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DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS

PROPERTY LAW UPDATE

SEPTEMBER 2018

Property Update

Speaker: Richard Snape
14th September 2018
3 CPD Points

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS

ABOUT DJB

Established in 1999, Davitt Jones Bould is now the largest national real estate law firm in the UK.

DJB's clients receive a fabulous service benefiting from their own dedicated Account Manager to ensure that the service they receive is on time, on price and totally meets their needs.

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 800 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.

The firm enjoys top tier rankings in all of the main directories and is a winner of the Lawyer Awards.

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

CHAMBERS UK

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

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LEGAL 500 2015

"I rate everyone we have dealt with as being first class"

CHAMBERS 2016

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

LEGAL 500 2015

"'Clients feel protected to the greatest extent.'"

CHAMBERS 2016

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SERVICE CHARGE LIABILITY

A consultation paper has now been produced as a consequence of the Hackett Enquiry on building regulations and fire safety in the light of the Grenfell Tower disaster. It looks at possible changes to construction, conversion and ongoing management of buildings and possbile changes to enforcement. In the light of this, fire safety risk assessments in particular may be changed in the future.

Both residential and commercial service charges are likely to be greatly effected, especially, where is usually the case, service charge allows recovery of payments for improvements and statutory works. In **Finchbourne v Rodrigues [1976] All E.R 581** it was held that there would be an implied term that the work must be reasonably incurred. In council house right to buys, the purchaser will be given an estimate of future works within the next five years from purchase but after this time the service charge may increase greatly. Due to the so called 'Florries Law', the liability of former council tenants cannot exceed £10,000 in any five year period. However, this will only apply in relation to works funded by Central Government.

Under the Service Charge Consultation Requirements (England) Regulations 2003 and the Service Charge Consultation Requirements (Wales) Regulations 2004, which came into force on 31 October 2003 and 1 March 2004 respectively, then if consultation does not occur between landlord and tenants in relation to service charges and dwellings, there will be a statutory cap of £250 for the works. Therefore, it is suggested that a management enquiry is made to the effect of, whether there has been any major works within the meaning of the Regulations and if so did consultation occur.

In March 2018 **First Port** obtained the tribunal rulings to the effect that tenants would be responsible for the replacement of aluminium cladding in a block of flats in Croydon. The cost is currently assessed at £2m including a bill of £4,000 per week to employ fire wardens. The maximum individual liability is £31,300.

In April 2018, the developer, Barratts, announced that they would voluntarily pay for the works.

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JAPANESE KNOTWEED

Japanese knotweed is a notifiable substance. It is illegal to cause it to be propagated in the wild under the Wildlife and Countryside Act 1981. The Local Authority can issue remediation notices and charge for its removal. The new residential enquiries, TA6 (3rd Edition), raise an enquiry as to whether the property is affected by Japanese knotweed. It allows the responses of yes, no or don't know. No would be a statement of fact and potentially actionable. Don't know may be a representation that attempts have been made to investigate. Moreover, the property may be affected by Japanese knotweed if it is within the neighbourhood. It is suggested that responses should make clear that there has been no attempt to find out. The presence of knotweed is also required in response to the CPSE enquiries sections 8 and 15 as it constitutes a contaminated substance and an infestation.

The mortgagee must be told of the existence of knotweed, although valuation reports may pick this up. The mortgage offer may be withdrawn unless the knotweed can be controlled by experts before reaching any building.

Note: Under the Anti-social Behaviour Crime and Policing Act 2014 local authorities may serve community protection notices on property owners who fail to control their knotweed.

Williams & Waistell v Rail Infrastructure Ltd [2018] EWCA Civ 1514 here Rail Infrastructure Ltd were successfully sued in nuisance for not removing knotweed growing on neighbouring land to dwellings owned by Williams & Waistell. Damages were assessed at £10,000 plus £5,000 towards remedial costs.

The Court of Appeal have now confirmed the first instance decision but on different grounds. Loss of value cannot be claimed as this is pure economic loss. However, damages were available for lost development potential and possible future damage to property.

MISREPRESENTATION OF ENQUIRIES

Misrepresentation Generally

Misrepresentation is a false statement of fact which at least in part induces another to enter into a contract. Silence, save in exceptional circumstances, such as insurance contracts, will not constitute a misrepresentation but a half-truth will. See e.g. **Nottingham Patent Brick Company v Butler [1889]** where a solicitor stated that he was not aware of any restrictive covenants not having attempted to find out.

More recently, **Cottingham v Attey Bower Jones [2000]** found that a solicitor who had allowed a seller to respond to an enquiry about Building Regulations by saying not available was in breach of contract for not checking why the Regulations were not available.

