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REPORTING TO THE LENDER & OTHER HOT MORTGAGE ISSUES

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CONFLICTS OF INTEREST AND THIRD PARTY OBLIGATIONS

In the famous case of ***Mortgage Express v Bowerman [1996] 2 All ER 836,*** it was held that were there was evidence of a mortgage fraud, in that the value of property had risen enormously in a series of sub-sales, this fact should be notified to the lender. Moreover, such notification would not be in conflict of interest to the borrower as he had an interest in knowing. A failure to disclosure the information gave rise to a claim in negligence.

In this case both solicitor and valuer were held to be negligent. This case may well need to be revisited in the context of Money Laundering where a disclosure of your suspicion might give rise to a tipping-off offence under the ***Proceeds of Crime Act 2002***. Disclosure must first be made to NCA. The Law Society, however, suggest that disclosure may be made to the mortgagee (and other solicitors) unless they should be suspected of being implicated in the fraud.

Contrast ***National Home Loans v Giffen, Couch and Archer [1997] 3 All ER 808*****,** where the solicitor had become aware of outstanding arrears on a loan which was meant to be paid off by the mortgage. Here, there was no duty to reveal this information as, unlike Bowerman, it did not affect the value of the property.

See also ***Omega Trust Co. Ltd v Wright Son & Pepper [1996] NPC 189*** for a similar decision.

Nationwide Building Society v Balmer Radmore [1999] SJlB 58

Made clear that in deciding the scope of the solicitor's duty express terms of the retainer must be looked at. The **Bowerman** duty on valuation will apply unless inconsistent with an express duty. Moreover, if information has been obtained not only in respect of the transaction in question but in respect of other dealings, it must be disclosed. It was concluded that information as to the correctness of the valuation, and the bona fides of the valuer must be disclosed.

Contrast ***Bristol and West Building Society v Baden Barnes Groves & Co [1996]*** unreported.

If there is information which has not come into the solicitor's possession in connection with the carrying out of instructions, there is no duty to disclose.

According to **Balmer Radmore** the solicitors and the agents need to be on guard for the following:-

- back-to-back sub-sales
- sudden reduction in purchase price
- direct deposits

All these may give rise to suspicions of Money Laundering and the need to report the client.

The solicitor must report on title;

- Sub-sales;
- Reduction in purchase price;
- Of direct deposits.

The report must be sufficiently clear to the lender and explain the solicitor's reasons as if writing to an educated lay person.

Mortgage Express v S Newman [2000] PNLR 298

After exchange of contracts, the solicitor discovered the purchase of the property was much less than that originally stated, and that the property seemed to be subject to shorthold tenancies.

She believed that she only needed to establish good title and did not notify the lender.

Held: although negligent the solicitor has not consciously suspected a mortgage fraud and could claim against the SIF Solicitors Indemnity Fund.

Note: However, if the same facts occurred today, however, the solicitor's negligence in failing to spot a mortgage fraud was occurring could amount to a money laundering offence.

This case has been confirmed by the case of ***Leeds & Holbeck Building Society v Clarke [2002]*** unreported. However, the burden of showing fraud can easily be rebutted.

E-Surv v Goldsmith Williams [2015] EWCA 1447 Surveyors valued a property at £725,000 in spite of the fact that it had recently been purchased for £390,000. The solicitors admitted negligence to the mortgagee in failing to disclose that the seller had not been the registered proprietor for at least 6 months. The surveyors successfully claimed off the solicitors for not disclosing the increase in purchase price. The High Court decided that this was relevant information to provide to the surveyor and any potential for conflict of interest was overridden by the CML Lenders Handbook. (Now UK Finance Mortgage Lender's Handbook)

In this case the court recognised that Mortgage Express v Bowerman (above) was still good law and survived any express provisions in the CML Lenders Handbook. Reports may need to be made to the mortgagee and reference made to the valuer even though more than 6 months have passed.

On 11th November 2015 the Court of Appeal confirmed that the solicitor should have reported the increase in price to the lender. However, as E-Surv could not prove that the lender would have changed their mind if the solicitor had so reported, the level of damages was nil.

See Section 5.1.1 of the Lender's Handbook which with exceptions requires you to report to the lender if the borrower has not been a proprietor for six months. The exceptions are personal representatives, mortgage companies in possession, trustees in bankruptcy, liquidators, part exchange with a builder and housing associations exercising their power of sale. The mortgagee may need to be told about unusual sales patterns even if more than six months have passed.

