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HOW TO RESPOND TO CPSE ENQUIRIES

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Richard Snape

www.LawSureInsurance.co.uk

TEL: **0345 557 0845**
EMAIL: enquiries@lawsure.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms 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.

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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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MISREPRESENTATION GENERALLY

Misrepresentation is a false statement of fact which at least in part induces another to enter into a contract. Silence, save in exceptional circumstances, such as insurance contracts, will not constitute a misrepresentation but a half-truth will. See e.g. *Nottingham Patent Brick Company v Butler [1886] 16 QBD 778* where a solicitor stated that he was not aware of any restrictive covenants not having attempted to find out.

If circumstances change, there will be a duty to notify parties of the change without request. See e.g. ***With v O'Flanagan [1936] Ch 575*** where a dental practice had been profitable was no longer so by the time of sale. A genuine statement of law or opinion as opposed to fact will not be a misrepresentation but the opinion must be genuinely held. See e.g**. *Bisset v Wilkinson [1927]* AC *177*** where an opinion as to the sheep holding capacity of a farm was made. The seller had no previous experience of sheep farming and this was held to be a statement of opinion. Contrast ***Smith v Land and House Property Company [1884] 28 ChD 7*** where a tenant was described as being most desirable even though he was one quarter in arrears of rent. This constituted a misrepresentation. More recently, see ***McMeekin v Long [2003] 29 EG 120*** where an enquiry about neighbour disputes was answered by the word "none". In fact there had been a ongoing parking dispute. This was actionable. If the buyer has the opportunity to discover the truth, this does not prevent a misrepresentation; see ***Redgrave v Hurd (1881) 20 Ch 1.***

ENQUIRIES GENERALLY

Clinicare Limited v Orchard Homes [2004] EWHC 1694

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

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

The case is based on ***Sindall v Cambridgeshire County Council [1994] 1 WLR 1016*** whereby a local authority selling land for development was asked questions about any property rights affecting the land which could not be seen on inspection and replied that they were not aware of any. If they had looked at their records they would have found that drains have been laid under the land some 60 years previously. This was found to be a misrepresentation. In responding to enquiries about public drains, do not state that the seller is not aware of any.

Rosser v Pacifico Limited [2023] EWHC 1018 The case concerned an apartment which was sold as having two bedrooms. The seller responded to 4.4 of the TA6 enquiries by stating that they were not aware of any breaches of planning permission. The property was in a conservation area and one of the rooms had a Velux window overlooking the highway. This constituted a breach of planning permission and the local authority required its removal. The consequence of this was that the room did not constitute a bedroom under building regulations. The court followed the case of ***Sindall v Cambridgeshire County Council (1993)*** and held that 'not aware' was a representation that reasonable steps had been taken to find out. Moreover, the buyer's conveyancer was under no obligation to find out about breaches. The seller was sued for the difference in value between a one bedroom and a two bedroom flat together with additional stamp duty land tax and the cost of removing their window.

In ***Morgan v Pooley [2010] EWHC 2447*** it was recognised that this liability could be excluded by special condition.

See also ***Morris v Jones [2002] EWCA 1790*** - here a response to an enquiry about damp stated that other than work carried on by a guarantee there was none to the vendor's knowledge but the buyer should rely on his own survey. The survey found damp but the seller was still liable as he failed to disclose more severe damp which was in his knowledge.

In ***McMeekin v Long [2008]*** a misrepresentation occurred when neighbour a dispute was not disclosed on request damages were assessed at £67,000.

In the American case of ***Stambovsky v Ackley (1991)***, a seller was held to be liable in misrepresentation when they responded to an enquiry about hauntings that they were not aware of any. In fact, they had recently written an article in the Readers Digest about the haunted house.

More importantly, in ***Sykes v Taylor-Rose [2004] EWCA 296*** the standard enquiry of the time as to whether there were any other factors which might influence the purchaser's decision was answered in the negative. To the seller's knowledge there had been a murder committed in the premises previously which they did not disclose. It was held as the question is subjective and it could not be proven that the seller's thought this important, there was no liability.

