms, if charity trustees act in breach of their duties, they may be held personally liable. However, in practice they will be protected from liability if they can show that they acted honestly and reasonably and ought fairly to be excused. PCC members must therefore be satisfied that any decision not to register chancel repair liability is consistent with their duties, taking account of their PCC’s particular circumstances.

The Commission’s role

Decisions about whether to register and enforce chancel repair liability are a matter for the trustees of the relevant PCC charity, acting with the benefit of professional advice where appropriate. PCCs are able to take a decision about whether to register and/or enforce the liability without the involvement of the Charity Commission.

Some PCCs do come to us to request confirmation that their decision not to register or enforce chancel repair liability is reasonable. Such advice would be provided under section 110 of the Charities Act 2011. Section 110 advice can provide additional reassurance for PCC members that they have acted correctly and in accordance with their duties by protecting them against the possibility of any subsequent legal challenge to their decision.
There is no legal requirement for PCCs to obtain section 110 advice on this matter. PCC’s should only seek advice if they believe that there is a real likelihood of their decision being challenged. If a PCC wishes us to consider providing such advice they need to explain why they consider their decision is likely to be challenged. They also need to present us with a substantive case explaining how they have reached their decision. This should, as a minimum, demonstrate that the trustees have considered all the relevant factors listed in the section above.

Note: In March 2014 HMLR announced that if a parochial church council wishes to register a unilateral notice within a priority search period or after the registration of purchase of a value, they will put notice on the register. They will not decide on whether as a matter of law chancel repairs liability may be binding but will expect a party to apply to the Lands Chamber for a decision as to the validity of the notice.
MANORIAL RIGHTS

Manorial rights to mines and minerals arise from the enfranchisement of copyhold by the Law of Property Act 1922. They are quite separate from the reservation of mineral rights. As with chancel repairs, such rights ceased to be overriding interests on 13th October 2013. There had been large numbers of registrations of unilateral notices in recent months. This is to allow money to be made from licenses in relation to fracking and to charge for building of foundations upon land.

In relation to oil, gas and coal, the Petroleum Act 1998 will vest these in the Crown. Any ancillary rights may be compulsory acquired under the Mining (Working Facilities and Support) Act 1966. Outlined below is an extract from The Land Registry Practice Guide 22:-

Lordship title may not have the benefit of rights

A lord of the manor may exercise certain rights usually known as ‘manorial incidents’. Such rights could no longer be created after 1925. The main manorial rights can be summarised as:

- the lord’s sporting rights
- the lord’s or tenant’s rights to mines or minerals
- the lord’s right to hold fairs and markets
- the lord’s or tenant’s liability for the construction, maintenance and repair of dykes, ditches, canals and other works.

These are just examples and it does not necessarily follow that such rights are legally exercisable. Registered lordship titles usually make no reference to any manorial incidents in the register. It may be that the benefit of the rights was not included in an earlier sale of the lordship title.

Land subject to rights

When registering a property for the first time, we may make an entry in the property register if it appears that the land may still be subject to manorial rights. This may be the case if the title deeds reveal that the land was former copyhold (ie held of the lord of the manor) and the rights were preserved on enfranchisement (when the title was converted to freehold).

Effect of LRA 2002

Under the LRA 2002 manorial rights are categorised as overriding interests, so a landowner takes subject to them even if they are not mentioned in their register. However, under s.117, LRA 2002 these rights will lose their overriding status after 12 October 2013 (10 years after the Act came into force). Where any manorial rights have not been protected by notice or caution against first
registration before 13 October 2013, they do not automatically cease to exist on that date. The position is set out in sections 4.3.1 The land was registered after 12 October 2013 and 4.3.2 The land was registered before 13 October 2013.

- Applicants have a duty to disclose manorial rights on all first registrations or dispositions of registered land. For further information see Practice Guide 15 – Overriding interests and their disclosure.

- Somebody with the benefit can apply for the existence of manorial incidents to be noted in the register of a title that is subject to them. The applicant must satisfy us of the existence of the rights. No fee is payable. For further information, see Practice Guide 66 – Overriding interests losing automatic protection in 2013, which deals with third party interests.

- If the land subject to the rights is not registered, they can be protected without fee by caution against first registration.