LEASEHOLD MATTERS

The EWS1 Form and External Cladding

Following the Grenfell Tower disaster in June 2017, mortgage companies naturally became reluctant to lend on flats in blocks which might have combustible cladding. On occasion, valuers were valuing such flats at £0. There was, moreover, no standardisation between the lenders.

The industry's response was the EWS1 (external wall systems) certificate which was introduced in December 2019 after discussion between UK Finance and the Royal Institution of Chartered Surveyors. A recognised property professional with the requisite qualification would carry out an inspection where deemed appropriate and would produce an EWS1 certificate which would be required by the mortgage company. The certificate would last for five years and would only be required for multi-let residential properties of more than 18 metres (c. six storeys) in height. If the cladding was deemed safe then the mortgage company would proceed, it would require the cladding to be replaced, a process which can take a significant amount of time.

Unfortunately, in January 2020, the Ministry of Housing Communities and Local Government muddied the waters somewhat when it produced **Advice for Building Owners of Multi-Storey, Multi-Occupied Residential Buildings**. This suggested that the EWS1 may be appropriate in some multi-let premises of less than 18 metres in height and which do not have external cladding, the issue apparently being high pressure laminate which is causing some concern. This concern increased after it was found to contribute to a fire in a block of halls of residence in Bolton in November 2019. As a consequence of this, some mortgage companies have required the EWS1 on buildings with three storeys and where brick is the building material. This is surely not what was intended.

The real problem is that in early 2020 there were roughly only 300 qualified fire safety inspectors in the country and insurers are not prepared to allow other property professionals to carry out the assessments due to the potential level of liability where there is a claim. Estimates vary but at the higher end there could be up to 3 million flats which may be affected. The certificates can cost upwards of £10,000 and there are examples of landlords or agents (who commission the assessments) being quoted of up to the 10 years for one to become available.

On 28 November 2018 in England (January 2020 in Wales), cladding was finally banned in multi-let residential properties of more than 18 metres in height. If the building was completed under the **2018 Building Regulations** the mortgage company should not require the certificate.

The EWS1 is undergoing review and this cannot come too soon for many, especially at the current time when many are unable to relocate to the countryside from their small city-centre dwellings. If changes are not made soon, some estimate that the level of negative equity in such premises will be greater than during the credit crunch of 2008-2011.

Note: On 22 November 2020 the Ministry of Housing announced that they have reached agreement with the RICS and UK Finance whereby an EWS1 certificate will not be required for buildings without cladding. At the time of writing, many mortgage lenders are saying that they know nothing about this. They are also pointing out that many brick buildings may have cladding behind the brickwork.

On 8 March 2021, the Royal Institution of Chartered Surveyors produced its new guidance note on the valuation of properties in multi-storey multi-occupied residential buildings with cladding. The guidance comes into effect on 5 April 2021, but it is expected that valuers will take it into account immediately.

The guidance is as follows:

- The certificate should be required for buildings over six storeys in height where there is cladding or curtain wall glazing or where there are balconies vertically above one another and both the balustrades and decking are constructed where combustible material such as timber, or where the decking is constructed of combustible material and the balconies are directly linked by combustible material.

- If the building is of five or six storeys in height then a certificate will be required if approximately one quarter of the whole elevation estimated from a viewing at ground level is comprised of cladding, or there is aluminium or metal composite material or high pressure laminate panels on the building or fire risk in relation to balconies as above

- If the building has fewer than five storeys a certificate will be required if there are aluminium or metal composite or high pressure laminate panels on the building

The guidance also makes clear that if the building complies with the **Building (Amendment) Regulations 2018 (or 2020 in Wales)** an EWS1 certificate should not be required.

At first glance this alleviates many of the problems, in particular there are examples of EWS1 certificates being required for three or four storey buildings with brick facades. Hopefully, this will be a thing of the past. However, the original purpose of the EWS1 certificates has been expanded to include high pressure laminate and balconies and not merely combustible cladding. Buildings of less than 18 metres in height may also still require the certificates which was not what was intended when the EWS1 was introduced.

Although a step in the right direction and the guidance has solved the problems for some, do not assume that the issue has gone away.