In ***Doe v Skegg [2006] EWHC 3746*** the client stated they were not in dispute with their neighbours when they had made recent complaints about them. This was held to be a fraudulent misrepresentation.

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

The Court of Appeal confirmed this decision.

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 Network Rail Infrastructure Ltd [2018] EWCA Civ 1514 here Network 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.

Davis v Bridgend County Borough Council [2023] EWCA 80. In spite of the above the Court of Appeal held that the ongoing existence of Japanese Knotweed would give rise to a nuisance and damages were available.

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.

Consider Section 8.1 the CPSE 1 enquiries:

"8.1 If the Property has been affected by any of the following, please supply details:

a) structural or inherent defects;
b) subsidence, settlement, landslip or heave;
c) defective Conduits, fixtures, plant or equipment;
d) rising damp, rot, or any fungal or other infection;
e) Japanese knotweed;
f) any other infestation; or
g) flooding"

REGULATORY REFORM (FIRE SAFETY) ORDER 2005

On 1 October 2006 the **Fire Precautions Act 1971** and a whole raft of employment protection fire safety legislation was repealed and replaced by the responsible person in non-domestic premises requiring a fire safety risk assessment under the **Regulatory Reform (Fire Safety) Order 2005**.

The fire authority is responsible for enforcement and may also serve improvement, alteration and prohibition notices. They will not, however, carry out the risk assessment. At least as frightening as the threat of prosecution, non-compliance with the legislation may well vitiate insurance the next time a policy is up for renewal. Presumably, insurers will require such an assessment before they commit themselves to reinstatement after fire. The prospect of not having insurance will no doubt spur lenders into also requiring such a risk assessment.

Who is responsible?

The person responsible for such an assessment will vary depending on the circumstances, but one thing is abundantly clear, the obligations go far beyond any previous requirement for a fire certificate and are not dependant on size of the enterprise or number of staff. The Office of the Deputy Prime Minister (ODPM) stated that the only non-domestic premises which would not require such an assessment is probably where someone works from home, either self-employed or as an employee and, for good measure, buried in the middle of one hundred and twelve pages of Regulations, the common parts of blocks of flats are (as with the **Control of Asbestos Regulations 2012**) defined as being non-domestic premises. Purchasers must ask for, and landlords provide, a fire safety risk assessment. The prospect of vitiating insurance policies will presumably mean that where no assessment is available, the mortgage lender must be notified and will withdraw any mortgage offer. The fact that a purchasing residential long-leaseholder, who will become a director of a residents management company after completion, will instantly become a criminal might also exercise the mind of the domestic conveyancer and managing agent. In relation to business premises, if an employer is in control of premises occupied by his or her staff, then that will trigger the need for a risk assessment which must assess the risk, including necessary remedial work, not merely for the workforce but any relevant persons, including visitors and neighbouring land owners, who may be affected. A tenant in control of their premises (as will almost certainly be the case) must also have an assessment whether or not they are also an employee, and a landlord who retains control of the common parts will require a quite separate assessment. As the costs of the assessment will inevitably be added to the service charge (as also will the cost of any remedial work provided that the landlords may charge for the carrying out of statutory works), then the tenant must fully enquire as to the landlord's assessment.

As well as the responsible person, there will also be duty holders such as fire assessors, managing agents and fire alarm engineers who may be subjected to criminal offences.

Who carries out the assessment?

The risk assessment is personal to the responsible person and criminal liability cannot be delegated. The assessment must be a satisfactory one and the Government recommend it be done professionally by an expert. S.156 of **Building Safety Act 2022** came into force in England and Wales on October 1st 2023. Whenever there are two or more sets of dwellings in a building the residents of any domestic premises must be notified of any risks and any preventative and protective measures, the names and addresses in the UK of and responsible person and the identity of anyone appointed by the responsible person. They must also take such steps as are reasonably practicable to ascertain

whether any other responsible person has duties and share information with them. Separately, any person who is employed by the responsible person must be competent and have sufficient training and experience or knowledge. Implementation of this provision has been delayed.

