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5th February 2025

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www.lawsureinsurance.co.uk

# ABOUT RICHARD SNAPE

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**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

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**EXTENDED COMPLETION DATES**

**Completion Dates**

The completion date in the contract will not be a definite fixed date. This is because, when a property is in the course of construction, the developer cannot predict with certainty the precise date when it will be available for occupation. I n 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.

**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. Here, however the notice to complete was only for ten days. 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.

**HIGH RISK RESIDENTIAL BUILDINGS AND THE BUILDING SAFETY ACT 2022**

S.38 **Building Safety Act 2022** has introduced the concept of a compliance notice requiring remedy of contraventions of building regulations or avoiding contraventions. There will also be stop notices preventing work if there is a risk of serious harm. Noncompliance with these will be a criminal offence with a maximum of two years imprisonment.

In England, higher-risk buildings and building control are now within the domain of the Building Safety Regulator. A higher-risk building is one which has at least two dwellings and is either 18 or more metres or seven or more storeys in height. Amongst other things, the accountable person who has an interest in possession in the common parts or an obligation to repair the common parts can not let anyone into residential occupation without having received completion certificates. This provision came into force on April 6th 2023. Higher-risk buildings must also be registered with the Regulator by October 1st 2023.

The Building Safety Regulator is as of October 1st 2023 the regulatory body for higher-risk buildings and responsible for building control. If the building had progressed adequately prior to October 1st so the Local Authority would accept an initial notice or deposit of plans then the local authority will be responsible if by April 6th 2024 the building is sufficiently progressed. For non higher-risk buildings, as of April 6th 2024 then the roll of approved inspectors will be transferred to registered building control approvers. A person carrying out work must give an initial notice to the approver at least two days prior to the start of work and within five days of the start a commencement notice. The approver may give a rejection notice within four weeks of the commencement notice. At the end, a completion notice must be given that to the best of their knowledge the work complied with building regulations. The approver cannot give a final certificate without this.

The Act has introduced 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. In England a high risk residential building is one with at least two dwellings 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 estate in possession in the common parts or is responsible for repair of the common parts. This will include any Right to Manage Company and any Residents Management Company 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 principal accountable person commits a criminal offence if they allow anyone into residential occupation in a higher-risk newbuild without obtaining building regulation certificates.

The accountable person will have access rights to individual flats on giving at least 48 hours' notice. If there is more than one accountable person, there will be a principal accountable person. They will have an interest in possession of the structure and exterior or be responsible for repair and maintenance of the structure or exterior of the building. 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. This came into force in England on April 6th 2023 and the principal accountable person will have to register the building with the Regulator by October 1st 2023. Guidance suggests that the registration must be approved by the Regulator and key building information provided by this date. The Regulator will then have to approve the registration.

Safety case report summarising major fire and structural hazards and risk management is mandatory for higher-risk buildings. Organisations must also establish a mandatory occurrence reporting system detailing communications with other accountable persons, arrangements for reporting to the Regulator and summaries of incidents.

In England, the provisions came into force on April 6th 2023**. The Building Safety (Registration of Higher-Risk Buildings and Review of Decisions) (England) Regulations** were introduced into parliament on March 9th 2023. There will be a registration fee of £251 which must be paid on the application. For new builds then the accountable person will commit a criminal offence if they allow anyone into residential occupation before completion certificates are available. This will include adding new residential units and doing work that results in the building becoming Higher-Risk. The principal accountable person will have to register the building with the Regulator within six months otherwise they will commit a criminal offence.

There are also **Higher-Risk Buildings (Key Building Information) (England) Regulations 2023**. Within 28 days of an application the principal accountable person must provide details as to use of the occupied building, any attachments or outbuildings, details of materials used, information about structure, storeys and staircases, energy supply and storage and emergency evacuation plans.