If circumstances change, there will be a duty to notify parties of the change without request. See e.g. **With v O'Flanagan [1939]** where a dental practice had been profitable was no longer so by the time of sale. A genuine statement of law or opinion as opposed to fact will not be a misrepresentation but the opinion must be genuinely held. See e.g. **Bissett v Wilkinson [1927]** where an opinion as to the sheep holding capacity of a farm was made. The seller had no previous experience of sheep farming and this was held to be a statement of opinion. Contrast **Smith v Land and House Property Company [1889]** where a tenant was described as being most desirable even though he was one quarter in arrears of rent. This constituted a misrepresentation. More recently, see **McMeekin v Long [2003]** where a enquiry about neighbour disputes was answered by the word "none". In fact there had been a ongoing parking dispute. This was actionable. If the buyer has the opportunity to discover the truth, this does not prevent a misrepresentation; see **Redgrave v Hurd (1881) 20 Ch 1**

Negligent mis-statements

As well as inducing a contract a negligent mis-statement may give rise to liability in tort and a claim may be made by anyone who reasonably relies on the statement.

Normally, liability in tort only arises for physical loss or financial injury which is associated with such loss. There will be no claim for pure economic loss. See e.g. **Murphy v Brentwood District Council [1991]** where a local authority negligently failed to check plans and an architect negligently designed a property with infill. A subsequent purchaser who did not have a contract with either and where the builder had become insolvent could not claim as the only loss suffered was economic, i.e. he had a less valuable building. See also **Department of Environment v Thomas Bates [1991]** where a building could not achieve its design load. The architect could not be sued as once more the loss was merely economic. For this reason collateral contracts may be desirable between purchaser and design team.

The exception to the above is where the loss is caused by a negligent mis-statement. See, e.g. **Hedley Byrne v Heller [1963]** where negligent references were held to be actionable. If someone holds themselves out as having specialist knowledge such that is reasonable to expect others to rely on that representation, and they do so rely and loss is caused, there will be a claim available. This

will usually occur in the course of a business but see, e.g. **Chaudrey v Prabhakar [1987]** where a friend of the claimants held themselves out as being an expert in cars and purchased an insurance write-off for the claimant. This was actionable.

There must also be a degree of proximity in that it must be reasonable for the claimant to rely on the representation. See, e.g. **Caparro v Dickman [1988]** where yearly accounts were relied on during the course of a takeover. There was no claim here. Contrast **Morgan Crucible v Hill Samuel [1989]** where accounts were produced when there was already an identifiable bidder for the business.

Enquiries Generally

Clinicare Limited v Orchard Homes [2004]

This case, at first glance, seems to drive a veritable coach and horses through the concept of caveat emptor "let the buyer beware". It is of fundamental importance to both solicitors and surveyors alike and it is one in a line of recent cases which increase the potential for claims of misrepresentation against both the agent and the client.

In response to an enquiry about dry rot, the solicitor replied that he was not aware of any but that the buyer should rely on their own inspection or survey. The buyer then arranged for a survey which revealed major problems in relation to damp, advised that this might have given rise to dry rot and that a further survey was therefore recommended. The buyer went ahead without having had a further survey. The dry rot was subsequently discovered and the seller's solicitor was successfully sued.

The court held that knowingly failing to disclose the existence of the dry rot, presumably on instruction from the client, amounted to an actionable misrepresentation. The burden cannot merely be passed on to the buyer and their solicitor by stating that they must rely on their own survey or, presumably, on their own skill and judgment. Where to draw the line is very unclear and this decision may present major difficulties for both solicitors and surveyors and, indeed, their clients. The only thing which may not be construed as a misrepresentation is silence and the buyer's solicitor cannot not accept this. An impasse between the parties will soon be reached. Furthermore, what does a solicitor do if a seller requires him not to disclose the existence of dry rot, for instance? Will he have to refuse to act as otherwise he may be faced with a conflict of interest? In following instructions the solicitor may be opening himself to a damages claim. There is, finally, less incentive for the buyer to employ his or her own specialists in the knowledge that they might have a cause of action against the seller in any case. This is indeed regrettable.

The case is based on **Sindall v Cambridge County Council** whereby a local authority selling land for development was asked questions about drains under the land and replied that they were not aware of any. If they had looked at their records they would have found that drains have been laid under the land some 60 years previously. This was found to be a misrepresentation. In responding to enquiries about public drains, do not state that the seller is not aware of any.

See also **Morris v Jones [2002]** - here a response to an enquiry about damp stated that other than work carried on by a guarantee there was none to the vendor's knowledge but the buyer should rely on his own survey. The survey found damp but the seller was still liable as he failed to disclose more severe damp which was in his knowledge.

- In **McMeekin v Long [2008]** a misrepresentation occurred when neighbour a dispute was not disclosed on request damages were assessed at £67,000.
- In the American case of **Stambovsky v Ackley 1991**, a seller was held to be liable in misrepresentation when they responded to an enquiry about hauntings that they were not aware of any. In fact they had recently written an article in the Readers Digest about the haunted house.
- More importantly, in **Sykes v Taylor-Rose [2004] EWCA 296** the standard enquiry of the time as to whether there were any other factors which might influence the purchaser's decision was answered in the negative. To the seller's knowledge there had been a murder committed in the premises previously which they did not disclose. It was held as the question is subjective and it could not be proven that the seller's thought this important, there was no liability.