Note: Strictly speaking, newbuild properties should have fire safety risk assessments although they should of course comply with building regulations. If NHBC are responsible for building control, they should have a separate fire safety assessment.

Note: If the flat is in mixed business residential premises, then each of the commercial units should have a separate fire safety assessment, the CPSE enquiries seem to envisage that the purchaser should see all of these and how the parties have cooperated.

THE FIRE SAFETY ACT 2021

The Act finally received the Royal Assent on 29 April 2021. 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 sets of 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.

Note: it is unclear, but the new legislation refers to two sets of domestic premises which seems to imply that buildings without common parts will require a fire safety risk assessment.

Consider Enquiry 11 of CPSE 1 enquiries:

"11 ***FIRE SAFETY AND MEANS OF ESCAPE***

In this enquiry, ***Fire Safety Order 2005*** *means the Regulatory Reform (Fire Safety) Order 2005 and any regulations made under it.*

11.1 Please advise us where we may inspect any records in relation to the Property, made for the purposes of complying with the Fire Safety Order 2005, including any records of findings following a fire risk assessment of the Property.

11.2 Please advise us where we may inspect any records in relation to any premises within any building of which the Property comprises part, made for the purposes of complying with the Fire Safety Order 2005, including any records of findings following a fire risk assessment of any such premises.

11.3 Please provide details of any steps taken in relation to the Property to co-operate with any other people and to co-ordinate measures to comply with the Fire Safety Order 2005.

11.4 What are the current means of escape from the Property in case of emergency?

11.5 If any current means of emergency escape from the Property passes over any land other than the Property or a public highway please:

a) provide copies of any agreements that authorise such use;
b) confirm that all conditions in any such agreements have been complied with; and
c) *provide details of anything that has occurred that may lead to any agreement for means of escape being revoked, terminated or not renewed."*

CONTROL OF ASBESTOS REGULATIONS 2012

The legislation applies to non-domestic property, but this expressly includes the common parts of dwellings. The Control of Asbestos Regulations 2012 replaced the previous Control of Asbestos at Work Regulations 2002 and 2006.

1. In this regulation "the dutyholder" means:-

   - every person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to the maintenance or repair of non-domestic premises or any means of access thereto or egress therefrom; or

   - in relation to any part of non-domestic premises where there is no such contract or tenancy, every person who has, to any extent, control of that part of those non-domestic premises or any means of access thereto or egress therefrom,

   and where there is more than one dutyholder, the relative contribution to be made by each such person in complying with the requirements of this regulation will be determined by the nature and extent of the maintenance and repair obligation owed by that person.

Note: that although the Regulations do not apply to domestic premises, a landlord of residential flats who retains the common parts will not be a domestic landlord and will be bound by the Regulations. This might greatly increase service charge contributions.

2. Every person shall cooperate with the dutyholder so far as is necessary to enable the dutyholder to comply with his duties under this regulation.

3. In order to enable him to manage the risk from asbestos in non-domestic premises, the dutyholder shall ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises.

4. In making the assessment:-

   - such steps as are reasonable in the circumstances shall be taken; and

   - the condition of any asbestos which is, or has been assumed to be, present in the premises shall be considered.

5. Without prejudice to the generality of paragraph (4), the dutyholder shall ensure that:-

   - account is taken of building plans or other relevant information and of the age of the premises; and

   - an inspection is made of those parts of the premises which are reasonably accessible.

6. The dutyholder shall ensure that the assessment is reviewed forthwith if:-

   - there is reason to suspect that the assessment is no longer valid; or

   - there has been a significant change in the premises to which the assessment relates.

7. The dutyholder shall ensure that the conclusions of the assessment and every review are recorded.

8. Where the assessment shows that asbestos is or is liable to be present in any part of the premises the dutyholder shall ensure that -

   - a determination of the risk from that asbestos is made;
   - a written plan identifying those parts of the premises concerned is prepared; and
   - the measures which are to be taken for managing the risk are specified in the written plan.