Note: On 11 May 2020 the Government announced a Building Safety Fund. Aluminium composite material may be replaced by separate Government funding. The end date for application for the Building Safety Fund was 30 June 2021 and work must have started by 30 September 2021. It is understood that only 22% of applicants were successful. There are also waking watch fund applications which ended on 24 June 2021. This was meant to cater for 400 blocks. Unfortunately, there are 600 blocks of flats in London alone with problems. The average cost of a waking watch to be done privately is £11,000 per week. In the Budget of 27 October 2021 the Government announced that it would provide a further £5 billion to the Building Safety Fund. Unfortunately, as previously, this will only apply to buildings of 18 metres or more in height. The plan to provide loans in relation to buildings of between 11 and 18 metres was abandoned on 9 November 2021. It will be funded by a building safety levy on builder profits over £25 million.

Note: On 21 July 2021 the Ministry of Housing announced they had reached agreements with some mortgage companies that EWS1 certificates will not be required for buildings of less than 18 metres. Whether this is the case is yet to be seen.

Note: On 21 November 2020 the Government announced that they would provide £700,000 to train fire safety inspectors under the auspices of the RICS. On 21 July 2021 they announced a Government backed PI insurance scheme for qualified professionals.

Note: In addition to the above, several local authorities are either serving or looking at serving improvement notices on landlords in relation to cladding under Part 8 of the Housing Act 2004 and the Housing Health and Safety Rating System.

Note: On 10 December 2021 the RICS announced that they would not be changing their guidance on buildings of less than 18 metres in height, inspite of Government intending to withdraw their guidance of January 2020.

Note: On 10 January 2022 the Ministry of Levelling Up withdrew the January 2020 guidance and also announced that for buildings between 11 metres and 18 metres in height they expect the building industry to draw up plans for remedial work. They have until Easter to do this, otherwise they may be faced with legislation. They also announced that they expect such buildings will not be required to have an EWS1 certificate save in exceptional circumstances.

On 16 March 2022 the RICS announced that although the forms were changing their guidance would remain in place. However, they would see a diminishing need for the EWS1 when the Fire Safety Act 2021 comes into force.

The building industry has now agreed to remove dangerous cladding in buildings between 11 and 18 metres in height. The Building Safety Act 2022 has provision whereby there will be a cap on service charge in relation to safety issues. This will be £10,000 or £15,000 in Greater London. This will be over a five year period. There will also be no ability to charge for safety in dwellings valued at less than £175,000 or £320,000 in Greater London.

GROUND RENT ISSUES

Arnold v Britton [2015] UKSC 36 here 99-year leases of holiday chalets required a service charge to be paid based on the work which was done on the premises plus a yearly sum of £90 which rose by 10% compound interest each year. The consequence of this was that by 2072 the liability would be £554,000 per annum. The Supreme Court confirmed that as this was the clear meaning of the provision they would not be prepared to re-write it. Contrast this with the commercial lease case of ***Monsolar v Woden Park [2021] EWCA 961*** where on a 25-year lease of a solar farm the rent increased by RPI every year but on a strict construction the previous years' increases were also added. The initial rent was £15,000 per annum, but with the strict interpretation the final year's rent would be over £76,000,000 per annum. The Court of Appeal decided that this was a clear mistake and the actual rent would be £30,000 per annum.

The topic of escalating ground rents, in particular in relation to the leasehold houses, has been in the media of late and mortgage companies are refusing mortgage offers.

Litigation claims are being made based on the case of ***County Personnel v Alan R Pulver*** where a solicitor was held to be liable for failing to spot onerous lease clauses.

Be careful where the ground rent exceeds £250 per annum or £1,000 per annum in Greater London. This may create an assured tenancy under the Housing Act 1988. If this is so, then mandatory ground 8 will apply and if there is defined rent arrears at both the dates of service of a notice seeking possession and at the date of any court proceedings the tenant will be evicted. There cannot be forfeiture of an assured tenancy and therefore there is no relief from forfeiture. Recently many mortgage companies have refused to accept this. They may require a mortgagee protection clause and/or insurance. This will also be a problem if the ground rent can double beyond these amounts. It only applies to leases created from 15 January 1989 onwards but this would include lease extensions which constitute a surrender and re-grant. Note also that Part 1 of the Landlord and Tenant Act 1987 and the right of first refusal will not apply to assured tenancies.

