Searches & Enquiries

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leasehold commercial residential
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**Practice Points** occur throughout the text and are displayed in separate boxes. Their position in the text may be indicated where necessary by numbering (e.g. 1, 2, 3).

**Information Points** are displayed in separate boxes and contain additional details pertinent to the main body of the text.

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Peta is a member of the Editorial Board of Landlord and Tenant Review and the author of a book Tenants’ Pre-emption Rights: A landlord’s guide to the Landlord and Tenant Act 1987, published by Jordans. She regularly writes and lectures on commercial property topics.
Why make searches?

Before becoming legally bound to buy a property, a prudent buyer should carry out all the searches that are relevant to that property. Indeed, the standard conditions of sale incorporated into the sale contract will normally state that the property is sold subject to all matters that would have been revealed by those searches that a prudent buyer would have carried out before entering into the contract. Accordingly, it is essential that the buyer should be aware of all such matters, since he will be buying subject to them.

When should searches be made?

The buyer will want to carry out his searches sufficiently early to ensure that he will receive the results before he wishes to exchange contracts, but equally he will want to search as late as possible in order to obtain the most up-to-date information relating to the property.

PRACTICE POINT

The electronic search facilities provided by NLIS has revolutionised the carrying out of the majority of property searches, and generally the time taken for a search to be completed has been reduced, and will no doubt reduce further. Nonetheless, in a transaction where substantial delays occur between exchange of contracts and completion, or where a non-standard search has to be carried out which takes a long time to complete, the buyer (or his solicitor) must balance the need for certainty against the need for the most up to date information possible. In some cases, one or more searches will need to be repeated before exchange in order to update information previously obtained.

For example, where a Certificate of Title is given by solicitors acting on behalf of the seller/mortgagor to the buyer/lender, it is normal for the buyer/lender to require that searches should be no more than 3 months old (or less, depending on the views of the buyer/lender) at the date of the Certificate. Some searches take only a day or a few days, others can take more than a month before the results are
received. Where exchange of contracts is to take place before a search result has been received, it may be possible for the buyer to obtain insurance against an adverse search result. Alternatively, a personal search may be able to be carried out, but the authority holding the information will not guarantee the information contained in this search.

National Land Information Service Searches

The National Land Information Service (‘NLIS’) delivers integrated electronic search facilities and aims to provide faster turn-around times for searches. NLIS acts as the ‘hub’ for information held by local authorities, the Land Registry and other information providers. There are currently three licensed channels through which solicitors may access the hub, namely Searchflow, TM Search and Transaction Online. The search request will be submitted on-line by the solicitor to his chosen channel, which will pass the request to the hub. The hub will obtain the information direct from the information provider and reports back to the channel, which supplies the search results to the solicitor. The whole procedure is streamlined and in some cases can take only a few hours to complete.

Who carries out searches and liability

Normally, the buyer’s solicitor will carry out the relevant searches on behalf of the buyer, but in some cases (such as where a property is sold at auction or by formal or informal tender), the seller (or his solicitor) will do so and provide a ‘package’ of search results to the buyer. The Home Information Packs (‘HIPs’), which will become compulsory for the sale of homes in England and Wales by 2007, will require the seller to make searches (although possibly not all the searches which may be required by a prudent buyer in a particular case) and incorporate the results in the HIP, which will be provided to the buyer. In such cases, it is essential that the buyer should be entitled to rely on the information contained in the search results.

In the case of some searches, such as the local land charges search, the local authority is expressly stated to owe a duty of care in negligence not only to the person carrying out the search but also to any buyer who relies on a search result obtained by another party. However, such liability is not made clear in respect of all searches.
There is also a limited right of compensation for a buyer who is affected by a local land charge that has not been registered, but only to the extent that his loss results from the fact that the charge is enforceable (Pound v. Ashford Borough Council, [2003] EWHC 1088 (Ch.).