9. The measures to be specified in the plan for managing the risk shall include adequate measures for:-

   - monitoring the condition of any asbestos or any substance containing or suspected of containing asbestos;
   - ensuring any asbestos or any such substance is properly maintained or where necessary safely removed; and
   - ensuring that information about the location and condition of any asbestos or any such substance is:-
     - provided to every person liable to disturb it, and
     - made available to the emergency services.

10. The dutyholder shall ensure that -

    - the plan is reviewed and revised at regular intervals, and forthwith if -
      - there is reason to suspect that the plan is no longer valid, or
      - there has been a significant change in the premises to which the plan relates;
    - the measures specified in the plan are implemented; and

    the measures taken to implement the plan are recorded.

Note: Strictly speaking newbuilds require Asbestos Assessments although white asbestos was finally banned as a building material in January 2000. A newbuild should have a Health and Safety File under the Construction (Design and Management) Regulations 2007 and within this should be confirmation that asbestos has not been used. Enquiry might be made as to the existence of the Health and safety file.

Consider Section 8.3 and 8.7 of the CPSE 1 enquiries:

"*8.3 Has asbestos been used in the present structures forming part of the Property or of any premises of which the Property forms part, including Conduits, fixtures, plant and equipment?*

8.7 Has any asbestos, or any other substance known or suspected to be unsuitable for its purpose, unstable or hazardous, been removed from the Property in the past?"

LEGIONNAIRES DISEASE

There is an HSC approved Code of Practice on the Control of Legionella in water systems. It applies to any business where water is used or stored and where there is means of creating and transmitting water droplets which may be inhaled. This includes, e.g. care homes, hotels, spas, leisure centres, health care premises, schools and colleges and all commercial manufacturing and distribution sites. A duty holder who is in control of the premises (e.g. the landlord or an employer) should have a risk assessment. Not do to so may be a breach of the Management of Health and Safety at Work Regulations 2002. It appears that the legislation applies to common parts of dwellings and also to buy to let properties.

Note: The British Property Federation has stated that they do not intend to include a specific enquiry on this as it is already included within sections 8 and 15.

CPSE 6 (VERSION 1.6)

Properties subject to residential leases.

These were changed in September 2023 to reflect the Leaseholder protections in Part 5 of the Building Safety Act 2022 and ask questions about any Leaseholder Deeds of Certificate which have been provided and also any Landlords Certificates for relevant buildings in England only. Enquiry 21 asks whether the building is a Relevant building. It also requires information necessary to fill in the Landlord's Certificate, whether the seller is aware of any breach or failure to supply a Landlord's Certificate or send copies to third parties. Copies of leaseholder deeds of certificates should also be provided and any notices where a leaseholder deed of certificate has not yet been received by the seller.

14.6 Please supply copies of all notices and responses to notices served or received by you (or, to your knowledge, any predecessor in title) in respect of the Building pursuant to the LTA 1987, together with copies of all correspondence sent or received by you (or, to your knowledge, any predecessor in title) in respect of the Building relating to the LTA 1987.

Relevant Buildings (England only)

To qualify the building must be at least 11 metres or five storeys in height and have at least two dwellings. This will apply to a self-contained building or part of a building which would be able to be developed separately. Mezzanine floor will only count as a storey if it is at least half the size of the largest storey. The legislation does not apply to enfranchised buildings or Resident Management Companies. The proposal from the Welsh Government is that this provision will not be introduced and leaseholders will rely on remediation orders and remediation contribution orders in relation to defects. This is problematic as the rest of the provisions came into force in Wales on June 28th 2022.

Leaseholder's Deed of Certificate

The leaseholder can send this at any time to the landlord. They must also provide it if the landlord notifies them. The certificate must be provided within eight weeks of request although there may be a request for a further four week extension. If the certificate is not provided then the caps on service charge will not apply.

In the certificates the Leaseholder must provide evidence that the property is their principal residence, such as a bank statement, council tax bill or utility bill, and official copies as evidence of the price. If the lease is shared ownership there must be evidence of the share on February 14th 2022.