Thorp v Abbotts [2015] EWHC 2142, a couple agreed to purchase a house for £625,000. The seller completed the 2007 edition of the TA6 which had the question:

3.1 Has the seller either sent or received any communication or notices which in any way affect the property, for example from or to neighbours, the council or a government department?

3.2 Has the seller had any negotiations or discussions with any neighbour, local or other authority affecting the property in any way?

Soon after completion the purchaser became aware of planning applications made a month after completion for 740 dwellings in the nearby green belt. Some months later another application was made for 800 houses in the flood plain nearby. Planning permission was eventually granted.

The purchaser sued the seller for misrepresentation. It transpired that the seller had been aware of the possible planning applications and had attended meetings in which they were discussed. At the meeting a planning officer had stated that permission would almost certainly not be granted. It was held that there was no misrepresentation as the seller genuinely believed that there would be no planning permission and therefore that the response was not material. Note that the 3rd edition of a TA6 now deals with this issue and a decision may be different.

First Tower Trustees v CDS (Superstores International) Limited [2018] EWCA Civ 1396 here the tenant raised enquiry as to whether there were any breaches of environmental law in the premises. The landlord responded in the negative. Subsequently, just before completion the landlord was served with notices in relation to asbestos on the premises. The landlord did not notify the tenant of the change of circumstance. The tenant was faced with nearly £500,000 worth of remediation work and sued the landlord in misrepresentation. The landlord relied on a non-reliance clause whereby the tenant was deemed was not to have relied on any misrepresentations. Exclusion of liability from misrepresentation must be reasonable under s3 Misrepresentation Act 1967. The non-reliance clause was held to be unreasonable.

The Court of Appeal has now confirmed this decision.

NEW CPSE ENQUIRIES

The New CPSE 7 Enquiries

These were introduced in July 2015 and are a much abbreviated version of the CPSE 1's. At first glance they are very welcome as a more appropriate form of enquiries for small businesses and the high street. However, consider some of the questions in the light of the above as they seem to require an objective response. For instance, questions as to whether asbestos has been used in the premises and also questions as to physical condition in relation to matters such as Japanese knotweed, infestation, structural stability and subsidence.

Note: The CPSE 1s and the CPSE 7s were amended in July 2016. We now have CPSE 1 version 3.6 and CPSE 7 version 2. The main changes relate to SDLT and deal with the fact that the rules in relation to substantial performance of a contract changed in 2013. The reference to abnormal rent increases was also deleted as these provisions also changed in 2013.

The CPSE Enquiries changed in March 2018. The following changes were made:-

Changes to CPSE.1 (now version 3.7)

- Enquiry 8.1 deals with the physical condition of the property. It has been amended to add reference to Japanese knotweed.
- Enquiry 14 considers statutory and other requirements. A new enquiry 14.8 has been added for grade F or G properties, asking for any information that has been or could be used to support a registration in the "*PRS Exemptions Register*" (that is, the exemptions register for MEES – the minimum energy efficiency standard). The existing enquiry 14.8 has been renumbered 14.9.

Changes to CPSE.5 (now version 3.2)

- Enquiries 1.5, 2.1 and 2.5: these questions have been slightly amended to make it clear that they refer to the lease that is to be surrendered, rather than the property.
- Enquiry 2.1: a new guidance note now reminds all parties to check that the landlord has power to accept the surrender, for example if the landlord's interest is charged.
- Enquiry 8.2: the guidance note has been updated by deleting reference to transitional amendments to empty rate relief that have now expired.

Changes to CPSE.7 (now version 1.2)

- Enquiry 10.4 has been amended by adding a definition of EPC.
- A new enquiry 10.5 has been added for grade F or G properties, asking for any information that has been or could be used to support a registration in the PRS Exemptions Register (as above). Existing enquiries 10.5 and 10.6 have been renumbered 10.6 and 10.7.

Amendments to introductory wording

- The introductory wording to CPSE.1, CPSE.5 and CPSE.7 has been amended to expand the exclusion of liability to partners, consultants or other staff.
- The introductory wording to CPSE.1 and CPSE.5 has been amended to make clear that where the property is in Wales, references to Stamp Duty Land Tax include the new Land Transaction Tax.
- Introductory note 2 of STER has been amended to refer to the Standard Commercial Property Conditions (Second **or Third** Edition).

Sources

CPSE.1 (version 3.7) General pre-contract enquiries for all commercial property transactions.

CPSE.5 (version 3.2) Enquiries before surrender of a rack rent commercial lease.

CPSE.7 (version 1.2) General short form pre-contract enquiries for all property transactions.

STER (version 3.1) Solicitor's title and exchange requirements.