PRACTICE POINTS

1 Section 10 of the Local Land Charges Act 1975 provides compensation to a purchaser of land, where a local land charge was not revealed by an official search (whether the local land charge had been registered or not). However, it should be noted that the local authority’s duty of care in relation to standard enquiries is not as wide as a buyer might wish. In the case of Gooden v. Northamptonshire County Council [2002] 1 EGLR 137, the buyer was not able to get compensation because the inaccurate information given in reply to his enquiry was due to the inaccuracy of the Council’s own statutory records. In contrast, The Coal Authority was held liable in negligence, in the case of Mason v. The Coal Authority, 15 March 2001 (unreported), for information given in mining reports which did not take account of the known inaccuracy of many old plans used in the compilation of mining reports.

2 Where the buyer has not carried out a search himself, or where the buyer has changed identity since the search was carried out (for example, in a commercial transaction, where a joint venture vehicle is formed to purchase the land some time after the initial searches were carried out in the name of one of the joint venture parties), the buyer should specifically check the position. If he is not certain that the person responding to any particular search owes him a duty of care, he would be well advised to repeat the search in his own name. Alternatively, where a bespoke search is carried out, the search provider could be asked to confirm specifically that the necessary duty of care is owed to the buyer (or to a funder or other third party who may wish to rely on the search result in the future).
Types of search

There are many different searches that can be carried out. The following are the most relevant to the majority of properties:

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<th>WHEN REQUIRED</th>
<th>INFORMATION PROVIDED</th>
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<tbody>
<tr>
<td>Local Land Charges on Form LLCL</td>
<td>On every transaction</td>
<td>Local Land Charges registered in the Register of Local Land Charges – these will include conditional planning permissions, compulsory purchase orders, tree preservation orders, planning agreements, etc.</td>
</tr>
<tr>
<td>Enquiries of Local Authority on Form CON 29 (Part I Standard Enquiries of Local Authority (2002 Edition), Part II Optional Enquiries of Local Authority (2002 Edition)).</td>
<td>Part I Standard Enquiries: on every transaction.</td>
<td>Part I Standard Enquiries: planning and building regulations consents, adoption of roads and road schemes, conservation areas, etc.</td>
</tr>
<tr>
<td>Standard Drainage and Water Enquiries on Form CON 29DW (2002 Edition)</td>
<td>Part II Optional Enquiries: only those enquiries that are relevant to the particular property should be raised. It is possible to raise additional specific enquiries.</td>
<td>Part II Optional Enquiries: advertisement consents, pipelines, houses in multiple occupation, enterprise zones, etc.</td>
</tr>
<tr>
<td>Application for Official Search of the Index Map.</td>
<td>On every transaction where there is any possibility that the property (or any part) is unregistered.</td>
<td>Adoption of sewers, location of public sewers, etc.</td>
</tr>
<tr>
<td>Application for Official Copies of the Register/Plan or Certificate in Form CI. Where an official copy is required of a document referred to on the Register, Form CC2 Application for Official Copies of Documents Only should be used.</td>
<td>On every transaction where the property (or any part) is registered (although Official Copies will in fact normally be supplied by the seller’s solicitors at the outset of the transaction).</td>
<td>Whether or not the land is registered at the Land Registry and, if so, the title number(s) relating to it.</td>
</tr>
<tr>
<td>Land Charges Registry Search</td>
<td>On every transaction where the property (or any part) is unregistered.</td>
<td>Information relating to encumbrances over the land. Confirmation that the seller is not bankrupt.</td>
</tr>
<tr>
<td>Commons Registration Search</td>
<td>On every transaction where there is any possibility that part of the property is common land (e.g. where there is undeveloped land) or where there is a strip of land between the property and the highway.</td>
<td>Whether the land is registered under the Commons Registration Act 1965 (this includes registration as a common or as a town or village green).</td>
</tr>
<tr>
<td>Coal Mining Search on Form CON 29M</td>
<td>Where the property is situated in an area of current or past coal mining.</td>
<td>Whether the land is situated in an area of past or present coal mining, the existence of underground workings.</td>
</tr>
<tr>
<td>Flooding Search at the Environment Agency</td>
<td>Where the property may be liable to flooding.</td>
<td>Whether the land is situated in an area of flood risk. Depending on the search form used, matters relating to the previous use of the property and land in the vicinity of the property that may cause the property to be contaminated.</td>
</tr>
<tr>
<td>Environmental Search. There is no standard form, although there are a number of commercial organisations providing such searches, some including commentary on the relevance of the entries revealed by a search.</td>
<td>Potentially, in all cases.</td>
<td></td>
</tr>
<tr>
<td>Companies House Search</td>
<td>When the seller is a company.</td>
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Please see next page for Practice Points 1-5
1 These may, for example, relate to the extent of the publicly adopted highway or the permitted use of the property for planning purposes. Where a public right of way affects the property and this is shown on the definitive map and plan, it should be noted from the case of R (on the application of Kind) v. Secretary of State for Environment, Food and Rural Affairs [2005] EWHC 1324 that the right may be capable of change if there is evidence that the nature of the use requires a different classification (such as the reclassification of a road used as a private path to a bridleway), and a specific enquiry should be raised relating to previous use of the right of way.