A Landlord must request a leaseholder's Deed of Certificate within five days of finding a relevant defect of becoming aware that the Leaseholder intends to sell.

The Landlord's Certificate

This can be provided at any time but must be provided by the landlord if they intend to remedy defects, or within four weeks of becoming aware of the sale of the flat, or four weeks after request is made by the tenant. If the landlord becomes aware of further defects then they must notify the tenant within four weeks. If the landlord does not comply with this they will not be able to charge for relevant defects by way of service charge. Under the Amendment Regulations 2023, since August 5th 2023 a landlord must also produce a new Landlord's Certificate if they receive a new Leaseholder

Deed of Certificate containing information that was not in the original Landlord's Certificate. Also under the Amendment Regulations they must pass on a copy of the Landlord's Certificate to any residents management company, RTM company and named manager within a week. Likewise, they must pass on to such persons a copy of a Leaseholder Deed of Certificate within a week. Failure to comply will result in them not being able to charge any leaseholder, including non-qualifying leaseholders, for safety work.

It must provide evidence of any group companies, and the net worth of any group companies on February 14th 2022. Accounts must be certified by a chartered accountant or finance director. There must also be details of any work to cure the relevant defects since June 28th 2017. This must include when the work was undertaken, when it was completed and what the cost was.

There are now **Building Safety (Leaseholder Protections) (England) (Amendment) Regulations 2023.** They came into force on August 5th 2023 and introduced a new Landlord's Certificate. The new Certificate must be used as of this date. They reduce the information which needs to be included in the Certificate in relation to certain transactions. Guidance was produced on August 10th 2023. The provisions are complicated and you should refer to the guidance. For instance, if on February 14th 2022 the landlord or an associate was responsible for the works or did not believe there was a relevant defect and they satisfy the contribution condition or the leaseholder is non-qualifying, they do not have to provide accompanying information. If they did not think there was a relevant defect but met the contribution condition on February 14th 2022 they have to provide some information such as evidence that there was no link to the developer. If the flat was worth less than £175,000 (or £325,000 in London) on February 14th 2022, they do not have to provide details of service charge going back to June 28th 2017. The registered providers of social housing and local authorities would not have to provide such information either.

ENERGY ACT 2011

Minimum Energy Performance of Buildings Standard

Energy Efficiency Regulations 2015 - Minimum Energy Performance of Buildings Standard

S.49 of the **Energy Act 2011** required the Secretary of State to introduce legislation on minimum energy performance standards by 1st April 2018 for rented property at the latest.

Firstly, the minimum standard is an E rated building. It is estimated that around 20% of buildings of rented property will fail on this. Secondly, the legislation will apply to all new leases (with exceptions below). Thirdly, for existing lettings there was a backstop of 1st April 2023 when they came within the legislation.

Exclusions are as follows:

- The regulations will only apply to buildings where there is an EPC. There may be lettings in place before the introduction of EPCs in 2007 which therefore escape the regulations.
- Where EPC regulations exempt landlords from providing an EPC, the minimum efficiency regulations will contain the same exemptions, e.g. a short term letting of a building prior to its demolition.
- Lettings under 6 months subject to a maximum of two such lettings to the same tenant.
- Leases where the length is more than 99 years.
- Lettings where the landlord cannot obtain the necessary consents for the efficiency works. Necessary consents can include:

  a) Planning or buildings regulation approval

  b) Consents from lenders or superior landlords

  c) Consent from a sitting tenant to allow the landlord access to do the works.

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

There are still some major issues to be determined, for instance whether any non-compliant leases will be illegal and thus unenforceable. There will also be major issues in relation to post 2018 rent reviews and dilapidations claims. In relation to the latter **S.18 Landlord & Tenant Act 1927** might limit the tenant's liability if the landlord has to bring the building up to minimum energy standards in order to re-let it. The tenant may also possibly find themselves liable, especially for leases terminating post April 2023 and April 2020 for residential properties, due to the statutory compliance provisions within the lease.