FRAUD THREATS FOR PROPERTY TRANSACTIONS

In October 2010, the Land Registry and The Law Society produced joint guidance on frauds and threats to property transactions. A new version was produced on 8th September 2017. It adds examples of various frauds, primarily based on the various cases below. The guidance may need to be changed when **Dreamvar v Mishcon de Reya** is decided by the Court of Appeal.

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* which was amended in January 2018.

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'.

Methods of Identity Fraud

The Practice Guide lists the following:-

- False passports from the UK or overseas (these can be checked with electronic identity verification services). Formats of passports can change from time to time and where there is a separate signature page, you should ensure that you retain a copy of that page.
- Genuine passports and/or driving licences where the fraudster has changed his/her name through deed poll. A change of name may be perfectly innocent but should always be checked carefully.
- False driving licences. The format for driving licences from different time periods can be found on the Public Register of Authentic travel and Identity Documents. The government has published an explanation on how to read a driving licence number.
- False payslips, bank statements or utility bills are easily forged or available from the internet. Look at them carefully; fakes can often be detected because they may contain anomalies such

as incorrect figures, minor typos or unlikely transactions (for instance a recent transaction with a company which no longer exists, such as BHS or Woolworths).

Companies

- false companies are created, particularly, impersonating well-known companies
- a UK company, for example, is set up in the same name as that of an overseas corporate registered proprietor in order to impersonate them
- the company's officers are impersonated which may be accompanied by a change of office holder notification to Companies House (sometimes referred to as 'company hijack').

Legal Practitioners

For solicitors check the Law Society's 'Find a Solicitor' website but do not rely on this alone. You should carry out further checks on the Solicitors Regulation website or through their contact centre on 0370 606 2555.

For licensed conveyancers check the Council for Licensed Conveyancers website.

For legal executives check the Chartered Institute of Legal Executives website.

Possible signs of fraud include the following:

- Spelling or typographical errors in letter-headings
- No landline telephone number
- 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, such as Hotmail
- 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 principal 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
- A firm's client account apparently overseas
- A strange or suspicious bank account name - for example, the account not being in the name of the firm you are supposedly dealing with
- The details of a bank account to which money is to be sent change during the course of a transaction

Consider also:-

- Have you received at least one piece of correspondence on headed notepaper? Are the details on that notepaper consistent with the information about the firm on the website of their professional body, and is there no other cause for suspicion?
- Looking up the name of a large firm in the area and speaking to them to see if they have had dealings with and know the other firm. Keep a note on your customer due diligence file of the actions you have taken (see Record keeping, below).
- Before transmitting funds or accepting undertakings from another conveyancer, verifying their bank details or transmitting a small sum first as a test transfer.

Examples of suspicious behaviour

The Practice Guide quotes the following:-

- If you are instructed on the sale of the property which has been owned by the registered proprietor for a long time, but the client appears to be younger than would be expected.
- Where a client is reluctant to answer questions from you or from the purchaser. In *Purrunsing* for example, the fraudster withdrew from the sale to a buyer who requested details of the alleged overseas employer of the purported seller, which should have raised suspicions on the part of the seller's solicitor, a factor which contributed to the finding that the firm was not entitled to s. 61 relief for breach of trust (see para 19 of the case report).
- If the sale is by a supposed owner-occupier but the client wants you to write to a different address. Various reasons may be given (which may be genuine).
- A client who requires the transaction to be completed with great urgency without a feasible explanation.
- There are inconsistencies between what the seller states in the seller's property information form (SPIF), and what a local search reveals. In *Purrunsing,* for example, the local authority search confirmed building works had been carried out although the seller had indicated in the SPIF that no works had been done on the property.
- Transactions in which the property is being sold at what appears to be a low price, which may or may not be linked to a desire for a quick sale.
- Statements or explanations are provided such as:

  -'I've already put my furniture into store and am living with a friend'

  -'I've moved in with my boy/girl-friend'

  -'We have trouble with our post being stolen'

  -'It will be quicker if you write to my office address'

  -'Don't send me letters - use email for speed and I'll call in to sign any paperwork

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 2017. 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 2017 [EWCA Civ 1295]** 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 seller's 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. In September 2017 the Court of Appeal confirmed the first instance decision. It was reasonable for conveyancers to rely on Find a Solicitor. Find a Solicitor now contains a disclaimer that it cannot be relied upon. The disclaimer will be subject to s3 of the Misrepresentation Act 1967 in that it can only be relied upon if reasonable.

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.

0n 8th January 2018 the Land Registry amended is Practice Guide 67 on identity checks, stating when ID must be provided and what is acceptable. If a person who is unrepresented is known to HMLR, due to the number of transactions they go through, ID1's and ID2's are not required, e.g. for large investors.

Record Keeping

The new Practice Guide stresses the need to keep contemporaneous records of identity checks that were carried out.

