"The Leading Specialist Independent Insurance Broker for Title Insurance"

NEWBUILDS FOR CONVEYANCERS

6th April 2022

Richard Snape

www.lawsureinsurance.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Professional Support at Davitt Jones Bould since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firm and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

ABOUT LAWSURE INSURANCE

LawSure Insurance is the leading independent UK based insurance broker specialising in providing title insurance covers. LawSure works with leading solicitors' firms and developers to facilitate all types of property developments and transactions, including finding solutions to complex bespoke issues as well as the more straightforward ones.

Our service is free and there is no obligation to take out any of our quotes.

We work with all the major title insurance providers so we can offer the most comprehensive title broking service to our clients. Working with us, you can ensure that you will receive the best quote available in the market. Our independent, comprehensive approach means that we satisfy the SRA requirements for insurance mediation as well as the Insurance Distribution Directive (IDD).

We provide a Demands and Needs statement meaning that our clients can eliminate the risk to them of inappropriate insurance selection.

We only get paid (by the insurer) if and when a quote is taken up - so our service has to be (and is) first class. We often get asked whether it is more expensive using a broker. It isn't! It is at least the same price, and often cheaper – with the certainty that you are doing the best for your client by LawSure reviewing the market on your behalf, saving you time and money. And all for free.

CONTACT US

If you would like to speak to us to see how we can help or to request a quote, please call our broking team on **01293 880 700** or email us at enquiries@lawsureinsurance.co.uk

OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

****Disclaimer****

This presentation including answers given in any question and answer session and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matter covered. Nothing said in this presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or accompanying paper. Richard Snape and LawSure Insurance will not accept responsibility for any loss suffered in consequence of reliance on information contained in the presentation or paper.

CONTENTS

EXTENDED COMPLETION DATES	**1**
PLANNING PERMISSION ENFORCEMENT	**3**
SECTION 106 AGREEMENTS	**4**
COMMUNITY INFRASTRUCTURE LEVY	**6**
SELFBUILD AND CUSTOM HOUSEBUILD ACT 2015	**8**
ARCHITECTS CERTIFICATES	**9**
STRUCTURAL GUARANTEE	**10**
ENFORCEABILITY OF POSITIVE COVENANTS	**12**
THE LEASEHOLD REFORM (GROUND RENT) ACT 2022	**17**
HELP TO BUY	**18**
FIRST HOMES	**20**
NEW MODEL SHARED OWNERSHIP LEASES (ENGLAND ONLY)	**21**

EXTENDED COMPLETION DATES

Completion Dates

The completion date in the contract will not be a definite fixed date. This is because, when a property is in the course of construction, the developer cannot predict with certainty the precise date when it will be available for occupation. In such cases, the contract will usually provide for completion of the transaction to take place within a specified number of days after the developer certifies that the property is completed and ready for habitation.

This contractual provision could cause further problems for a buyer who has a contract for the sale of his present house. It may prove difficult to synchronise completion of both sale and purchase as it is unlikely that the buyer's purchaser would be willing to agree to a similar condition in the sale contract. There are various practical solutions. The ideal is to wait until the house is completed before exchanging contracts and thus agreeing a fixed completion date. This is sometimes possible. In other cases, the developer will be able to give an indication as to when the property will be finished. Having taken the client's instructions and explained the problem it would be possible to exchange on the dependent sale with a completion nearby. Thus if the house were to be completed as estimated or a week later or even a week earlier, it would still be possible to complete both transactions in accordance with the terms of the respective contracts. The risks must be explained to the client, however, and if there is an exceptionally long delay in the completion of the new property, the danger of having to complete the sale and move into alternative accommodation must be fully discussed.

There will need to be a longstop otherwise the contract may be unenforceable on analogy with the lockout agreement case of **Walford v Miles [1994] 4 All ER**.

An alternative argument is that the contract must be performed within a reasonable time under S.13 of the Supply of Goods and Services Act 1982.

Note: For many off plan properties purchasers are being required to complete having not obtained, or having lost, their mortgage offer. They may lose their deposits and could be sued for consequent financial loss.