There are also **Higher-Risk Buildings (Descriptions and Supplementary Provisions) (England) Regulations 2023** which were laid in front of Parliament on March 6th 2023. A Higher-Risk Building is one which is 18 metres or more in height or has seven or more storeys. Any floor where the ceiling is below ground level will not be included, nor will any top floor which only includes rooftop plant and machinery. The measurement will be from the lowest part of the ground floor to the finished floor of the top floor. A mezzanine floor will be ignored if it is less than 50% in size of the largest storey vertically above or below it. A separate structure will be treated as being the same building if it can be accessed to another part which has a residential unit. This will not apply if the access is only intended for exceptional use for emergencies or maintenance. In the case of ***Waite v Kedai (2023),*** the first measurement of the building was stated to be 17.57 metres, the second measurement was 17.97 metres with a margin of error of 30 centimetres. It was later decided that a roof terrace was the top of the building. This caused it to be well beyond 18 metres in height. As a consequence of this case the RICS told members not to state the height of the building. In the first-tier tribunal decision of ***Smoke House and Curing House, 18 Remus Road, London E3 2NF***, it was decided that a roof terrace constituted a storey thus making the property a higher-risk building which would need to be registered and also have the regulator oversee any building work. This conflicts with the Government guidance which states that a storey must be fully enclosed although this seems to be wrong. On October 4th 2024 the Ministry of Housing and the Building Safety Regulator stated that the guidance should still be followed unless they say otherwise.

**PLANNING PERMISSION ENFORCEMENT**

**Planning Enforcement and Deceit**

Time limits for enforcement of planning breach

Planning enforcement periods were

- 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 makes 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.

Note: There is provision in the **Levelling-up and Regeneration Act 2023** to increase the time for enforcement of building works in England to ten years. This provision came into force in England on April 25th 2024. It will not apply to works which are substantially completed by April 24th 2024 or to breaches of single dwelling conditions which occurred prior to April 25th 2024.

**SECTION 106 AGREEMENTS AND PLANNING CONDITIONS**

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. S.106 agreements have no limitation period in relation to enforcement.

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

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

**Planning Conditions**

As we have seen above, planning conditions can be enforced for ten years from the breach unless there has been a deliberate concealment. Amongst the most important planning conditions for conveyancers are those that ban Permitted Development, or e.g. prevent a garage being used as living accommodation. The date of the breach is relevant and not the date the condition was imposed. The 2011 Conveyancing Protocol stated 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.

From 1975 planning conditions should be noted on local land charges as should S.106 agreements if any monetary payment is to bind a subsequent purchaser.

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

**Pre-Commencement Planning Conditions**

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

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

In **Greyfort Properties v Secretary of State for Communities and Local Government [2011] EWCA Civ 908,** this was disputed. The case involved a condition requiring the ground floor plan to be determined prior to development commencing. The court decided that non-compliance meant that there would be no planning permission and therefore a refusal to grant a Certificate of Lawful Use was valid 20 years later.

The court stated:

- The Whitley principle, noted above, is approved such that if an operation contravenes a condition it cannot be properly described as commencing the development authorised by the permission. The Court of Appeal here appears to favour the more general approach taken in Whitley in respect of the wording of conditions. Hart appeared to restrict Whitley by requiring Planning Authorities to be explicit with the wording of their planning conditions.
- Hart is generally approved in that the condition must be one which goes to the heart of the planning permission. Breaches of pre-commencement conditions dealing with more trivial matters are less likely to be caught.

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

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

**COMMUNITY INFRASTRUCTURE LEVY**

**About the Community Infrastructure Levy**

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

**Who may charge the levy?**

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

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

**What development is subject to a charge?**

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

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

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

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

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

**Relief and Exemption**

Relief from the levy is available in three specific instances.

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

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

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

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

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

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

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

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

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

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

There is provision in the Levelling-Up and Regeneration Act 2023 whereby Community Infrastructure Levy was to be replaced in England by Infrastructure Levy. Labour have announced that they will not proceed with this.

**SELFBUILD AND CUSTOM HOUSEBUILD ACT 2015**

Local authorities must maintain a register of those wishing to build properties at least 50% designed by themselves in the locality. This must be taken into account in the development plan. Such properties do not attract Community Infrastructure Levy unless they cease to be the main residence within 3 years.

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

**ARCHITECTS CERTIFICATES**

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

Some mortgage companies are not accepting architects' certificates.

The future of architect certificates is in doubt when the Building Safety Act provisions came into force (see later).

**STRUCTURAL GUARANTEE**

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

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

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

On the purchase of a new property, the contract with the developer should include a term that he is registered with the NHBC (and will continue to be so until completion) and that on exchange he will offer to enter into this 10-year guarantee. On exchange, a separate 'offer of cover' (form BM 1) will be handed over. The acceptance of cover (form BM 2) should be signed by the client and returned to the NHBC. There is also a comprehensive guidance booklet handed over which the solicitor has to certify that he has given to his client, i.e. the buyer. Once the property is completed, the NHBC will undertake a final inspection and, if all is satisfactory, will issue a ˊ10-year notice'. This is the document which gives the 10-year guarantee previously explained. In theory, this will be handed to the buyer on completion, but it is often not available and an undertaking for it should be obtained. In the case of flats, in addition to the 10-year notice in respect of the individual flat being bought, there will be a separate notice in relation to the common parts of the block.