Case Law

Lloyds TSB Bank Plc v Markandan & Uddin [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. 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 fraudsters ability to sell. They merely relied on a statement that he did not live in the property. The seller'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 & Mishcon de Reya: High Court Decisions

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.

Note: Bizarrely, in this case, the purchaser did not attempt to sue their own solicitor.

Dreamvar (UK) Ltd v Mishcon de Reya [2016] EWHC 3316 (Ch) the case once more involved the fraudulent sale of an unoccupied high value property without a mortgage. The transaction was set aside and the purchaser sued both buyer and seller solicitors. It was held that the seller's solicitors had acted negligently as they had not carried out adequate identity checks, relying on a television licence and a provisional driving licence which had only recently been taken out. However, as with **P & P Properties** (as above) the seller's solicitors under the Code for Completion were not liable to the purchaser as they did not hold the purchase money on trust. Moreover, there was held to be no breach of warranty of authority as the solicitors merely warranted that they had the authority of the person in front of them to act and not the registered proprietor.

The purchaser's solicitors (MDR) seemed to have acted reasonably as they had addressed various 'red flags' such as the premises being unoccupied and the address of the seller being another property. The judge also recognised that in certain circumstances it might be appropriate for the

purchaser's solicitor to obtain undertakings that the seller's solicitors have made adequate identity checks but this was not necessary in the current case. Nevertheless, the purchaser's solicitors were in breach of trust having paid the money to the wrong person. In the circumstances, it was held not to be appropriate to exempt MDR from liability under s61 Trustee Act 1925 even though they had acted honestly and reasonably as the purchasers financial circumstances were worse than the solicitors and the solicitor could claim off their insurance. In the light of this, it may be appropriate to make clear to the purchaser that the solicitor is unable to verify that the sellers are the registered proprietors.

The case is due to be heard by the Court of Appeal in February 2018.

The Court of Appeal Decision [2018] EWCA Civ 1082

The cases were decided by the Court of Appeal on 22nd May 2018. In **P & P**, the seller's solicitors were held liable in breach of trust as it was held that temporarily the purchased money would be held on trust by the solicitor before transferring on to a seller or mortgage company. Relief was not available under s61 as inadequate identity checks had been made. In particular, it had not been noticed that the seller had claimed to be the owner of a property for 10 years whereas HMLR made it clear that the property had been purchased 20 years previously. Further questions should also have been raised in relation to a quick sale at 25% less than market value. The fraudster claimed to need the money quickly as they were going through a divorce. There were also warning signs which were ignored, such as the fact the purported seller was based in Dubai and the solicitor in Dubai, who carried out identity checks, had been struck off some years previously. Bank statements which were relied on as evidence of identity only included the front page of the statement.

There was also a breach of clause 7 of the Code for Completion whereby the seller's solicitor undertakes that they have the seller's authority to act. This meant the true owner's authority and not the person purporting to sell. There would have been both negligence claims and a claim for breach of warranty of authority against the seller's solicitor but for the fact that there was no reliance by the purchaser's solicitor on the seller's solicitors' breaches.

In **Dreamvar v Mishcon de Reya**, the court held that the seller's solicitors were liable in both breach of trust and breach of warranty of authority for similar reasons to the above. S61 was not available as identity checks had been completely inadequate. More importantly, the Court of Appeal by a 2 to 1 majority held that the purchaser's solicitor was also in breach of trust and could not rely on s61 as a defence to this. In the dissenting judgment of Gloster L.J. they could not accept that the purchaser's solicitors who had done nothing wrong should be liable and also pointed out that in the first instance decision Railton J. had stated that **Mishcon de Reya** could have used s61 as a defence if the seller's solicitors had been liable. This was not the case in the Court of Appeal decision.

Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017

These came into force on 26th June 2017 and implement the Fourth EU Money Laundering Directive. They replace the Money Laundering Regulations 2007. They do not constitute a fundamental change to the previous law. Key changes include:

1. **General Risk Management**

   Previous regulations required firms to keep policies relating to risk management and due diligence. The new version is more prescriptive and sets out the procedure that must be taken by a relevant person to analyse businesses potential exposure to money laundering. This means that a relevant person must produce a written AML risk report in relation to their customers and their businesses and country.

2. **Risk Mitigation**

   There must be written policies which are proportionate to the risks identified and which must be approved by the relevant person.

3. **Level of Due Diligence**

   The situations in which simplified due diligence is permissible are more restrictive as above under the Fourth EU Directive. There is also a black list of high risk jurisdictions where enhanced due diligence must be provided.

4. **Politically Exposed Persons**

   The provisions of the Fourth EU Directive have been implemented.

5. **Reliance on Third Parties**

   This is still permitted but the third party must effectively provide the information it has obtained and enter into a written agreement under which it agrees to provide within 2 days copies of all due diligence documentation in respect of the customer and beneficial owner.