2 Where the boundaries of a property are not clear, or where the property is to be developed, it is good practice to carry out a Search of the Index Map using a plan that extends beyond the boundaries of the property itself, in order to reveal any ransom strips that may exist. A Search of the Index Map may occasionally be returned with a warning letter, referring to the Land Registry Act 1862 or the Land Transfer Act 1875. In that case, refer back to the Land Registry to see if there really is a problem with the title, as this letter will be sent out automatically where the title number falls within a specified range of title numbers, and accordingly receipt of such a letter does not necessarily mean that there is in fact a problem with the title.

3 Where the buyer intends to develop the property, it may be advisable, after obtaining a clear Commons Search result, to raise an enquiry of the commons registration authority in order to ensure that there is no pending application to register the property (or part of it) as a common. If such an application has been made, further information about it may be sought, including whether or not any objections have been made, and the buyer will no doubt wish to register an objection himself.

4 The Law Society’s “Green Card” requires the risk of contaminated land to be considered, and clients formally warned, on every conveyancing transaction.

5 The initial environmental search which is carried out is normally a “desktop” search, i.e. it considers the likelihood of the property being contaminated, having regard to current and previous uses of that property and neighbouring property, but no physical check of the property itself is made. If the results of the desktop search are disturbing in any way, then a physical check of the property may need to be carried out in order to determine whether it is actually contaminated, and to what extent. Specialist advice may be required from an environmental consultant.
There are many other searches that may be applicable to particular properties. These include:

- a Rivers Search (made with the Environment Agency, where the property abuts a river or a river runs through the property),
- a British Waterways Search (made with British Waterways, where the property abuts a canal or a canal runs through the property),
- an Underground Railways Search (made with London Underground, in the case of underground railways in London, where the property abuts an underground railway – there is also the Metro in Newcastle),
- a Tin Mining Search (where the property is situated in Somerset, Devon or Cornwall only),
- a China Clay Search (where the property is situated in Cornwall, Devon or Dorset only),
- a Cheshire Brine Subsidence Compensation Board search (where the property is situated in or near Cheshire),
- a Chancel Repairs Search (where the property is near to an old church – although liability may be difficult to establish for certain),
- a BIDs Search (to see whether or not the property lies within a local Business Improvement District pilot),
- an Access land Search (to see whether or not the property is subject to the right of open access),

1 Note that there is currently no point in sending a “railway search” letter to Network Rail (formerly Railtrack), the owner of all railway lines currently used for operating intercity and suburban trains in Great Britain, as well as some disused lines, as neither Network Rail nor the rail operators, who use the railway infrastructure, provide current information of any use in reply to general enquiries. Specific enquiries may be sent to the Estates Surveyor and Manager at Network Rail, Paddington Station.
• a **Disadvantaged Areas Search** (Relief from Stamp Duty Land Tax)35 (to see whether or not the property lies within a Disadvantaged Area – since March 2005, this has been relevant only to a freehold residential property costing £150,000 or less).

Where the buyer is a developer, he is likely to require searches to be carried out with all the utility companies, in order to find out what services are available in the vicinity of the property for him to use in the course of his development.

**Dealing with adverse search results**

Where an adverse search result is received, this should be referred to the buyer for instructions. In some cases, more information may be required, e.g. an adverse search result in the case of an environmental search may lead to a physical investigation of the property. In other cases, such as where there is a risk that the property has a liability for chancel repairs, insurance cover may be available. Sometimes, an amendment may be required to the sale contract relating to the property, or the purchase price may need to be reduced or a retention made from the purchase moneys – for example, where the road that gives access to the property has not been adopted as a highway maintainable at the public expense. In a few cases, the buyer may decide not to proceed with his purchase, although this is relatively rare.
Enquiries of the Seller

Why raise enquiries?