The **Energy Efficiency of Buildings (Private Rented Property) (England & Wales) Regulations** will apply to any commercial lease of more than 6 months and less than 99 years duration and to residential assured, assured shorthold and protected tenancies and to any other tenancy designated by the Secretary of State. Any exemption in relation to detracting from value will have to be confirmed by an independent surveyor and will only last for 5 years. The penalties will be a

maximum fine of £5,000 or 5% of rateable value for commercial property where the breach has occurred for less than 3 months and a maximum £2,000 fine for residential property. The fine will be doubled after 3 months.

Note: Guidance suggests that the reduction in capital value referred to above should be at least 5%. Any exemption will only last for 5 years and any reduction must be confirmed by an independent surveyor.

Note: According to the guidance the provisions apply to non-domestic lease renewals.

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

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

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

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

Consider the CPSE enquiries 14.6 to 14.9 where it is envisaged that details of any PRS exemption and any information provided for the exemption should be disclosed.

SDLT AND LAND TRANSACTION TAX

A Land Transaction Return will not be required if the lease is for less than 7 years duration and there is no tax to be paid. Nor in the future will a Return in the be required if the lease is for 7 or more years and the chargeable consideration is less than £40,000 or the annual rent less than a £1,000.

Under the Finance Act 2016, as of 17th March 2016 non-domestic leaseholds will pay 2% SDLT on any Net Present Value exceeding £5m.

Instead of assessing the duty on the basis of one year's rent, if the net present value of the rent exceeds £150,000 (or £125,00 for domestic premises) for non-residential property, the original Act stipulates that SDLT is paid at 1% on the whole. The net present value (NPV) is the total amount of rent paid during the lease discounted by 3.5% on a compound basis.

It is calculated by the equation:

$$NPV = \sum_{i=1}^{n} \frac{r_i}{(1+T)^i}$$

where: ri is the rent payable in year i, *n* is the term of the lease and *T* is the temporal discount rate.

Note: SDLT on rent only attracts to the grant of leases. However, if an assignment is taken from an assignor who is subject to relief with the exception of disadvantage areas relief, this is treated as a new lease and SDLT is payable on the remainder of the term. Examples will include assignments from a charity, other leaseback, and from a company which claimed group relief. This is now a CPSE enquiry.

The Finance Act 2003 provides that if the threshold is exceeded, albeit by £1, then the whole of the net present value is taxed at 1%. This would result in some tenants, who complete on or after 1 December, paying several times more Stamp Duty than if they complete prior to this day.

No SDLT will be paid on any amount below £150,000 (or £125,000 for domestic premises). The tenant has a tax free initial amount of £150,000 (or £125,000 for domestic premises). However, those entering into long leases or on high NPV's will nevertheless pay substantially more SDLT than Stamp Duty.

Rent increases must be estimated if they occur within four years and nine months of the effective date of the transaction.

After five years (or the end of the lease, if shorter) the tenant must fill in a further tax return and pay an extra charge if the rent has been increased by virtue of the rent review or stepped rent. The rent for the remainder of the lease will then be taken to be the highest yearly rent within the previous five years. Whether this is workable in practice is debatable but clients should be told to revisit their agents after five years to fill in their new return and sign for it!

There was originally an anti-avoidance provision whereby if rent was increased at more than RPI plus 5% this would trigger the need for a new tax return even after the five year time period. This was dispensed with by the Finance Act 2015 and in 2016 the CPSE enquiries were changed accordingly.

If the lease has been assigned within the five year period, the assignee is liable to pay any extra tax. This is now a CPSE enquiry.

The client, presumably through an accountant, must make a reasonable estimate of the likely turnover rent at the beginning and pay SDLT accordingly. Again, they then fill in a further return

after five years with a balancing payment or requiring a refund (hopefully with interest) where appropriate. The highest yearly rent from the previous five years is then, once more, deemed to be the rent for the remainder of the lease.

Again, how workable this provision is in practice, is debatable, but agents, to avoid possibly implication in tax evasion, should advise clients as to this from the very beginning.