6. **Criminal Offence**

   Any individual who recklessly makes a false or misleading statement in relation to money laundering may be faced with an unlimited fine and 2 years prison.

Note: The Law Society produced guidance for conveyancers in March 2018.

BUSINESS RATES LIABILITY AND EMPTY PROPERTIES

Empty commercial properties pay full business rates after 3 months and empty industrial units and warehouses pay full business rates after 6 months. If there has been occupation of at least 6 weeks in these periods then the time period to attract business rates starts again.

Exemptions from the business rates charge

After the initial three or six month rate free period expires, an empty property is liable for 100 per cent of the basic occupied business rate charge unless:-

1. The rateable value of the property is **less than £2,900**. (Less than £2,600 from 1 April 2011 to 31 March 2017 and less than £18,000 in 2010/11).

2. The owner is prohibited by law from occupying the property or allowing it to be occupied.

3. The property is kept vacant because of action taken by or on behalf of the Crown, or any other local or public authority, to prohibit occupation of the premises or acquisition of them.

4. The property is included in the schedule of monuments compiled under s.1 to the Ancient Monuments and Archaeological Areas Act 1979.

5. The property is the subject of a building preservation notice within the meaning of the Planning (Listed Buildings and Conservation Areas) Act 1990 or is included in a list compiled under section 1 of that Act.

6. The owner is entitled to possession only in his capacity as the personal representative of a deceased person.

7. One of the following insolvency or debt administration situations exists:

    - A bankruptcy order within the meaning of section 381 (2) of the Insolvency Act 1986.
    - The owner is entitled to possession of the property in his capacity as trustee under a deed of arrangement to which the Deeds of Arrangement Act 1914 applies.
    - The owner is a company subject to a winding-up order made under the Insolvency Act 1986 or which is being wound up voluntarily under that Act.

- The owner is entitled to possession of the property in his capacity as liquidator under s112 or s145 of the Insolvency Act 1986.
- The owner is a company in administration under the Insolvency Act 1986 or is subject to an administration order.

There are also no business rates to pay on an empty property if:

- it is held by a charity and appears likely to be next used for charitable purposes.
- it is held by a community amateur sports club and appears likely to be next used for the purposes of the club.
- it is a newly-built non-domestic property completed after 1st October 2013 and before 30th September 2016.

Business Rates & Empty Properties

John Laing & Son Ltd v Kingswood Assessment Committee [1949] I KB 344 at p350 here, the court accepted that occupation for business rates purposes had four aspects:

1. Actual occupation
2. Beneficial occupation
3. Exclusive occupation, and
4. Occupation must not be too transient

In **Kenya Aid Programme v Sheffield City Council [2013] EWHC 54 (Admin)** it was accepted that occupation by a charity for storage purposes in two adjoining warehouses could avoid business rates liability even though only 25% and 30% of the floor area was actually occupied. The Charity Commission subsequently warned charities that they should not be involved in avoiding business rates.

In **Makro Properties Limited v Nuneaton & Bedworth Borough Council [2012] EWHC 2250 (Admin)** the court accepted that storage of 16 pallets for 6 weeks every 3 months was sufficient to avoid business rates.

Principled Offsite Logistics Ltd v Trafford Borough Council [2018] EWHC 1687 (Admin) Empty office premises attract full business rates after 3 months but if premises are occupied for more than 6 weeks in any 3 month period business rates can be avoided. Here, POLL were given 43 day leases to occupy premises for the sole purpose of avoiding business rates. They paid a peppercorn rent and received

20% of the avoided business rates. This was held to be sufficient occupation and there need not be any specific purpose. The rates were avoided.

ENERGY ACT 2011

Minimum Energy Performance of Buildings Standard

Energy Efficiency Regulations 2015 - Minimum Energy Performance of Buildings Standard

S49 of the Energy Act 2011 required 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:

2. 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.

3. 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.

4. Lettings under 6 months subject to a maximum of two such lettings to the same tenant.

5. Leases where the length is more than 99 years.

6. 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.

7. Where the works cause a material net decrease in the property's capital value.

8. 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.

Note: On 23rd February 2017 the Government produced guidance on minimum energy Efficiency standards for non-domestic premises. In particular, an exemption must be specifically applied for and will only last for 5 years. If the landlord can not obtain necessary consents for the work they must show that they have taken all reasonable steps to obtain such consent. There will be a register of exempt premises. The landlord may also be able to show that he has taken all steps that can be expected and cannot make the property E rated. There will also be an exemption if the landlord can show that the proposed work would not be paid for by the energy savings within 7 years.

If a property continues to be let after 1st April 2023 with a F or G rated EPC then they may be faced with enforcement action and the leasing out of the premises will be unlawful. It is unclear how this affects the landlord and tenant relationship.

If a listed building exemption is being claimed then the landlord must show that any EPC recommendation report would unacceptably alter the appearance of the building.