In addition to carrying out searches in respect of a property, the prudent buyer should also raise any enquiries of the seller that may be relevant to the transaction and the particular property. Indeed, the standard conditions of sale incorporated into the sale contract will normally state that the property is sold subject to all matters that would have been revealed by those enquiries that a prudent buyer would have raised before entering into the contract. Accordingly, it is essential that the buyer should be aware of all such matters, since he will be buying subject to them.

Who raises enquiries?

It is normal practice for the buyer’s solicitor to raise enquiries on behalf of the buyer and send these to the seller’s solicitor. However, where a ‘package’ of legal information relating to a property is prepared at the outset by the seller, standard replies to enquiries may be contained in that package. In that case, the buyer may wish to raise additional enquiries in relation to matters not dealt with in the standard enquiries.

When should enquiries be raised?

Enquiries should be raised as early as possible in a conveyancing transaction, although normally a buyer’s solicitor will wait until he has received the initial papers relating to the transaction, in order that irrelevant enquiries can be deleted (and additional ones inserted) before the enquiries are sent to the seller’s solicitor. Additional enquiries will often be raised after the making of the initial enquiries, right up to exchange of contracts, as further

PRACTICE POINTS

The CPSE contain a specific confirmation by the seller that he will notify the buyer up to exchange of contracts (or completion, if there is no prior contract) of anything which causes any previously given reply to become inaccurate.
information relating to the property or the transaction comes to light or is agreed and further points need to be queried 2.

**PRACTICE POINTS**

It is a good idea to raise additional enquiries on a separate enquiries form, rather than including them within correspondence (or e-mails), as the form, together with the reply, can then be easily isolated and kept with the deeds on completion.

**Forms of enquiries – residential transactions**

In residential property transactions, it is normal for the Seller’s Property Information Form (SPIF) to be used, together with the Seller’s Leasehold Property Information Form (SLIF) in the case of leasehold properties. The seller will complete the replies in Part 1 and send the form(s) to his solicitor, who will check the replies (and any other information which he may have, such as old files or deeds) and complete and sign Part 2 to confirm that he has done so.

The SPIF contains questions relating to ownership of boundaries, disputes about the property, occupiers’ interests, planning requirements, guarantees affecting the property, approximate completion date, fixtures and fittings, and details of notices received by the seller which affect the property. The SLIF contains additional questions relating to the landlord, service charges, etc.

**Forms of enquiries – commercial transactions**

Although other forms are available, and it is not uncommon to find solicitors using their own customised forms of enquiries, it is recommended that the Commercial Property Standard Enquiries (CPSE) should be used in all commercial property transactions. The CPSE were originally prepared by the London Property Support Lawyers Group, and are generally accepted for use in the industry. They are very comprehensive, and include (in the case of CPSE.1, General pre-contract enquiries for all commercial property transactions) enquiries relating to boundaries and extent, party
Enquiries of the Seller

walls, rights benefiting the property, adverse rights affecting the property, title policies, access to neighbouring land, access to and from the property, physical condition, contents, utilities and services, fire certificates and means of escape, planning and building regulations, statutory agreements and infrastructure, statutory and other requirements, environmental, occupiers and employees, insurance, rates and other outgoings, capital allowances, Value Added Tax (VAT) registration information, transfer of a business as a going concern (TOGC), other VAT treatment, standard-rated supplies, zero-rated supplies, transactions outside the scope of VAT (other than TOGCs), notices, disputes, Stamp Duty Land Tax (SDLT) on assignment of a lease and deferred payments of SDLT.