The land was registered after 12 October 2013

Prior to first registration the legal owner of the land will be bound by any manorial rights because they are legal interests. On first registration they will hold the estate free of manorial rights unless they are protected by notice at the time of first registration.

The land was registered before 13 October 2013

Even if the interest has not been protected by the entry of a notice in the register the land will remain subject to it. But, unless such a notice is entered, a person who acquires the registered estate for valuable consideration by way of registrable disposition after 12 October 2013 will take free from that interest (s.29, LRA 2002). Until such a disposition is registered the person having the benefit of the interest may apply to protect it by entry of notice.

Reservation of Mineral Rights

Land owners may reserve mineral rights when they sell the land. These may be referred to on the registered proprietors title. If so, an index map search should be made to see if the mines and minerals had been registered under their own title. This will show the name of the proprietor and may also show details of the reservation, for example it may show that there is no ability to enter the land to extract the mines and minerals and no ability to cause subsidence. There may also be limitations as to the depth at which mining may occur.

Quite separately under the Infrastructure Act 2015 a property owner does not have the ability to prevent drilling for hydrocarbons more than 300m beneath ground level.

In the case of Coleman v Ibstock Brick Ltd [2008] EWCA Civ 73 the court decided that for the purpose of reserving mineral rights, minerals must have some intrinsic value. The owner of the rights could not prevent a landfill on the site.
FLOOD RISKS

The Law Society has produced guidance on flood risk and conveyancing. This was amended in late 2014. The guidance was amended in February 2016 as a consequence of the Flood Re Regulations of November 2015.

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

These provisions came into force on 4th April 2016.

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 suggest 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.

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

Note: 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.

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

Note: Flood Re came into force on 4th April 2016, subject to approval from the Consumer Regulation Authority. Premiums will be capped at between £210 and £540 depending on Council Tax Band.

The Regulations make the following clear:

The following must apply

1. The insurance contract must be held in the name of, or on trust for, one or more individuals or by the personal representative of an individual
2. Have a domestic Council Tax band A to H (or equivalent)
3. Used for residential purposes
4. Have an individual premium

5. The holder of the policy, or their immediate family, must live in the dwelling for some or all of the time (whether or not with others) or the dwelling must be unoccupied.

6. Built before 1st January 2009 (if a building built pre 1st January 2009 is demolished and rebuilt, the new property is still eligible).

7. Located within the UK comprising England, Wales, Scotland and Northern Ireland (excluding the Isle of Man and the Channel Islands).

Examples are:

a) bed and breakfast premises paying council tax and insured under a home insurance contract.

b) farmhouse dwellings and cottages, where farmhouse dwellings are included in a commercial line policy, provided the insurer can split out the dwelling element (which meets the criteria 1-6 (inclusive) above), that part of the risk can be ceded to Flood Re.

c) holiday/second homes.

d) home workers.

e) individual leaseholders protecting own dwelling.

f) leasehold blocks will be eligible for buildings cover if they contain three units or fewer, and the freeholder(s) lives in the block. Leasehold blocks will not be eligible for the buildings cover, regardless of the number of units, if the insurance contract is held in the name of a management company.

g) residential 'buy to let' (which meet the criteria 1-6 (inclusive) above) mobile homes if in personal ownership. Many ‘buy to let’ properties will not meet the requisite criteria because the owner (and policy holder) will not live at the premises all or some of the time.

h) tenant's / individual's contents (even if living in large block/flats, where the buildings risk would not be eligible).

The following will not apply:

a) bed and breakfast premises paying business rates.

b) blocks of residential flats.

c) company houses/flats.

d) contingent buildings policies (eg held by banks).

e) farm outbuildings (not included in the definition of a dwelling).
f) freeholders/leaseholders insuring blocks/large numbers of properties in a portfolio for commercial gain


g) housing association's residential properties


h) multi-use under commercial or private ownership


i) residential 'buy to let' (which do not meet the criteria 1-7 (inclusive) above)


j) social-housing properties; (eligible for contents cover but not eligible for buildings cover)


k) static caravan site owners (for commercial gain)
The Telecommunications Act 2003 and the Communications Code provide major security for the operators of telecommunications equipment. As most of such equipment is held under a lease there should be an exclusion of the 1954 Act by means of the service of a notice. It may still prove difficult however to remove the equipment.