Any exemptions is personal and will not benefit a purchaser of the reversion who must apply for a new exemption. If they are an unexpected landlord, e.g. an inheritance or disclaimer, they have 6 months to apply for the exemption.

Note: The residential guidance was produced on 9th October 2017. It is similar to the commercial property guidance.

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.

RECENT COMMERCIAL LEASE CASE LAW

Rectification

Palo Alto Ltd & Others v Alnor Estates Ltd [2018] UKUT 0231 If an option to renew a lease is on the same terms as the original lease including the option then it becomes perpetually renewable. Such a lease will be converted into a 2000 year lease by virtue of s145 and sh 15 of the Law & Property Act 1922. Here, such a lease had been created. The tenant was aware of this fact but there was no suggestion of dishonesty. Nevertheless, the Upper Tribunal allowed rectification of the lease on behalf of the landlord.

Break Clauses

Vacant Possession

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 tenant's fixtures which should have been removed.

Goldman Sachs International v (1) Procession House Trustee Ltd and (2) Procession House Trustee 2 Ltd (2018) to constitute a condition precedent to exercise a break the provision must be clear. Here, vacant possession was required to exercise the break but not reinstatement at the end of the lease.

Correct Service

In **Vanquish Properties (UK) Ltd Partnership v Brook Street (UK) Ltd [2016] EWHC 1508 (Ch)** the landlord created an overriding lease in favour of Vanquish Properties (UK) Ltd Partnership, a limited partnership. The limited partnership then purported to terminate the original lease by means of a break clause in their name. The tenants successfully argued that a limited partnership, unlike a limited liability partnership did not constitute a separate legal entity and could not hold the overriding lease. The break should have been served by their controlling company, Vanquish GP.

Service of Notices

In **Levett-Dunn and others v NHS Property Services Ltd [2016] EWHC 943** a break notice had to be served on one of four landlords. The address given in the lease did not relate to any of the current landlords. The tenant served notices on all the addresses. This was held to be valid as the notice provisions incorporated s196 Law of Property Act 1925 which states that notices are deemed to be served if served at last known address. The tenant's argument that the notice had been served on a former landlord at the address failed as service to a former landlord, unless notified of the new landlord, is only valid if s23 (2) of the Landlord & Tenant Act 1927 applies.

Grimes v Trustees of the Essex Farmers and Union Hunt [2017] EWCA Civ 361 this involved notice to quit an agricultural tenancy. Notices could be served at the address given in the tenancy agreement or such other address as had been notified to the tenant. These were not alternatives and the notice should have been served on the latter address.

VAT ON SEARCHES

Brabners LLP v HM Revenue & Customs (HMRC) [2017] UKFTT 0666 (TC) the tribunal confirmed that there was no concession on VAT for electronic searches as there is for property searches and VAT was payable. In June 2018 The Law Society amended their guidance on VAT. It should now be charged on electronic searches.

It is understood that HMRC are now investigating several other firms.

The Issues

The problem arose as the search provider were not charging VAT on their searches. If they had done so, the client could on the gross amount if the solicitor was not claiming back VAT. If HMRC claimed output tax against the solicitors, they could then claim back input tax and would not be out of pocket.

If the firm is charged VAT by the search provider but then claims it back against VAT and only charges the client the net amount, then they should be paying VAT to the revenue anyway.

Postal Property Searches have a concession whereby they are not charged.

ESTATES RENTCHARGES

Enforceability of Positive Covenants

1. Positive Covenants and Restrictions

The problem here is that in freehold land a positive covenant will not burden third party purchasers. See **Austerberry v Oldham Corporation [1885]** - this was confirmed by the House Lords in **Rhone v Stephens [1994] 2 All ER 65** where maintenance of a flying freehold roof could not be required against third party purchasers. Mortgage companies may be required to be told about flying freeholds and insurance may be available. It is suggested that the best manner of enforcement would be to include direct covenants and restrictions on the register. There are many ways of circumventing this, e.g. estate rentcharges and the doctrine of mutual benefit and burden, i.e. if a right is claimed, a corresponding obligation must be taken on. The classic example of this is in relation to maintenance of private roads and drains in small estates. This is not suitable however in relation to overage.

Direct covenants and restrictions

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

Stamp Duty Land Tax

SDLT will attach to positive overage but not to negative. A best estimate of the total consideration based on the contingent event occurring, no matter how remote, must be made and the tax calculated accordingly, e.g., ransom strips and restrictive covenants. When the triggering event actually occurs a further return must then be made. Developers should accommodate any extra SDLT liability in their tendering process.

A deferral form may be obtained from the Birmingham Stamping Office. How any estimate of final liability may be made is debatable but note that the client must be made aware that if a trigger event occurs, they will have to fill in a new return with a balancing payment. If the estimate were to tip the SDLT liability from one band to another, the higher payment must be paid initially.