The CPSE comprise a suite of documents, as follows:

<table>
<thead>
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<th>REFERENCE NUMBER</th>
<th>DESCRIPTION</th>
<th>WHEN REQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>CPSE 1</td>
<td>General pre-contract enquiries for all commercial property transactions</td>
<td>In all cases, whenever freehold or leasehold commercial property is being acquired</td>
</tr>
<tr>
<td></td>
<td>Guidance notes on CPSE.1 General pre-contract enquiries for all commercial property transactions</td>
<td>Where CPSE.1 has been used, to assist the parties and their legal advisers to understand why an enquiry is raised, how it should be answered and what may need to be done if a particular reply is given</td>
</tr>
<tr>
<td>ON/CPSE 1</td>
<td>Supplemental pre-contract enquiries for commercial property subject to tenancies</td>
<td>In addition to CPSE.1, where the property being acquired is subject to any lease(s)</td>
</tr>
<tr>
<td></td>
<td>Guidance notes on CPSE.2 Supplemental pre-contract enquiries for commercial property subject to tenancies</td>
<td>Where CPSE.2 has been used, to assist the parties and their legal advisers to understand why an enquiry is raised, how it should be answered and what may need to be done if a particular reply is given</td>
</tr>
<tr>
<td>CPSE 2</td>
<td>Supplemental pre-contract enquiries for commercial property on the grant of a new lease</td>
<td>In addition to CPSE.1, where a new lease is being granted. Note CPSE.2 may also be required</td>
</tr>
<tr>
<td></td>
<td>Guidance notes on CPSE.3 Supplemental pre-contract enquiries for commercial property on the grant of a new lease</td>
<td>Where CPSE.3 has been used, to assist the parties and their legal advisers to understand why an enquiry is raised, how it should be answered and what may need to be done if a particular reply is given</td>
</tr>
<tr>
<td>ON/CPSE 2</td>
<td>Supplemental pre-contract enquiries for commercial leasehold property on the assignment of the lease</td>
<td>In addition to CPSE.1, where a lease is being assigned. Note that CPSE.2 may also be required</td>
</tr>
<tr>
<td></td>
<td>Guidance notes on Supplemental pre-contract enquiries for commercial leasehold property on the assignment of the lease</td>
<td>Where CPSE.4 has been used, to assist the parties and their legal advisers to understand why an enquiry is raised, how it should be answered and what may need to be done if a particular reply is given</td>
</tr>
<tr>
<td>CPSE 3</td>
<td>Solicitor’s title and exchange requirements</td>
<td>In all cases.</td>
</tr>
<tr>
<td></td>
<td>Guidance notes on Solicitor’s title and exchange requirements</td>
<td>Where STER has been used, to assist the parties and their legal advisers to understand why an enquiry is raised, how it should be answered and what may need to be done if a particular reply is given</td>
</tr>
</tbody>
</table>
Enquiries of the Seller

In addition, there are SCR Solicitor’s completion requirements and GN/SCR Guidance notes on SCR Solicitor’s completion requirements, together with a Disclosable Overriding Interests questionnaire and GN/Disclosable Overriding Interests questionnaire.

Liability of seller for inaccurate replies

The seller may be liable to the buyer if any reply to an enquiry is inaccurate. Liability will be in misrepresentation – so an inaccurate but honest reply is unlikely to give rise to liability, and liability will only arise where the buyer has actually been induced to enter into the contract in reliance upon the reply.

Great care must be taken in wording replies to enquiries if the seller is to avoid liability to the buyer. For example, a statement that the landlord was not aware of any dry rot but suggesting that the tenant should carry out his own survey carries with it an implied representation that the landlord has made reasonable investigations of the matter (see Clinicare Limited v. Orchard Homes and Developments Limited [2004] EWHC 1694). However, there is no implied representation by the seller/landlord that proper records have been kept - such a representation was proposed in the case of William Sindall v. Cambridgeshire County Council [1994] 3 All ER 932 but rejected by the Court of Appeal (although it should be noted that the Court went on to say that if the deeds of the property had been eaten by mice or destroyed by enemy action, then the seller must disclose these facts) (see next Practice Point).

It is common for a seller to respond to an enquiry, particularly in relation to the physical state of the property, by stating, “Not to the seller's knowledge but no warranty is given and the buyer must rely on his own inspection and survey”. It has been held (Morris v. Jones and others [2002] EWCA Civ 1790) that the denial of any warranty and the statement that the buyer should inspect or carry out a
survey will not protect the seller if the reply also contains a misrepresentation, namely that the seller is not aware of the particular matter enquired about. However, a simple response directing the buyer to inspect or carry out a survey, without any statement as to the seller’s knowledge, will not generally cause any liability to be owed by the seller to the buyer, even if the seller is aware of a particular defect.

