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REPORTING TO THE LENDER: CURRENT ISSUES

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ABOUT RICHARD SNAPE

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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

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EXTENDED COMPLETION DATES

The mortgage company always reserves the right to withdraw the mortgage offer at any time prior to completion. This may cause difficulties, especially in relation to new builds and extended completion dates. They may also revalue the property resulting in loss of the mortgage offer after exchange.

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 Rent) Act 2022** then a ground rent may still be charged (see later).

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.

In ***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.

This may cause particular problems in the current market where property prices have risen steeply over a short period of time.

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.

THE FIRE SAFETY ACT 2021

The Act finally received the Royal Assent on 29 April 2021. It will not come into force until detailed guidance has been provided. The Act clarifies the Regulatory Reform (Fire Safety) Order 2005 and makes clear that a fire safety risk assessment where there are at least two dwellings in a building must include the exterior, structure, external doors and windows, internal doors which open into the common parts, balconies and other external fixtures. Non-compliance may result in prosecution of the responsible person, ie. the landlord, and buildings insurance may be vitiated. The House of Commons successfully rejected a House of Lords amendment whereby the cost of the assessment and any works would not be added to service charge.

The Act came into force in Wales on 1 October 2021 and in England 16 May 2022. On 22 November 2021, the LPE 1 forms changed, partly to reflect this.

Fire Safety (England) Regulations 2022

These will come into force in England on January 23rd 2023.

In multi occupied residential buildings of at least 18 meters or 7 or more stories in height the responsible person must:

- Share electronically with the fire and rescue services details of external wall sytems, floor plan and building plan
- Keep hard copies of the floor plan and details of the responsible person in a secure information box
- Have low visibility wayfinding signage
- Inform the fire and rescue service if any fire fighting equipment is out of action for at least 24 hours

For multi occupied residential buildings of 11 or more meters there must be quarterly checks for fire doors and annual checks of flat entrance doors.

BUILDING SAFETY ACT 2022

This was introduced into Parliament on 5 May 2021 as a consequence of the Hackitt Report on Building a Safer Future after Grenfell. It passed through Parliament 26 April 2022 and received the Royal Assent on 28 April 2022. Much of it is not expected to come into force for 12 to 18 months. It is 262 pages long and this is a summary.

Previously, **S.1** of the **Defective Premises Act 1972** provides that there is a claim against the person responsible for defects in a new dwelling. In the case of **Jenson v Faux [2011] EWCA 423** this was held not to include refurbishments. See also **Sportcity v Countryside [2020] EWHC 1591** where rectification works were outside the six year period. Here there was no claim. The new provisions will include refurbishment and rectification work. Previously, there is a six year limitation period in relation to such work. The new provisions will provide for a 30 year limitation period for works completed before the commencement date. This will be retrospective subject to human rights claims. For example, if a defect occurred in 2010 remedial work could be required until 2040. For work after commencement date of the new provisions there will be a 15 year limitation. If the company responsible for the defect no longer exists then the High Court can provide for a Building Liability Order whereby companies within the group may be liable. We do not know the detail of this yet. The rest of these provisions will come into force on 28 June 2022. In addition, **S.38** of the **Building Act 1984** will finally be implemented. This allows anyone suffering loss as a consequence of building regulations breaches to claim damages for personal injury, including mental distress, or damage to property. This will not be retrospective. It comes into force on 28 June 2022. There will be a 15 year limitation period. There is also provision whereby enforcement periods for building regulations breaches may be increased from 1 year to 10 years.

The Act will also introduce the Building Safety Regulator who will be a part of the Health and Safety Executive. They will have a general role in relation to building safety, but will also be responsible for building control in high risk residential buildings. A high risk residential building is one with at least one dwelling which is at 18 metres or more in height or, if less than 18 metres, which has 7 or more storeys. Such a building will have an accountable person who has a legal state in possession in the common parts or is responsible for repair of the common parts. If there is more than one accountable person then there will be a principal accountable person. A residents' panel must be constituted and the accountable person must listen to health and safety complaints. They will have to produce reports to the Regulator and keep records in relation to health and safety and report any fire safety or structural safety problems that have occurred. Originally, there was meant to be a Building Safety Manager who would be an intermediary between the building safety regulator and the accountable person. This was dropped due to cost. Also, the original Bill provided for a building safety charge whereby any costs could be charged to the long leaseholders. This was also dropped and any charges will now be covered by the service charge.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. There are also offences if anyone removes or disturbs a relevant safety item. Any high risk buildings must be registered with the Building Safety Regulator. The intention is that this will come into force in April 2023 for new builds which will require to be registered before occupancy can occur. The intention is that non new builds will have to be registered between April and October 2023.

In relation to removal of cladding on buildings 18 metres of more in height, this should be covered by the Government's Building Safety Fund. For cladding removal on buildings of 11 metres or more in height, the Government has reached agreement with the construction industry that the developers will pay for the removal. If the developer is no longer in existence then a Government "orphan" fund is available.

For other safety work on residential buildings 11 metres or more in height (excluding anything beneath ground level and any top floor for equipment or machinery), the starting point is that the developer should pay. If the developer can't be found then the building owner will be responsible if they have a net worth of £2 million or more per affected building. There will be a cap on service charge for long leaseholders (of more than 21 years duration) for safety work on 11 metres (or 5 storeys) or more high buildings of £10,000 (or £15,000 in London) in any 10 year period. If the property is valued at between £1 million and £2 million the cap will be £50,000. If over £2 million it will be £100,000. The cap will include legal and professional costs, the cost of any waking watch and arbitration and mediation costs. Any charges which have been made in the previous five years can be taken into account. There cannot be a service charge for liability for safety work if the flat is worth less than £175,000 or £325,000 in London. For the cap to apply the long leaseholder can own up to three properties.