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

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

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

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

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

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

There is provision in S.144 and 145 of the Building Safety Act 2022 to change new home warranties. They will apply where a developer carries out a development in England that results in the creation of one or more dwelling. The developer must, no later than creating a freehold or granting a lease of more than 21 years provide the purchaser with a new build home warranty and also provide a warranty for the common parts. It must last at least 15 years beginning with the day on which the interest is granted or disposed of. The warranty must have insurance cover for at least 15 years. A failure to comply can give rise to a financial penalty which cannot exceed the greater of 10% of the value of the property at the time of sale for £10,000.

Regulations will impose particular requirements as to the kinds of defect which the developer must remedy, the time for remedy, the developer agreeing to meet costs, the insurance policy and solvency of the insurer or underwriter, the standard of service provided by the insurer and the ability of the beneficiary of the warranty to transfer it to another. A compulsory New Homes Ombudsman will also be introduced. These provisions are not yet in force.

**THE WATER INDUSTRY (SCHEMES FOR ADOPTION OF PRIVATE SEWERS) REGULATIONS 2011**

These came into force on 1 July 2011. On 1 October 2011 all private lateral drains outside the curtilage of the premises became adopted, as will any shared sewers within private premises. The Crown may opt out.

Private pumping stations and private surface water drains which run into a watercourse went into public ownership by 1 October 2016. The Water Authority will require a build over agreement and there must be compliance with Part H4 of the Building Regulations if a building is to be built within three metres of a public sewer.

Note: For residential properties any building should not be within three metres of a drain or sewer without building regulations. If it is a public sewer, then they will also require build over agreements from the utility. It is unclear what the situation is for buildings which pre-dated the adoption of sewers in 2011 but the utilities state that if building regulations were in existence they would carry out any maintenance work and make good any damage at their own expense. If building regulations were required and were not in existence, then the utility could charge the owner.

Under S.42 Flood and Water Management Act FWMA 2010 there cannot be a connection to a public sewer since October 2012 unless there is first a S.104 Water Industry agreement in place. These provisions are yet to come into force in England.

**ESTATE ROADS**

The new estate roads (being, at present, unadopted private roads) are likely to be 'adopted' (i.e. become publicly maintained) at some point in the future (but be aware that sometimes they might not be). As between the developer and the buyer, there should be a clause in the contract that the developer will be responsible for making up the roads to the local authority's standard and keeping them in that condition until they are adopted at no extra cost to the house buyer.

Note: Check that roads have easements in the meantime and that the developer actually owns the roads or has legal easements himself pre exchange of contracts.

The roads are usually one of the last things a developer will complete when he is building a housing estate and so there is a risk that if the developers become insolvent he will not have completed the roads. In that situation, when the roads are adopted, the properties 'fronting' onto the road might incur road charges if the highway authority has to spend money to 'make up' the road to their standard. The local authority will divide the cost of making up the road between 'frontagers' i.e. the owners of the properties 'fronting' on to it. In this context, a house 'fronts' onto a road even if it is at the back of the property which adjoins the road and even if the property in question has no access on to the road. There is thus a danger that having paid for the roads as part of the price of the house; the buyer will have to pay for them all over again. Obviously, there would be a right of action against the developer, but this will be only an academic right if he is insolvent

To protect the owners of such properties from these charges, check to see that a Highways Act 1980 Section 38 Agreement has been entered into by the developer with the highway authority. This is an agreement between the developer and the highway authority that the developer will be responsible for the roads. Obviously, on its own it suffers from the same defect as the similar agreement between the developer and buyer, i.e. if the developer becomes insolvent This agreement must therefore be supported by a financial bond, issued by a bank or insurance company, in a sufficient amount to cover against the developer defaulting on the Road Agreement. This, in effect, acts as an insurance policy against the developer defaulting and is paid for by the developer. If the developer does default, the bank, etc, will pay out under the bond and so avoid the risk of the 'frontagers' having to meet the cost of making up the road.

Note: Both the costs of roads and section 106 Agreements for the building of infrastructure may be dealt with by an Advance Payment Code Notice whereby the Developer is required to build up the roads to a suitable standard. The Code will be initiated upon Building Regulations approval and the Developer pays a deposit for compliance.