North Eastern Properties v Coleman [2010] EWCA Civ 277

Where a developer gave an expected completion date but did not promise that the premises will be completed on time, a purchaser was not able to serve notice to complete even though completion was delayed for a long period of time. The developer was able to obtain specific performance.

Note: If there is an extended completion date it is suggested that the contract is protected as a unilateral notice at HMLR. Problems generally are also arising in relation to the time taken to register transfers of part.

Note: Be careful in relation to leaseholds as if exchange occurs before implementation of the Leasehold Reform (Ground Rents) Act 2022 then a ground rent may still be charged (see later).

Consumer Code for Homebuilders

The Code applies to newbuild dwellings, including conversions, where the builder is registered with NHBC, Premier Guarantee, or LABC. It came into force on 1 April 2010 but only in relation to people buying or placing reservations from this date.

To qualify for Help to Buy then the builder must act in the spirit of the 'code'.

Although the Code is voluntary, builders registered with the above are expected to implement it under the threat of being deregistered from the Scheme. The major provisions are as follows:

- If there is an unreasonable delay in completing by the expected date, the purchaser can withdraw from the contract and obtain any reservation fee and deposit back; and
- If there is significant change in the specifications that the purchaser does not agree to they can also withdraw from the Scheme
- The purchaser's solicitor should ask the client at an early stage what statements they relied on in deciding to purchase the property. The Developer's solicitor should ask a similar question of the purchaser's solicitor. Such reliances should then be dealt with in the contract, or by way of responses to enquiries.
- There should be arbitration available in relation to disputes.

Note: The above will not apply to buy to let properties or company purchasers.

The Consumer Code for Homebuilders - Changes in Third Edition and Fourth Edition

- The Code and associated Dispute Resolution Scheme do not apply to homes assigned or sub-sold by an investor to a third party before settlement of the purchase.
- If a reservation deadline is extended by agreement between the Home Builder and the Home Buyer, this should now be confirmed in writing.
- If the reservation agreement is cancelled or expires, the reservation fee is to be returned to the Home Buyer, less any reasonable costs the Home Builder has genuinely incurred in processing and holding the reservation. It is not acceptable to set or deduct a fixed percentage or fixed amount from the reservation fee.
- If the terms of a reservation agreement relating to incentives (e.g. discounts, part exchange or similar) have to be altered due to a change in mortgage scheme proposals (e.g. from a straight mortgage to 'new buy'), the Home Builder and Home Buyer should cancel the existing reservation agreement and enter into a new agreement without any deduction from the reservation fee.
- It is not necessary for the Home Builder to notify the Home Buyer of changes of construction materials that do not affect the home's size, appearance or value.
- If the Home Builder fails to serve notice on the Home Buyer to complete the sale before the long-stop date, the Home Buyer may have the right to cancel the contract as well as being able to seek out-of-pocket expenses through the independent Dispute Resolution Scheme.

Note: If the builder wishes to sell Help to Buy properties then they must comply with the spirit of the Code

Note: In February 2017, the Fourth Edition was produced. The major change is that now up to £500 compensation for injury to feelings may be awarded and there will also be interest on compensation.

PLANNING PERMISSION ENFORCEMENT

Planning Enforcement and Deceit
Time limits for enforcement of planning breach

Planning enforcement periods are

- Four Years:
  - for unauthorised building, engineering, mining or other operations in, on, over or under land (TCPA 1990, s171B (1)); and
  - for unauthorised change of use of any building to use as a single dwelling house (section 171B(2), TCPA 1990). This includes breach of a planning condition relating to use as a single dwelling house: **First Secretary of State v Arun District Council and Another [2006]** EWCA Civ 1172
- Ten years for any other breach (section 171B (3), TCPA 1990)

In **Welwyn Hatfield Council v Secretary of State for Communities and Local Government [2011] UKSC 15** the Supreme Court held that where a structure that looks like a barn but was in fact containing a three-bedroom house, after four years enforcement could still occur as there had been a deliberate concealment of the breach.

In **Fidler v Secretary of State for Communities and Local Government [2010] EWHC 143** a fifteen-room castle was built behind straw and after four years the straw was removed. It was held that removal of the bales of straw amounted to building work and the enforcement period still ran. Likewise, in **Sage v Secretary of State for Environment, Transport and the Regions [2003] UKHL22**) doing finishing work and placing in doors and windows still amounted to development.