In June 2019 many of the developers agreed a code of practice whereby ground rents for new leases would not increase at less than twenty-year intervals and for existing leases the developer would cooperate in a variation of a lease where the ground rent increased at less than twenty-year intervals and replace the provision within RPI increase. There would be no new leasehold houses and for existing leases the developer would cooperate in transferring the freehold on fair and reasonable terms.

On 10 December 2020 Barratt Homes and Bellway Homes announced that they would no longer have ground rents other than a peppercorn on their new leases. The term would be 999 years and there would be a resident's management company. Countryside announced they would only include a peppercorn rent and a 250-year term. Taylor Wimpey would stop having a ground rent other than a peppercorn and Berkeley Homes would only include a peppercorn in some developments.

When the new Help to Buy scheme came into force in England on 1 April 2021 ground rents other than a peppercorn were banned.

Note: Most mortgage companies now deal with ground rents in Part 2, for instance many mortgagees will not lend if the ground rent is greater than .1% of value for a new build or .2% otherwise. Most will also not lend if the ground rent doubles at less than 20 year intervals.

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 February 2022. The provisions will come into force on 30 June 2022.

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.

MORTGAGE REQUIREMENTS

Management Structure and Mortgage Enquiries

5.14.5 You should ensure that responsibility for the insurance, maintenance and repair of the common service is that of:

- the landlord, or
- one or more of the tenants in the building of which the property forms part, or
- the management company – see sub-section 5.15

5.14.6 Where the responsibility for the insurance, maintenance and repair of the common services is that of one or more of the tenants the lease must contain adequate provisions for the enforcement of these obligations by the landlord or management company at the request of the tenant.

5.14.7 In the absence of a provision in the lease that all leases of other flats in the block are in, or will be granted in, substantially similar form, you should take reasonable steps to check that the leases of the other flats are in similar form. If you are unable to do so, you should effect indemnity insurance (see section 9). This is not essential if the landlord is responsible for the maintenance and repair of the main structure.

5.14.8 We do not require enforceability covenants mutual or otherwise for other tenant covenants.

5.14.9 We have no objection to a lease which contains provision for a periodic increase of the ground rent provided that the amount of the increased ground rent is fixed or can be readily established and is reasonable. If you consider any increase in the ground rent may materially affect the value of the property, you must report this to us (see **part 2**).

Note: be careful where the ground rent can increase to more than £250 per annum as this can create an assured tenancy (see earlier).

5.14.10 You should enquire whether the landlord or managing agent foresees any significant increase in the level of the service charge in the reasonably foreseeable future and, if there is, you must report to us (see **part 2**).

5.14.11 If the terms of the lease are unsatisfactory, you must obtain a suitable deed of variation to remedy the defect. We may accept indemnity insurance (see section 9). See **part 2** for our requirements.

5.14.12 You must obtain on completion a clear receipt or other appropriate written confirmation for the last payment of ground rent and service charge from the landlord or managing agents on behalf of the landlord. Check **part 2** to see if it must be sent to us after completion. If confirmation of payment from the landlord cannot be obtained, we are prepared to proceed provided that you are satisfied that the absence of the landlord is common practice in the district where the property is situated, the seller confirms there are no breaches of the terms of the lease, you are satisfied that our security will not be prejudiced by the absence of such a receipt and you provide us with a clear certificate of title.

5.14.13 Notice of the mortgage must be served on the landlord and any management company immediately following completion, whether or not the lease requires it. Please ensure that

you can provide either suitable evidence of the service of notice on the landlord or management company or a receipt of notice. Check **part 2** to see if a receipted copy of the notice or evidence of service must be sent to us after completion.

Note: previously acknowledgement of receipt of the mortgage was required and as a last resort suitable evidence of service. Since December 2014 these are alternatives.

5.14.14 We will accept leases which require the property to be sold on the open market if re-building or reinstatement is frustrated provided the insurance proceeds and the proceeds of sale are shared between the landlord and tenant in proportion to their respective interests.

5.14.15 You must report to us (see **part 2**) if it becomes apparent that the landlord is either absent or insolvent. If we are to lend, we may require indemnity insurance (see section 9). See **part 2** for our requirements.