Questions the property owner/occupier/surveyor should ask before agreeing to let equipment on to the property

1. **Is the company a licensed operator?**
   Not all operators have well known names such as O2, T-Mobile, Orange or Vodafone - many other operators exist and if in doubt you should check with Of tel (www.oftel.gov.uk). Only licensed operators may benefit from the Code.

2. **What kind of property is involved?**
The effect on your other tenants should be taken into consideration.

3. **Are you the occupier?**
An occupier is generally taken to mean someone who has sufficient degree of control and management over the property or activities of the persons on it. In practice freeholders who are approached need to check whether or not they have demised roof top space in which case it will be the roof top owner who is the occupier [query air space].

4. **Are consents required?**
Where you are a tenant the landlords or mortgagees consent may well be required (see below). Similarly planning or conservation matters may be relevant.

5. **Does the agreement allow for sharing between networks?**
If so, you may miss out on future revenues as a result of any new sharing agreement if the operators enters into them amongst themselves.

6. **Is it the standard form of agreement that you have been asked to sign?**
If so, refuse! You are much better off entering into a document with independent advice. Similarly, it is worth excluding business security of tenure.

7. **Other issues of access.** Check if your rights of access are sufficient - do you want telecom engineers calling at the weekend or calling at your offices while you are having clients visiting?

8. **What about the electricity supply - you may require a contribution towards your service charge if there is.** Is there going to be significant increase?
9. Rent review - Rent review patterns tend to be three or five years and specialist advice should be obtained. It is worth noting the view put forward in one of the articles that this regard in relation to improvements ought not to apply. (see below)

10. Indemnities - if you are being offered any indemnities do they cover claims made by your landlord?

Make sure that any indemnities are not so broad that they fall foul of the non-contracting out provisions of the Code.

11. Insurance cover - insurers should be consulted and an increase in insurance cover obtained if necessary given the electrical voltages, the equipment and personnel attending to check it.

12. What other health and safety issues are there?
You should check as there is a possibility you may be somewhat liable if there should be any risks arising. To minimise the risk you should carry out an assessment and put in place appropriate protocols and establish safety barriers.

13. Who will control the management of the health and safety risk?
This is really a development of the above question.

14. Are you being asked to sign an early access agreement?
If so, do not sign. Do not be enticed into early access payments. The powers conferred on Code operators apply wherever there is a written agreement to install and keep apparatus on the land. It does not have to be a lease and an early access agreement (ostensibly entered into pending the finalisation of negotiations for a new lease) will confer rights under the Code. Note that at BT it was standard practice to send out an early access agreement with a first draft of a lease - the majority of these were signed and returned.

15. Even if the document is a wayleave or describes itself as a licence it may still be a lease. The safest course is to contract it out of security of tenure.

16. If planning any redevelopment, build this in and take advantage of the paragraph 21 rights and ask the operator to confirm it will not exercise paragraph 21 counter notice rights.

17. Be careful about saying no. It may be that the operator uses paragraph 5 powers and you are saddled with an agreement foisted upon you by the courts which is less advantageous than that which would have been obtained by negotiation.

18. Who decides compensation if I am taken to court?

The answer is the court will itself fix any rent you receive. Most operators may be very reluctant to give up their confidential information and reveal profits. They may be prepared to backdown.
19. Will I actually get an advantage from the mast?

It may well be that there is an advantage if, for example, technology is installed in your premises that can help you if you are a retailer.

20. How will allowing the presence of the masts affect your relationship with others?

This question will have very different answers for the owner of a shopping centre (who can probably put whatever he likes on the roof without anyone noticing let alone objecting), the governors of a school, a body in charge of a church or a local authority running a nursing home.