Note: As of 15 January 2012, the Localism Act 2011 has made clear that if there is at least partial deliberate concealment of breaches then the enforcement action can be taken within six months of the local authority becoming aware. The concealment must be deliberate and possible enquiry may be made of any breaches; however, insurance may often be required by purchasers. As of 6 April 2012, the Local authority has a discretion not to regularise breaches after an enforcement notice has been served. The above provisions are retrospective.

Sometimes planning permission will be conditional on the roads being built up. This should always be checked. Enforcement steps may be taken against the purchaser and not merely the developer.

SECTION 106 AGREEMENTS

Section 106 Agreements will bind the purchaser and give rise to joint and several liability unless they make clear otherwise. If an S.106 Agreement gives rise to joint and several liability, then it is suggested that the mortgage company should be notified, as it will bind them on possession and will also affect value. UK Finance Handbook states that you should refer to Part II to see if they wish to know about onerous S.106 Agreements. It is also suggested that if a development contains social housing this should be notified to the purchaser.

Note: Subject to showing on local authority searches, subsequent purchasers may also be jointly and severally liable. To bind third parties then any monetary payment must be registered as a local land charge. One problem is that such local land charges will not be subsequently removed. Enforcement is without limitation. However, as many obligations do not need to be complied with until after the development has ceased, problems may arise for some years in the future.

As of 1 April 2021 in England, the Government intends that affordable housing requiring shared ownership lease should be a New Model Shared Ownership Lease. There will be a minimum 10% share and staircasing can be at 1% tranches.

Planning Conditions

As we have seen above, planning conditions can be enforced for ten years from the breach unless there has been a deliberate concealment. Amongst the most important planning conditions for conveyancers are those that ban Permitted Development, or e.g. prevent a garage being used as living accommodation. The date of the breach is relevant and not the date the condition was imposed. The 2011 Conveyancing Protocol states that if the seller commissioned the work then they should obtain planning consent, if a buyer wishes to obtain consents more than 20 years previously it is at their expense. This has not been repeated in the 2019 Protocol. The other important conditions are those which should be satisfied before the purchaser can go into occupation.

As of August 1977, planning conditions should be noted on local land charges as should S.106 agreements if any monetary payment is to bind a subsequent purchaser.

Be careful in particular of pre-occupancy and pre-commencement conditions. If the latter are breached this will vitiate the planning permission and enforcement action can occur. A new planning application would have to be made.

Pre-Commencement Planning Conditions

The case of **Whitley v Secretary of State for Wales (1992) 64 P&CR 296** it was held that if a condition precedent to commencing the development was breached then there would be no planning permission at all. To be such a condition it must be phrased negatively, e.g. “no development will commence”. The judge stated "the permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission, they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful."

In **R (Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 Admin**, involving agreeing restoration of land after quarrying activity had ceased, the judge held that the condition must go to the core of the activity.

In **Greyfort Properties v Secretary of State for Communities and Local Government [2011] EWCA Civ 908,** this was disputed. The case involved a condition requiring the ground floor plan to be

determined prior to development commencing. The court decided that non-compliance meant that there would be no planning permission and therefore a refusal to grant a Certificate of Lawful Use was valid 20 years later.

The court stated:

- The Whitley principle, noted above, is approved such that if an operation contravenes a condition it cannot be properly described as commencing the development authorised by the permission. The Court of Appeal here appears to favour the more general approach taken in Whitley in respect of the wording of conditions. Hart appeared to restrict Whitley by requiring Planning Authorities to be explicit with the wording of their planning conditions.

- Hart is generally approved in that the condition must be one which goes to the heart of the planning permission. Breaches of pre-commencement conditions dealing with more trivial matters are less likely to be caught.

Previously, the National Planning Policy in England states that planning conditions should not be imposed unless necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in other respects. The **Neighbourhood Planning Act 2017** came into force on 1st October 2018. Section 7 allows the Secretary of State to introduce regulations to restrict the imposition of planning conditions upon the grant of planning permission but without the agreement of the applicant.