To be a qualifying long leaseholder everything will be decided on Febuary 14th 2022. The lease must be in existence prior to this date and the value will be that of the flat on this date. Information must be provided by the leaseholder as to the prove when the property was last sold.

Under the **Building Safety (Leaseholder Protection) (England) Regulations 2022** the leaseholder must provide a leaseholder deed of certificate in order to pass on any historical safety remediation costs and the building owner, who is usually the immediate landlord, must provide a landlords certificate. Section 5.14.17 of the UK Finance Motgage Lenders Handbook now requires that the buyer's conveyancer must ask the seller's conveyancer if the flat is subject to a remediation scheme. If so, copies of the Leaseholder deed of certificate and the landlords certificate must be provided.

The LPE1 forms where changed on January 9th 2023. There are now enquiries as to whether a leaseholder deed of certificate has been served on the landlord and whether the landlord certificate has been served and information as to any outstanding enforcement action.

On January the 9th 2023 the TA 7 Leasehold Property Information form was also changed. It now has a section on service charge liability for safety work, Leaseholder deed of certificate and various other information in relation to the qualifying leaseholder. The TA 13 was also amended to include details of electronic passwords and codes.

There is also provision whereby if a landlord does not claim off building guarantees then they cannot collect via service charge. This is probably the case already: see **Avon Ground Rents v Cowley (2019)** (see later). New build guarantees will have to last up to 15 years.

Section 5. 14.17 of the Lenders Handbook states: Where the security will comprise a leasehold flat you must request the following information from the seller's conveyancer about the safety of the building in which the flat is situated:

- Confirmation as to whether the building has been or will be remediated under the Building Safety Act 2022.
- Copies of any Landlord's Certificates, signed by the Landlord in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022.
- Copies of any executed Leaseholder Deed of Certificate (in the form set out in the Building Safety (Leaseholder Protections) (England) Regulations 2022) and confirmation that they have been submitted by the relevant leaseholder to the landlord.

You may want to consider any guidance from your professional body and/or regulator about the information and advice you should provide to the home-buyer relating to building safety. You should also consider any implications for section 4.4 of the Handbook.

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 £50,000 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. 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.

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. The RICS promptly denied that there was any such agreement and the mortgage companies say that they will be guided by the valuers.

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 Department 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 risk assessments conducted under the **Fire Safety Act 2021** together with any works required have been carried out.

New RICS guidance was introduced in December 2022. On the basis of this Lloyds bank announced on December the 19th, that if a remediation notice was in place they would not require an EWS1. In January 2023 Santander, Barclays, Nationwide, HSBC and National Westminster have announced that if a remediation plan is in place an EWS1 would not be required and some will not require an EWS1 if a remediation plan might become available.

AIRBNB

Triplerose v Beattie [2020] UKUT 180

In the case of **Nencova v Fairfields Rents 2016 [UKUT] 303** it was held that providing short term lettings under Airbnb was both a breach of a covenant against using other as a private dwelling and also a covenant not to carry out a trade or business on the premises. In the present case, it was held that Airbnb constituted a breach of a private dwelling covenant but none business user covenant as there was regular use of the premises by the tenant when not let out on short lettings. There would also be a possible breach of the mortgage and insurance implications.

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 came into force on 30 June 2022 with the exception of retirement homes where they will not come into force until 1 April 2023.

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.

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.

There is no specific section on Japanese Knotweed in The Lenders Handbook, but some mortgagees include it within section 5.4.4 and contaminated land. HSBC have amended part 2 in relation to knotweed and say that they will be guided by their valuer.

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 5.5 of the Lenders Handbook says: You must by making appropriate searches and enquiries take all reasonable steps (including any further enquiries to clarify any issues which may arise) to ensure:

- the property has the benefit of any necessary planning consents (including listed building consent) and building regulation approval for its construction and any subsequent change to the property and its current use; and
- there is no evidence of any breach of the conditions of that or any other consent or certificate affecting the property; and
- that no matter is revealed which would preclude the property from being used as a residential property or that the property may be the subject of enforcement action.

If there is evidence of such a breach or matter but in your professional judgment there is no reasonable prospect of enforcement action and, following reasonable enquiries, you are satisfied that the title is good and marketable and you can provide an unqualified certificate of title, we will not insist on indemnity insurance and you may proceed.

If there is such evidence and all outstanding conditions will not be satisfied by completion, where you are not able to provide an unqualified certificate of title, you should report this to us in accordance with 2.3.

RESTRICTIVE COVENANTS

Hepworth v Pickles (1900) stated that if a covenant is openly breached for 20 years, it is unenforceable. The Lenders Handbook says in section 5.11. 1 and 5.11.2.

You must by making appropriate searches and enquiries take all reasonable steps (including any further enquiries to clarify any issues which may arise) to ensure:

- the property has the benefit of any necessary planning consents (including listed building consent) and building regulation approval for its construction and any subsequent change to the property and its current use; and
- there is no evidence of any breach of the conditions of that or any other consent or certificate affecting the property; and
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