In deciding the duration of the lease, break clauses, forfeiture clauses and options to renew are ignored.

If a tenant holds over after the end of the initial lease, he will now be deemed to have a further one year lease which will be linked to the original transaction. A year later, a further one year lease will be deemed and so on, but once the total amount of rent exceeds the threshold or the total duration of the leases exceed seven years, a SDLT1 form must be filled in and, where appropriate, tax paid. The idea of an assured shorthold residential tenant on a short term lease, who holds over eventually having to pay the tax seems a little bizarre but is required! Presumably the same would apply to a business tenant who holds over under a 1954 Act continuation tenancy.

Note: An RPI based increase does not have to be taken into account. However, an RPI based increase plus a certain percentage does.

Consider Enquiry 23 of the CPSE 1 enquiries:

"*23* ***Stamp Duty Land Tax (SDLT) on assignment of a lease***

In this enquiry, ***Lease*** *has the same meaning as in CPSE.4 ("the lease under which the Property is held and which is to be assigned by the Seller to the Buyer").*

23.1 If the grant of the Lease or the substantial performance of the agreement to grant the Lease or any event since the grant of the Lease was a land transaction for SDLT purposes,

a) what was the date of the grant of the lease or substantial performance (or later transaction) for SDLT purposes?
b) was the transaction notifiable?
c) if the transaction was notifiable, please provide a copy of each land transaction return made to HMRC and copy of each certificate issued by HMRC certifying that the transaction was notified to them;
d) if the transaction was not notifiable, please specify why it was not and provide a copy of any self-certification certificate made on the grant of the lease (or later transaction) or otherwise certify the effective date of the grant of the lease or substantial performance.

23.2 Is there a potential or outstanding obligation to make an additional land transaction return to HMRC as a result of any of the following occurring during the first five years from the date given in the answer to enquiry 23.1(a):

a) the settlement or determination of any rent reviews or any other provision for varying the rent; or
b) the settlement or determination of any contingent, uncertain or unascertained rents?

If there is, please provide a full schedule of the rents payable and paid in each quarter since the date given in the answer to enquiry 23.1(a).

23.3 If a premium was paid for the grant of the lease or any assignment of the lease to you

a) was the whole or any part of that premium contingent, uncertain or unascertained;
b) if it was, does the whole or any part of that premium remain contingent, uncertain or unascertained; and
c) have you made any application to HMRC to defer payment of SDLT on that contingent, uncertain or unascertained consideration?

23.4 Were any SDLT reliefs claimed on the grant of the Lease and, if applicable, on the assignment of the Lease to you, that would result in the assignment of the Lease by you being deemed to be the grant of a new Lease?"

CONTINGENT CONSIDERATION AND OVERAGE

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

How any estimate of final liability may be made is debatable but note that the client must be made aware that if a trigger event occurs, they will have to fill in a new return with a balancing payment. If the estimate were to tip the SDLT liability from one band to another, the higher payment must be paid initially. If the trigger event may occur more than six months after the effective date of the transaction the person subject to overage should ask for a deferral of payments of the additional amount. If they do not do so they will be charged interest if the event does occur.

On subsequent transfers where there is clawback post 1 December 2003, enquiry must be made as to whether a deferral was requested. The CPSE Enquiries envisage that a request to see the Land Transaction Return must be made.

Consider Section 24 of the CPSE 1 enquiries:

"**24 Deferred payment of SDLT**

If you have made any application to defer the payment of SDLT on any contingent, uncertain or unascertained consideration and you are seeking an indemnity from the buyer in respect of the deferred payment:

a) please provide a copy of the original land transaction return made to HMRC and a copy of the certificate issued by HMRC certifying that the transaction was notified to them;

b) please provide a copy of all correspondence with HMRC regarding the application to defer the payment of SDLT;

c) what is the amount of SDLT on which payment has been deferred;

d) when does the period of deferral end; and

e) has any event occurred that quantifies the amount of the contingent, uncertain or unascertained consideration that would impose an obligation on you to make a further land transaction return to HMRC?"

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