Pre-commencement conditions must be complied with before any operation or material change to use is begun. However, if the applicant refuses to accept an agreement which the local Planning Authority considers necessary, the authority can refuse permission. Consultation to the legislation gives examples of refusals such as on the grounds of heritage, natural environment, green space and flooding. If there is no agreement the applicant would have to appeal. These restrictions will not apply to outline planning permission.

COMMUNITY INFRASTRUCTURE LEVY

About the Community Infrastructure Levy

The Community Infrastructure Levy is a new planning charge, introduced by the Planning Act 2008. It came into force on 6 April 2010 through the Community Infrastructure Levy Regulations 2010. Development may be liable for a charge under the Community Infrastructure Levy (CIL), if your local planning authority has chosen to set a charge in its area.

Who may charge the levy?

The Community Infrastructure Levy charging authorities (charging authorities) in England will be district and metropolitan district councils, London borough councils, unitary authorities, national park authorities, The Broads Authority and the Mayor of London. In Wales, the county and county borough councils and the national park authorities will have the power to charge the levy.

In London, the boroughs will collect the Mayor's levy on behalf of the Mayor.

What development is subject to a charge?

Most buildings that people normally use will be liable to pay the levy. But buildings into which people do not normally go, and buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery, will not be liable to pay the levy. Structures which are not buildings, such as pylons and wind turbines, will not be liable to pay the levy.

Any new build – that is a new building or an extension – is only liable for the levy if it has 100 square metres, or more, of gross internal floor space, or involves the creation of one dwelling, even when that is below 100 square metres.

While any new build over this size will be subject to CIL, the gross floor space of any existing buildings on the site that are going to be demolished may be deducted from the calculation of the CIL liability. Similarly, the gross floor space arising from development to the interior of an existing building may be disregarded from the calculation of the CIL liability. The deductions in respect of demolition or change of use will only apply where the existing building has been in continuous lawful use for at least six months in the 3 years prior to the development being permitted.

The Community Infrastructure Levy must be levied in pounds per square metre of floor space arising from any chargeable development. The charge will be applied to the gross floor space of most new buildings or extensions to existing buildings.

The trigger is commencement of development, though payment may be made in instalments if the charging authority has a payment by instalments policy.

Relief and Exemption

Relief from the levy is available in three specific instances.

First, a charity landowner will benefit from full relief from their portion of the liability where the chargeable development will be used wholly, or mainly, for charitable purposes. A charging authority can also choose to offer discretionary relief to a charity landowner where the greater part of the chargeable development will be held as an investment, from which the profits are applied for charitable purposes. The charging authority must publish its policy for giving relief in such circumstances.

Secondly, the regulations provide 100% relief from the levy on those parts of a chargeable development which are intended to be used as social housing.

A social housing relief calculator has been developed that will assist you to calculate this relief.

Exceptional circumstances relief is only available where a charging authority has made it available in their area. Claims from landowners will only be considered on a case by case basis, provided the following three conditions are met.

Firstly, a section 106 agreement must exist on the planning permission permitting the chargeable development.

Secondly, the charging authority must consider that the cost of complying with the section 106 agreement is greater than the levy's charge on the development and that paying the full charge would have an unacceptable impact on the development's economic viability.

An assessment of this must be carried out by an independent person with appropriate qualifications and experience. The person must be appointed by the claimant and agreed with the charging authority.

The Levy will not be charged in relation to self builds and First Homes (see later).

The Levy will not apply to development which is wholly internal. In **Orbital Shopping Park Swindon Ltd v Swindon Borough Council [2016] EWHC 448 (Admin) (03 March 2016)** a mezzanine floor was built and separately a new shop front. The council argued that this was all part of the same development and therefore attracted the Levy. The applicant successfully argued that they were separate and the mezzanine floor being wholly internal did not attract the Levy.

Oval Estates v Bath & North East Council [2020] EWHC 457. Where the development is phased then a levy will only be payable after the commencement of each phase. On the fact this was held to be a phased development but in the future it is suggested that this is made clear in the permission.