5.14.16 You must check a certified or official copy of the original lease. In the case of a registered lease where the original lease is now lost, or destroyed by Land Registry, we are prepared to proceed provided you have checked an official copy of the lease from the Land Registry.

Mortgage Requirements

The UK Finance Lender's handbook requires solicitors to check the following:

5.15.1 In paragraph 5.11 the meanings shall apply:

- "management company" means the company formed to carry out the maintenance and repair of the common parts;

- "common parts" means the structure, main walls, roof, foundations, services grounds and any other common areas serving the building or estate of which the property forms part.

If a management company is required to maintain or repair the common parts, the management company should have a legal right to enter the property; if the management company's right to so enter does not arise from a leasehold interest, then the tenants of the building should also be the members of the management company.

If this is not the case, there should be a covenant by the landlord to carry out the obligations of the management company should it fail to do so.

5.15.1.1 For leases granted before 1 September 2000:

If the lease does not satisfy the requirements of paragraph 5.11.1 but:

you are nevertheless satisfied that the existing arrangements affecting the management company and the maintenance and repair of the common parts; and you are able to provide a clear certificate of title, then we will rely on your professional judgment.

5.15.2 You should make a company search and verify that the company is in existence and registered at Companies House. You should also obtain the management company's last three years' published accounts (or the accounts from inception if the company has only been formed in the past three years). Any apparent problems with the company should be reported to us (see **part 2**). If the borrower is required to be a shareholder in the management company, check **part 2** to see if you must arrange for the share certificate, a blank stock transfer form executed

by the borrower and a copy of the memorandum and articles of association to be sent to us after completion (unless we tell you not to). If the management company is limited by guarantee, the borrower (or at least one of them if two or more) must become a member on or before completion.

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 (4th 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. In 2019 Bristol City Council became the first local authority to prosecute for a breach of a community protection notice. The recipient was fined £18,000.

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.

Ryb v Conway Consultants, June 2019. In this case a surveyor was successfully sued for not spotting Japanese Knotweed in a residential garden in North London. He should have taken photographs and made a record of the knotweed. The claimant successfully argued that he would not have bought the property or would have wanted a reduced price if he had known. Damages were assessed at £50,000.00.

In 2020 a case was settled where the purchaser was suing the seller for 23% of the value of the property.

On 23 March 2022 the RICS produced new guidance on Japanese knotweed. Previously, it was stated that knotweed could be a problem if within 7 metres of a boundary. This has now been reduced to 3 metres. The new guidance also states that save in exceptional circumstances knotweed is unlikely to have an impact on value. Ultimately, however, the decision will be that of the mortgage company.

SOLAR PANELS

Leases of Roof Space

The lease is a business tenancy within s23 of the Landlord and Tenant Act 1954 and so contracting out notices must be served. Care should still be taken at the end of the period as unless steps are taken to terminate the lease and rent continues to be paid, a 1954 Act protected business tenancy may be created. Furthermore, the tenant will obviously have exclusive possession of the roof space. The Agreements also tend to exclude s6 to s8 Landlord and Tenant (Covenants) Act 1995, and the landlord homeowner will remain liable even after transferring the property: *See* ***Avonridge Property Co. v Mashru [2005] UKHL 70***. The lease will also, obviously bind third party purchasers. It would need to be registered substantively at HMLR but would bind in any case as an overriding interest under Schedule 3 Land Registration Act 2002.

Note: In the future when properties are subsequently purchased having had solar panels installed, then be sure that the mortgage company consents and that the lease is satisfactory to both mortgagee and client. In particular, it must be excluded from the Landlord and Tenant Act 1954.

UK Finance: Leasing the roof for solar panels

UK Finance have published guidance for firms seeking to lease roof space to install solar panels on mortgaged properties. We recognise that borrowers may wish to do this both to improve the environmental performance of their homes and to reduce energy bills.