It often takes several years for the roads on a new estate to be adopted, particularly if it is a large estate which takes several years for the development to be completed. Therefore, when buying a house or flat 'second hand', always check the results of the enquiries of the local authority carefully to see whether the roads have been adopted yet. If they have not, then the existence of the agreement and bond will still be relevant.

In cases where there is no agreement and bond, a mortgage lender will usually protect itself against the property owner having to pay 'road charges' by making a retention from the advance of the estimated cost of those charges. This retention will be released only when the roads are adopted and may well cause the buyer financial problems on completion

**ENFORCEABILITY OF POSITIVE COVENANTS**

**1. Positive Covenants and Restrictions**

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

**Direct covenants and restrictions**

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

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

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

**3. Estate Rentcharges**

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

**Meaning of "rentcharge".**

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

a) rent reserved by a lease or tenancy, or

b) any sum payable by way of interest.

In some parts of the country freehold properties are subject to fixed sum rentcharges, a sum of money is paid per annum to the rent owner. In such rentcharges cannot be created since July 22nd 1977 when the Rentcharges Act of that year came into force. Existing fixed sum rentcharges will come to an end on July 22nd 2037 or within 60 years of first becoming payable whichever is the latter. However, estate rentcharges which may include a fixed nominal amount which otherwise are variable and reasonably reflect maintenance, repairs or insurance costs can be created.

Note the **Leasehold and Freehold Reform Act 2024** intends to make residential rentcharges and estate charges subject to a reasonableness test and application to the tribunal. The provisions will only apply to arrears occurring from November 27th 2023 onwards.

**The Problem**

**S.2 Rentcharges Act 1997** provides the situations where the rent charges may still be creates. This includes estate rentcharges which are defined as such:

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

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

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

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

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

*(c) which is an estate rentcharge;*

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

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

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

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

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

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

The **Leasehold and Freehold Reform Act** intends to add to S.2(4)(a) to include improvements as well as repairs maintenance and insurance.

***Roberts v Lawton [2016] UKUT 396 (TCC) S.121*** (4) of the Law of Property Act 1925 allows the holder of a rentcharge to appoint trustees who will be tenants under a 99 year lease if a rentcharge is not paid within 40 days of being due. This will be the case whether the charge is formally demanded or not. Here the arrears amounted to between £6 and £15. This was held to be a lease which can be registered at HMLR. The lease will continue even if the arrears are paid. In the present case, the holder of the rentcharge used this fact to hold home owners to a ransom in order for them to pay administration charges. S.121 (4) will apply equally to estate rentcharges. The provision can be excluded but only in the document that creates the rentcharge.

Note also S.121 (3) allows possession of the land by the rent owner under similar circumstances.

Note there is provision in the **Leasehold and Freehold Reform Act 2024** whereby S.121 will not apply to fixed sum rentcharges but will still apply to estate rentcharges.

As above in the future the tribunal will be able to question the reasonableness of work carried on under an estate rentcharge. In relation to S.121 then the legislation defines a regulated rentcharge as being one which cannot be created under **S.2 Rentcharges Act 1977.** This relates to fixed sum rentcharges only. No claim may be made by the rent owner unless they have first made a demand in prescribed form and then waited 30 days. The form will have to have:

- the name of the rent owner and an address in the UK
- The amount of arrears
- How it has been calculated
- How to pay
- A copy of the instrument creating the rentcharge
- Proof of title of the rent owner. This will be deemed to be so if their title is registered at HMLR.

The changes to enforcement of rentcharges came into force on July 24th 2024.

**Commonhold**

Commonhold was introduced by the **Commonhold and Leasehold Reform Act 2002** and came into force on September 27th 2004. Currently there are 159 commonhold units in England and Wales.

Commonhold has been much in the news of late as it has been proposed as a way of solving problems with leaseholds. It is fundamentally a freehold title where there will be a Commonhold Association and the various freeholders will become members and agree to be bound by positive and restrictive covenants. This is fundamentally a residents management company and a management structure will always be required.

There is nothing in the Bill which amends Commonhold. In particular residential leases of seven or less years cannot currently be created under commonhold. It does seem however that the commonhold unit holder will have the benefit of the changes to service charges and administration charges. There is currently no right to forfeit under commonhold which gives rise to concerns that the commonhold association may become insolvent if debts are not paid.

In the King's Speech it was announced that the draft Leasehold and Commonhold Reform Bill will amend commonhold. Before the General Election Labour announced that they would abolish Leasehold dwellings within 100 days of being elected. They now say that the bill will be make Commonhold the default option for new dwellings but this is unlikely to happen for some time.

Published January 2022

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