Note: In England the Government have produced a White Paper on Planning for the Future. This intends to replace Community Infrastructure Levy and Section 106 Agreements with a developer levy which will apply to the whole of England. It is intended to be based on the value of the property and be paid on occupation.

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.

In the case of **R (Shropshire County Council) v Secretary of State for Communities and Local Government (2020) 15 November**, the Court of Appeal confirmed that if a commencement notice is not served when starting work the levy will still be payable. However, since September 2019 the liability will be no more than £2,500.

ARCHITECTS CERTIFICATES

Hunt v Optima (Cambridge) Ltd [2014] EWCA 714 The architects confirmed completion of a block of flats and provided certificates. Subsequently major defects were found including water ingress. The purchasers of the flats were not able to rely on the certificates and could not claim damages. The Court of Appeal held that the certificates did not constitute warranties. Moreover, as the purchasers had committed themselves before the certificates were provided they could not have relied on them.

Some mortgage companies are not accepting architects' certificates.

STRUCTURAL GUARANTEE

The NHBC 'Buildmark' scheme provides a two-part guarantee. The developer agrees to be responsible to remedy all defects which occur within two years of purchase. In the case of default, the NHBC will itself step in. Similarly, if the developer becomes insolvent before completion of the house, the NHBC will make good any loss to a buyer, for example in respect of the deposit.

After the first 2 years, the NHBC provides an insurance-style guarantee that it will rectify specified structural defects arising in the house during the next 8 years. Structural defects are defined to exclude, for example, defective plasterwork or decorations. There is thus a 10-year guarantee offered. When buying a house (or flat) constructed within the previous 10 years, ensure that the property is covered by such a guarantee. Although the balance of the NHBC guarantee is sometimes expressly assigned to a subsequent buyer, the NHBC has publicly stated that it will honour its obligations whether or not the benefit has been assigned. Statistically, most defects occur between 5 and 10 years after construction, emphasising the importance of obtaining a structural guarantee even when not buying directly from the developer.

In the case of houses registered with the NHBC after 1 April 1999, the cover will also include the cost of cleaning up any contamination in the land on which the house is built; there is no such cover for houses registered with the NHBC before that date.

On the purchase of a new property, the contract with the developer should include a term that he is registered with the NHBC (and will continue to be so until completion) and that on exchange he will offer to enter into this 10-year guarantee. On exchange, a separate 'offer of cover' (form BM 1) will be handed over. The acceptance of cover (form BM 2) should be signed by the client and returned to the NHBC. There is also a comprehensive guidance booklet handed over which the solicitor has to certify that he has given to his client, i.e. the buyer. Once the property is completed, the NHBC will undertake a final inspection and, if all is satisfactory, will issue a ´10-year notice'. This is the document which gives the 10-year guarantee previously explained. In theory, this will be handed to the buyer on completion, but it is often not available and an undertaking for it should be obtained. In the case of flats, in addition to the 10-year notice in respect of the individual flat being bought, there will be a separate notice in relation to the common parts of the block.

Although the NHBC Buildmark scheme is by far the most common, other similar insurance backed schemes do exist. Alternatively, if the building work was supervised by, for example, an architect or surveyor, a certificate to that effect will allow an action to be brought against such person in the case of structural defects arising out of his negligent supervision. The effectiveness of such action, however, may well be dependent upon his having professional indemnity insurance.

Where the new property is to be bought with the aid of a mortgage loan, the *Lenders Handbook* contains a requirement that one or other of the above forms of protection is in existence.

Major insurance problems may arise and check the UK Finance Handbook to see if the solicitor is required to check the insurance policy. Insurance will be required and satisfactory cover in the event of death or retirement may be needed as latent building damages may be claimed for up to six years after the damage has become obvious.

Note: Check when the NHBC guarantee commence as many newbuilds have been used e.g. for letting prior to sale.

Note: Check that the person whom the deposit is paid to is NHBC registered as this may not be the same person as the developer. If this is the case then the deposit should be paid to the solicitor as a stakeholder.

Note: The structural guarantee may cover removal and replacement of combustible cladding. However, under **2018 Building (Amendment) Regulations** (**2019 in Wales)** combustible material should not be used in dwellings of 18 m or more in height.