21. To be able to update equipment, but not add to it or add extra cabins.

Note: In 2016 the government announced a major review of the Code, however, as this is based on a proposed EU Directive, the detail remains to be seen.
THE DIGITAL ECONOMY BILL 2016-2017

The Government explanatory notes states that this intends to achieve the following:

- reform the Electronic Communications Code, to deliver better coverage in rural areas through greater investment and faster rollout of mobile and broadband infrastructure

- make it easier for communications providers to have access to land - moving to a “no scheme” valuation system more akin the regime enjoyed by utility providers

- protect landowners by strengthening the “access principle” and requiring communication providers to pass a public interest test

- clarify roles and responsibilities for all parties that use the Code, helping commercial agreements to be reached more easily and disputes to be resolved more quickly

- make it easier for digital communications companies to upgrade and share their equipment and get faster access to maintain sites

- work with industry and Ofcom to develop a Code of Practice to ensure effective implementation of new rights.

- powers for Ofcom to use new technologies to better manage spectrum and make it easier for different users to share spectrum

- make it easier to install broadband cabinets, overhead lines and poles in all areas except Sites of Special Scientific Interest (SSSIs) by making regulations introduced in 2013 for a period of five years to be made permanent.
THE HOUSING & PLANNING ACT 2016

When these provisions come into force a register of rogue landlords will be available. If they rent premises, the tenant can recover any rent paid. There will also be provision whereby if the tenant has vacated and not paid the rent for 2 months, the lease may be brought to an end by the service of three notices at the address.

Higher Value Local Authorithy Housing

- A duty on local housing authorities (LHAs) to sell their interests in higher value local authority housing that has become vacant
- The SoS may make a determination to require a LHA to make a payment to the SoS representing the market value of their interests in any higher value housing that is likely to become vacant during the year (less costs and deductions to be prescribed)
- An agreement may be entered into between the SoS and the LHA for the provision of housing in an area. The agreement may reduce the amount of the payment to be made subject to certain terms and conditions.
- Where an agreement is in place it must provide that for every old dwelling sold, there must be at least one new affordable home provided in areas outside Greater London (‘one-for-one replacement’) and at least two new affordable homes in areas within Greater London (‘two-for-one replacement’)
- A “new affordable home” can include a starter home.

Compulsory Purchase of Easements: s203

S203 provides the following:

(i) the land is the subject of planning consent for building or maintenance work
(ii) the land has become vested by a specified authority or has been appropriated by a local planning authority for planning purposes
(iii) the authority could acquire the land compulsorily for the purposes of the building or maintenance work; and
(iv) the building or maintenance work is related to the purposes for which the land was vested, acquired or appropriated.
These provisions are now in force.

**Rogue Landlords**

The RLA summarises this as follows:

- Banning orders for most prolific offenders
- Database of rogue landlords/property agents
- Civil penalties of up to £30,000
- Extension of Rent Repayment Orders
- Tougher Fit and Proper Person test for landlords
- Tenancy Deposit Protection Scheme data sharing.

**Houses in Multiple Occupation**

**Houses in Multiple Occupation: Housing Act 2004**

Previously an HMO was defined by Section 345 of the Housing Act 1985 as a self-contained building or part of a building which is occupied by people who do not form a single household and is not a purpose-built block of flats. The local authority may impose HMO additional licensing. There are also overcrowding, management and fire safety provisions.

As of 6 April 2006 in England and 30 June 2006 in Wales, a HMO comprises a self-contained building or part of a building occupied by people who are not related. However, purpose-built blocks of flats and conversions with completion certificates post 1 June 1992 will not be included. Flat conversions will not be included within the definition as long as two thirds or more of the flats are occupied on long leases. A long lease is defined as being one of at least 21 years’ duration. If in a block of flats which has not been designed and constructed as such, and which received buildings regulations approval prior to 1 June 1992, the whole block will be an HMO if there has been significant subletting.

**Note:**

1. There must be at least three people in the premises to be an HMO.
2. ‘Related’ includes co-inhabitants and step family.
3. The local authority has discretionary powers in relation to HMO’s even where they do not require licensing.
4. Some mortgage companies will not lend on HMO’s, see Part 2 Instructions. Part 2 of the CML Handbook should be consulted, although mortgagees seem really to be concerned with bedsits and student accommodation and not long leasehold flats.

5. Insurance companies may require to state where there is an HMO. The existence of an HMO can significantly affect premiums and non-disclosure may vitiate the policy. The mortgagee would also need to know whether the insurance is adequate.