The guidance applies to firms operating in England and Wales and includes:

- background information on the process of seeking consent from the lender to enter into a leasehold agreement with the borrower; and
- a helpful, standardised letter that can be used to seek the lender's consent.
- In getting the consent of lenders, firms wishing to lease roof space to install panels will have to fulfill a series of requirements protecting both the lender and the borrower. These include giving undertakings that:
- no panels will be installed until there has been a proper inspection to ensure this can be done without damaging the property;
- any damage to the property caused in installing, maintaining or removing solar panels will be repaired;
- panels will be removed to allow home-owners to carry out property repairs or improvements if necessary, and any charges for this will only reflect reasonable costs;
- lenders have the right to break the lease if they end up taking possession of the property and solar panels hinder efforts to sell it;
- solar panel equipment is insured by the firms installing it, and the borrower has been advised to inform his or her own insurance company about the new arrangements;
- solar panel equipment, once installed, will be properly maintained;
- all relevant planning consents have been obtained;

- the firm installing the panels is accredited to the Microgeneration Certification Scheme, which should ensure that equipment is properly installed;
- the firm installing the panels has supplied a letter signed by the borrower giving permission to contact the lender for consent;
- full contact details for the solar panel firm have been provided; and
- the lender has been given a chance to see the agreement between the householder and the firm installing the panels.

Once all the requirements are fulfilled, the lender will tell both the householder and solar panel firm that it gives consent. But the firm installing the panels must agree to tell the lender about any relevant changes to its agreement with the householder.

Lenders also recommend that borrowers seek professional advice from a suitably qualified conveyancer on the terms of the lease to install solar panels and any impact it may have on the value of the property.

UK Finance Handbook and Solar Panels

5.20.1 Where a property is subject to a registered lease of roof space for solar PV panels we require you to check that the lease meets the UK Finance minimum requirements. Where you consider it does not, check **part 2** to see whether you must report this to us and for details of any additional requirements.

5.20.2 If, after completion, the borrower informs you of an intention to enter into a lease of roof space relating to energy technologies, you should advise the borrower that they, or the energy technology provider on their behalf, will need to seek consent from us.

5.20.3 UK Finance has issued a set of minimum requirements where a provider/homeowner is seeking lender consent for a lease of roof space for solar PV panels. See **part 2** for our additional requirements relating to these leases.

PLANNING PERMISSION ENFORCEMENT

Planning Enforcement and Deceipt

Time Limits for enforcement of planning breach

Planning enforcement period 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.

Note: Any S.106 Agreements providing for shared ownership leases in England as of 28 June 2021 must be New Model Shared Ownership leases. The term should be 990 years and there is an ability to purchase a 10% share and staircase up at 1% tranches. First Home is also being introduced in England whereby first time buyers with local connection and/or key workers can purchase at at least 30% off the purchase price. Subsequent purchasers will have the benefit of the discount, but will have to fulfil the same criteria.

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.

Section 5.5.1 of the Lender's Handbook states that the conveyancer must obtain necessary planning consents (including listed building consent) and confirm there is no evidence of any breach. If there is evidence of a breach you may state that in your professional judgment there is no reasonable prospect of enforcement in which case the mortgage company will not insist on insurance.

FLYING FREEHOLDS

Dalton v Angus (1881) established that there is an easement of vertical supports which may be expressed, implied, for example by the rule in ***Wheeldon v Burrows [1879]***, or prescriptive through acquiescence.

Unfortunately**,** in the case ***Rhone v Stephens (1994)*** above, the House of Lords reluctantly confirmed that none of this would apply to horizontal support which does not give rise to a property right which is binding on third parties. Thus, where there was a room of one house, over the downstairs of the neighbouring house, there was no ability to maintain. Direct covenants and restrictions (see above) would be one method of enforcement. Alternatively, application can be made to the county court under the **Access to Neighbouring Land Act 1992** where this is a discretionary power in relation to basic preservation works. Any order can be registered at HMLR to bind third parties.

See the UK Finance Lender's Handbook in relation to Flying Freeholds.

5.7 Flying Freeholds and Freehold Flats

5.7.1 If any part of the property comprises or is affected by a flying freehold or the property is a freehold flat, check part 2 to see if we will accept it as security.

5.7.2 If we are prepared to accept a title falling within 5.7.1:

- the property must have all necessary rights of support, protection, and entry for repair as well as a scheme of enforceable covenants that are also such that subsequent buyers are required to enter into covenants in identical form; and
- you must be able to certify that the title is good and marketable; and
- in the case of flying freeholds, you must send us a plan of the property clearly showing the part affected by the flying freehold.

If our requirements in the first bullet under 5.7.2 are not satisfied, indemnity insurance must be in place at completion (see section 9).