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.

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

S.1 of the Rentcharges Act 1977 defines a rentcharge as follows:

Meaning of "rentcharge".

For the purposes of this Act "rentcharge" means any annual or other periodic sum charged on or issuing out of land, except—

a) rent reserved by a lease or tenancy, or

b) any sum payable by way of interest.

In some parts of the country freehold properties are subject to fixed sum rentcharges, a sum of money is paid per annum to the rent owner. In such rentcharges cannot be created since 21st July 1977 when the Rentcharges Act of that year came into force. Existing fixed sum rentcharges will come to an end on 21st July 2037 or within 60 years of first becoming payable whichever is the latter. However, rentcharges which reasonably reflect maintenance costs can be created.

Consider Part 1 of the UK Finance Lenders Handbook: *"**6.8.1** if the roads or sewers immediately serving the property are not adopted or maintained at public expense, there must be an agreement and bond in existence or you must report to us…."*

"*6.8.4* *where roads and sewers are not adopted or to be adopted but are maintained by local residents or a management company this is acceptable providing that in your reasonable opinion appropriate arrangements for maintenance, repairs and costs are in place.*"

If there is no estate rentcharge and no deed of covenant requirement, then this has not been satisfied.

Rentcharges Act 1977 S.2

(1) Subject to this section, no rentcharge may be created whether at law or in equity after the coming into force of this section.

(2) Any instrument made after the coming into force of this section shall, to the extent that it purports to create a rentcharge the creation of which is prohibited by this section, be void.

(3) This section does not prohibit the creation of a rentcharge—

(a) in the case of which paragraph 3 of Schedule 1 to the Trusts of Land and Appointment of Trustees Act 1996 (trust in case of family charge) applies to the land on which the rent is charged;

(b) in the case of which paragraph (a) above would have effect but for the fact that the land on which the rent is charged is settled land or subject to a trust of land;

(c) which is an estate rentcharge;

(d) under any Act of Parliament providing for the creation of rentcharges in connection with the execution of works on land (whether by way of improvements, repairs or otherwise) or the commutation of any obligation to do any such work; or

(e) by, or in accordance with the requirements of, any order of a court.

(4) For the purposes of this section "estate rentcharge" means (subject to subsection (5) below) a rentcharge created for the purpose—

(a) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or

(b) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land.

(5) A rentcharge of more than a nominal amount shall not be treated as an estate rentcharge for the purposes of this section unless it represents a payment for the performance by the rent owner of any such covenant as is mentioned in subsection (4)(b) above which is reasonable in relation to that covenant.

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

In **Orchard Trading Estates v Johnson Security [2002] EWCA 406,** the Court of Appeal held that an estate rentcharge need only reasonably maintenance of the whole estate and did not have to relate to the individual property.

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 estate rentcharge was still reasonable even though it referred to maintenance of the estate and a private road that the property owner would never use. It seems to be very difficult to question apportionments of rent charges.

Extinguishment of Rentcharges

Fixed sum rentcharges can be extinguished under S.8-10 of the Rentcharges Act 1977. This is done by application to the Ministry of Levelling Up, Housing and Communities. There is a statutory formula as to the amount which is usually around 16 times the annual rentcharge. A certificate of redemption will be obtained which can be used to notify HMLR. This can only be done if the rent owner is known. Otherwise, insurance may be appropriate. However, make sure that the policy covers not just debt but other remedies (see later).

The Tribunals, Courts & Enforcement Act 2007 treats rentcharges as normal rent in relation to remedies. If there has been no collection of the rentcharge for more than six years, it is statute barred from that moment onwards.

If the rentcharge applies to land which is then sub-divided then each plot will have joint and several liability. For a fixed sum, rentcharge application may be made under S.4 of the Act for an apportionment. This does not apply to estate rentcharges.

The Problem

S.1 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 rentcharge administration costs are reasonably incurred. Even if such an obligation existed, there is no ability to question the estate rentcharge in the tribunals and there would have to be much more costly court proceedings.