6. In relation to sub-letting, the mortgagee would require consent not to be unreasonably withheld. Some leases have bans on subletting which the conveyancer can easily miss.

7. It is suggested that enquiry needs to be made as to the number of sub-tenants occupying units in a pre-June 1992 conversion. If the agents do not know the answer then some investigation may need to be made by the conveyancer, e.g. Council Tax obligations. An additional enquiry may need to be made when the property is an HMO as to whether the insurers have been notified.

Licensing of Houses and Multiple Occupation

The following will require an automatic licence

(a) the HMO or any part of it comprises three storeys or more;
(b) it is occupied by five or more persons; and
(c) it is occupied by persons living in two or more single households.

The following storeys shall be taken into account when calculating whether the HMO or any part of it comprises three storeys or more—

(a) any basement if:-
   (i) it is used wholly or partly as living accommodation;
   (ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation;
   (iii) it is being used in connection with, and as an integral part of, the HMO; or
   (iv) it is the only or principal entry into the HMO from the street.

(b) any attic if:-
   (i) it is used wholly or partly as living accommodation;
   (ii) it has been constructed, converted or adapted for use wholly or partly as living accommodation, or
(iii) it is being used in connection with, and as an integral part of, the HMO;

(c) where the living accommodation is situated in a part of a building above business premises, each storey comprising the business premises;

(d) where the living accommodation is situated in a part of a building below business premises, each storey comprising the business premises;

(e) any mezzanine floor not used solely as a means of access between two adjoining floors if:

(i) it is used wholly or mainly as living accommodation; or

(ii) it is being used in connection with, and as an integral part of, the HMO; and

(f) any other storey that is used wholly or partly as living accommodation or in connection with, and as an integral part of, the HMO.

In the case of Digs v Bristol City Council [2014] EWHC 869 it was held that a mezzanine floor which was merely an access point did not qualify as a separate storey.

Licenses must be taken out for each property and be renewed every 5 years. They are personal and a purchaser must apply for a new license. Likewise a personal representative must apply for the license. There is a 3 month temporary exemption period. The local authority will charge an administration charge which varies throughout the country.

Some local authorities have introduced additional licensing whereby all HMOs in a particular locality will require a license. This should show on local land charges searches.

There is also selective licensing whereby none HMOs in a particular locality require a license.


The provisions came into force on 6 April 2010 and introduce a new form of Use Class for Houses in Multiple Occupation, which brings it into line with Section 257 Housing Act 2004 and Houses in Multiple Occupation generally. The provisions apply to short term lettings where there is sharing of kitchen, bathroom or toilet facilities. Pre 6 April, such premises would be categorised as dwellings within Use Class C3, as long as there were no more than 6 occupants. Now, if there are three or more occupants who are not related, planning permission will be required for conversion into short term lettings. These provisions are now under review.

Note: These provisions were repealed on 1 October 2010. However, local authorities were encouraged to use Article 4 directions as an alternative, and many authorities have reduced HMOs to properties where there are three or more people sharing anyway.
The Government intends to introduce mandatory licensing for HMOs of 2 or more storeys and flats above shops.

It also intends to introduce mandatory electrical wiring certificates in the private rented sector.

### 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 Act 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.

**Note:** the maximum discount for right to buy in Wales has now been reduced to £8,000. Labour has announced that if they are in power after the Welsh Assembly elections they intend to abolish right to buy in Wales.
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. The provisions are included in the Housing and Planning Act 2016. Developers will be able to sell at the reduced rate as they will be exempted from Community Infrastructure Levy (see later) and s106 obligations which do not relate to the actual site.

These are not expected to come into force until 2017. Consultation regulations have been produced. Qualifying developers will be expected to set aside 20% of housing as starter homes. People under the age of 23 will not be able to purchase and there will be clawback for 5-8 years if the property ceases to be a main residence.
SELFBUILD AND CUSTOM HOUSEBUILD ACT 2015

Local authorities must maintain a register of those wishing to build properties at least 50% designed by themselves in the locality. This must be taken into account in the development plan. Such properties do not attract Community Infrastructure Levy unless they cease to be the main residence within 3 years.
ENERGY ACT 2011

Minimum Energy Performance of Buildings Standard


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.
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