On subsequent transfers where there is clawback post 1 December 2003, enquiry must be made as to whether a deferral was requested. If this has occurred then the subsequent

purchaser will have a further tax bill on the trigger event occurring. The CPSE Enquiries envisage that a request to see the Land Transaction Return must be made.

2. Section 33 Local Government (Miscellaneous Provisions Act) 1982

As above, Local Authorities may enforce positive covenants if they invoke their powers under the Act and the transfer refers to the 1982 Act, or its predecessor, the Housing Act 1974.

3. Estate Rentcharges

Estate Rentcharges can still be created post the Rentcharges Act 1977, which prohibited new annuity rentcharges. The rentcharges will reflect maintenance costs, and will have a right of re-entry if the payment is not made.

Note: HSBC appear not to give mortgages where the estate rent charge has right of entry.

Smith Brothers Farms Ltd v Canwell Estate Company Ltd [2012] EWCA 237. An Estate Rentcharge, to be valid, needs to reflect maintenance costs and cannot have a profit element – S.2(5) Rentcharges Act 1977. Here, the Estate Rentcharge covered maintenance for the whole of an estate including roads which would not be used by the covenantor. It was still valid as maintenance need not be in relation to the particular piece of land of the covenantor.

The Problem

S1 of the Rentcharges Act 1977 provides that a rentcharge created since implementation is void if it has any profit elements. The rentcharge must collect purely from maintenance. However, administration charges can be expensive and clients should be warned of this. Unlike leasehold flats and administration charges there is no statutory ability to question the reasonableness of administration charges. It must be made clear in the provisions that charges must be reasonable. Even then application through the Courts, and not Tribunals, to question reasonableness may be difficult.

Note: Currently there is no obligation that the estate rent charge administration costs are reasonably incurred. Even if such an obligation existed, there is no ability to question the estate rent charge in the tribunals and there would have to be much more costly court proceedings.

Note: **Roberts v Lawton [2016] UKUT 396 (TCC)** s121 of the Law and Property Act 1925 allows the holder of a rentcharge to appoint trustees who will be tenants under a 99 year lease if a rentcharge is not paid within 40 days of being due. This will be the case whether the charge is formally demanded or not. Here the arrears amounted to between £6 and £15. This was held to be a lease which can be registered at HMLR. The lease will continue even if the arrears are paid. In the present case, the holder of the rentcharge used this fact to hold home owners to a ransom in order for them to

pay administration charges. S121 will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

4. Mutual Benefits and Burden: The rule in Halsall v Brizell (1957)

If a landowner wants to obtain a benefit, then it must submit to any corresponding burden. This may be by way of enforcing obligations in relation to private roads in smaller developments. However, the **Thamesmead Town v Allotey (1999)**, payments for maintenance of private roads and drains was able to be collected, but not for gardening and landscaping if the owner does not wish to avail themselves of such rights.

Note: Post the above case, a mortgage company may well require direct covenants and restrictions on the register in relation to maintenance of private roads and drains. This will often be the case in anything but the smallest of developments.

Wilkinson v Kerdene Ltd [2013] EWCA 44. Here, the doctrine of mutual benefit and burden was held to apply to the whole of a holiday village in Cornwall. This included maintenance of roads, car parks, footpaths and other recreational facilities and also maintenance to the outside of bungalows and the foul sewer system.

5. Long Leases

If the lease was created pre 1 January 1996, both positive and negative covenants will pass with the land if they touch and concern the land, i.e. they are leasehold covenants.

Note: **Woodall v Clifton (1909)** Options to purchase, as opposed to options to renew the lease, will not pass with the land. If the lease was created from 1 January 1996 onwards, then all covenants will pass unless expressed to be personal under Sections 2 and 3 of the Landlord and Tenant (Covenants) Act 1995. On enlargement of a long lease without a rent and without forfeiture provisions, positive covenants will pass onto the freeholds under Section 153 of the Law of Property Act 1925.

6. Commonhold

Under Part 1 of the Commonhold and Leasehold Reform Act 2002, a Commonhold Association may be set up, and the various freeholders will become members. They will agree to be bound by positive and restrictive covenants via the Memorandum and Articles of Association. Since September 2004, very few commonholds have been set up, mainly as there is no right to sublet in relation to a dwelling for more than seven years and thus affordable housing cannot be built into the developments via shared ownership leases. Moreover, as the mortgage companies are concerned at the Commonhold Association being struck off, thus giving rise to a series of flying freeholds, many are reluctant to give mortgages.

RECENT CASE LAW ON OVERAGE

Sparks v Biden [2017] EWHC 1994 Ch, here there were no express provisions as to the time in which properties would be sold to trigger the overage payments. The courts implied that the person subject to the overage would endeavour to sell within a reasonable time.

London & Ilford Ltd v Sovereign Property Holdings Ltd [2018] EWCA Civ 1618 overage was triggered on prior approval of permitted development. Prior approval was given for conversion of an office block into 16 flats. The overage was payable even though the development was impossible as building regulations approval was not given.

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