Note: **S.121 Law of Property Act 1925** states the following:

> **Remedies for the recovery of annual sums charged on land.**
>
> Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the annual sum shall have such remedies for recovering and compelling payment thereof as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

Note: **Roberts v Lawton [2016] UKUT 396 (TCC) S.121** (4) of the Law of 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. S.121 (4) will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

Note also S.121 (3) allows possession of the land by the rent owner under similar circumstances. These provisions only apply if the rentcharge was created from 1st January 1881 onwards when the Conveyancing Act of that year came into force.

Any possession or long lease would bind a mortgage company if the rentcharge was created before the mortgage and not if the lease was created before the mortgage.

Some estate rentcharges include an express right of entry but the effect of S.121 (3) is to have a statutory right anyway. It is suggested that there should be a clause whereby the mortgagee is given at least 28 days notice by the rent owner prior to proceedings being brought. This may cause problems with newbuild Help to Buys for reasons we have seen in relation to ground rents.

Some mortgagees e.g. Barclays are requiring such a mortgagee protection clause and exclusion of S.121, especially where the residents are not members of the management company.

Note: In March 2022 HMLR rewrote their Practice Guide 56 now titled Rentcharges. They include non-statutory wording to create a rent charge and a right of entry and also how to make an application for a deed of variation.

4. Mutual Benefit 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 **S.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.

THE LEASEHOLD REFORM (GROUND RENT) ACT 2022

This applies to England and Wales.

The Bill was announced in the Queen's Speech on 11 May 2021 it was published and introduced into the House of Lords on 12 May 2021 and received the Royal Assent on 8 Februrary 2022. We are awaiting a commencement date.

When it comes into force ground rents other than a peppercorn will be banned in leasehold dwellings of more than 21 years' duration although it will not be retrospective. Non-compliance may lead to a fine between £500 to £30,000 and the ground rent will not be able to be collected. Shared ownership leases are excluded and other exemptions apply in relation to community led housing projects, equity release schemes and Sharia mortgages.

The provisions will not apply if contracts have been exchanged prior to the commencement date, however, they will apply to voluntary surrender and regrants which give rise to a new lease post commencement date. In this event, from the date of the Royal Assent the leaseholder must be notified of the future change.

On 23 June 2021, the Competition and Markets Authority announced that they agreed with Aviva that escalating ground rents free of charge by RPI increases. In addition, Persimmon would offer leasehold house owners the freehold at a discount so they could buy at the same price they originally thought they would buy. Anyone who already purchased the freehold from Persimmon would receive a repayment.

On 28 September 2021, Countryside announced that they would remove any escalating ground rents provisions and the rent for the first year would remain for the rest of the term. On 22 December 2021, Taylor Wimpey announced similar provisions whereby the ground rent would be varied so as not to increase throughout the term. Where there had already been a variation to an RPI based increase then there would be a further variation to remove this.

On 18 March 2022, the CMA announced that they had reached agreement with 15 investment bodies who had purchased the reversions from Countryside that the first year's ground rent would be the same for the rest of the term and deeds of variation would be entered into.

HELP TO BUY

Help to Buy in England ended in its current form on 31 March 2021. Its replacement will last for two years. It will only be available to first time buyers and will have different maximum purchase prices in different regions.

New Help to Buy regional price caps

Region	Price cap for properties eligible for Help to Buy from April 2021 to March 2023
North East	£ 186,100
North West	£ 224,400
Yorkshire and the Humber	£ 228,100
East Midlands	£ 261,900
West Midlands	£ 255,600
East of England	£ 407,400
London	£ 600,000
South East	£ 437,600
South West	£ 349,000

Source: HM Treasury

On 31 July 2020 the deadline for Help to Buy homes to be built under the old regime was extended from 31 December 2020 to 28 February 2021. The completion date was extended from March 31 2021 to May 31st 2021.

Help to Buy Wales changed on 1 April 2021 for a year with an option to extend for a further year. The main difference is that the maximum purchase price will be reduced from £300,000 to £250,000.

The New First Time Buyer Declaration

The conveyancer will require all purchasers to sign this declaration which states that if they lie they may be prosecuted under S.1Fraud Act.

Definition of a first time buyer:

For consistency, the Homes England has adopted HMRC's definition of a first time buyer and in order to count as a first time buyer, a purchaser must not, either alone or with others, have previously acquired a major interest in a dwelling or an equivalent interest in land situated anywhere in the world.

This includes previous acquisitions by inheritance or gift, or by a financial institution on behalf of a person under an alternative finance scheme.

Eligibility for the Scheme is not denied by virtue of a previous acquisition as a trustee unless the purchaser was also a beneficiary of the trust.

Relief is also not denied if the purchaser owns or has previously owned non-residential or mixed-use property, as long as that property did not include a dwelling.

This restriction does not apply where the interest acquired was the grant or assignment of a lease with less than 21 years to run e.g. assured shorthold tenancies.

If the property is being purchased jointly, all the purchasers must meet these conditions.

Note: Under the New Help to Buy the rent must be at a peppercorn.

Note: If there is an estate rentcharge then S.121 LPA 1925 must be excluded (see later).

FIRST HOMES

On 24 May 2021 the Ministry of Housing and Local Government announced a major change to planning policy whereby developers would have to provide First Homes in respect of planning permission as of 28 June 2021. The first properties were advertised for sale on 12 June 2021.

Previously in Part 1 of the Housing and Planning Act 2016 it had been announced that first time buyers between the ages of 23 to 40 could buy homes on brownfield sites at a 20% discount. Nothing came of this and most notably mortgage companies were unhappy about the valuation implications.

First Homes provide the qualifying first time buyers can buy with a minimum discount of 30% which local authorities may increase to 40% or 50%. After discount the price must be no higher that £250,000 or £420,000 in Greater London. The purchasing household must not have a combined of £80,000 or more or £90,000 in London. The definition of a first time buyer is the same as for first time buyer relief for SDLT. Local authorities may set a lower income cap and also prioritise key workers. They may also set local connection requirements based on the workplace or residence. People who have been members of the armed forces within the last five years cannot be required to show a local connection. The property must be the purchaser's main residence but they can let it out for two years if the local authority is notified.

S.106 Agreements will be used to secure first homes which will be required for a minimum of 25% of affordable housing units which are secured through developer contributions. First homes will be exempt from Community Infrastructure Levy, presumably leaving a large hole in local government financing.

To make the product attractive to mortgage companies, they will be able to sell at full value on a repossession. With this proviso any sale by the original purchaser must be to a first time buyer. To enable this HMLR has produced a version of a Form L restriction which must be complied with.

In March 2022 guidance was produced in relation to conveyancing, including a conveyancing pack, transfer, restrictions, plot sale contract, undertakings, certificate of title and local planning agreement.

NEW MODEL SHARED OWNERSHIP LEASES (ENGLAND ONLY)

These should have been available by 1 April 2021, but on 24 May the Government announced that they would apply as of 28 June 2021. They will be a condition of planning permission as of that date unless the developer has already expended significant time and money in relation to the old regime. The new model leases were meant to be available from Homes England (HE) on 1 May 2021. It was then announced that they would be available on 31 May 2021 but as of the beginning of June they still have not been published. A purchaser will be able to buy with a 10% share and not the current minimum of 25%. They may also staircase up in 1% tranches for the first fifteen years of the lease and not the current minimum 10%. The Housing Association would not be able to charge for this increase and any valuation would be based on house price inflation in the area. The conveyancer would, however, be allowed to charge. There will also be provision whereby the tenant will be able to claim back the costs of repairs up to a maximum of £500 per annum from the landlord. If the maximum is not used in one year it can be held over into the next. It will not apply to any works covered by a new build guarantee scheme. The extent of the repairs is currently not clear nor is it clear what happens if the tenant has already expended money in advance of making a claim.

The landlord must be responsible for structural and exterior repairs including to floors, ceiling and stairs for the first ten years but the full extent of the landlord's liability is still not clear.

The right of pre-emption and eight weeks' notice period which must be given to the landlord will be reduced to four weeks although the Housing Association rarely exercises this right.

The lease will be for 990 years.

Whether any of this encourages staircasing up to 100% is debatable. It is estimated that only between 2% and 3% of shared owners staircase to 100%.

The Government has also introduced a right to share ownership whereby social tenants can buy their dwellings through a shared ownership lease.