Where an inaccurate reply results from the seller’s solicitor’s negligence, he will be liable to his own client. However, the seller’s solicitor owes no duty of care in negligence to the buyer (see Gran Gelato Limited v. Richcliff Group Limited [1992] Ch. 560), and the CPSE specifically exclude such liability.

Dealing with adverse replies to enquiries

As in the case of an adverse search result, an adverse reply to enquiries should be referred to the buyer for instructions. It may be that more information is required, or perhaps insurance cover may be available. Sometimes, an amendment may be required to the sale
contract relating to the property, or the purchase price may need to be reduced or a retention made from the purchase moneys. In a few cases, the buyer may decide not to proceed with his purchase, although this is relatively rare.

Title

Background

The deduction and investigation of title to land has changed completely over the last 20 years or so. Previously, title was mainly unregistered, and was not deduced by the buyer to the seller until after contracts had been exchanged. The buyer would then check the title (which, if unregistered, would comprise a thick package of copy documents or an “abstract” of those documents, some of which would frequently be hand-written or, if registered, would comprise office copies of the register entries, which had to be obtained by the seller, since the registers of title at H.M. Land Registry could only be searched by the registered proprietor or a person authorised by him) and raise formal requisitions on title, which the seller would answer. If a satisfactory reply could not be given to a requisition, the buyer might find himself unable to proceed with his purchase, which was highly unsatisfactory to both buyer and seller.

Now, however, many solicitors never come across an unregistered title, and the whole of the country is subject to compulsory registration on completion of a sale or any of the other specified triggers. It is standard practice (and compulsory, where the Protocol applies) for title to be deduced at the outset (although this is not apparent from the standard forms of conditions of sale), at the same time as searches are being made and enquiries raised, and for the buyer to satisfy himself that the title is satisfactory prior to exchange of contracts, subject only to anything adverse which may be revealed by pre-completion searches. Indeed, it is usual for the contract to prohibit any objection to or requisition on title after exchange of contracts, unless this arises from a matter revealed by a pre-completion search. Deducing title is normally a simple matter of obtaining a copy of the entries on the registers of title maintained at the Land Registry, and if these are not forthcoming from the seller, they can easily be obtained by the buyer, as the registers of title are open to inspection by anyone.
Registered Title - Deduction of Title

Where the property is registered at the Land Registry, the seller will normally deduce title to the buyer by providing official copy entries of the registers (i.e. the Property Register, the Proprietorship Register and the Charges Register) maintained at the Land Registry in relation to the property, together with either the filed plan for the property or a Certificate in Form C1 (which certifies which colour references on the registers of title affect the property), and copies of any documents referred to in the Register entries which relate to the property. Where the property is leasehold, a copy of the lease should also be provided.

PRACTICE POINT

It is not unusual for the seller to provide only the official copy entries of the registers of title and the filed plan, and not to supply any copy documents. In such a case, where the property being sold comprises part only of the registered title, the buyer can either request from the seller (or obtain direct from the Land Registry) copies of those documents which appear, from an examination of the filed plan or Certificate in Form C1, that they may affect the property which is to be sold and check them himself, or he can seek confirmation in his enquiries before contract [link to Enquiries section of portal] that none of the documents referred to affect the property which is to be sold. Clearly the former alternative will be more costly for the buyer, since his solicitor may need to check a large number of large and complex documents, but he will have the certainty of knowing that they have been properly checked or, if they have not, that he has a claim against his solicitor for negligence. The latter alternative will be cheaper for the buyer, since the seller’s solicitor will check the documents (and, indeed, is likely to have done so already when preparing the draft contract), but any liability of the seller for any misrepresentation contained in the reply to an enquiry may be difficult to enforce, particularly if the seller lives or is situated abroad or has no significant financial substance.
There is no obligation to provide such items by way of deduction of title, however, as no rules have been made under Schedule 10, Paragraph 2 of the Land Registration Act 2002 as to how evidence of title is to be deduced, and the parties may agree, for example, that it is for the buyer to obtain official copies. Both the Standard Conditions of Sale and the Standard Commercial Property Conditions of Sale, though, require the seller to provide official copies of the register entries to the buyer, as does the Protocol.

Registered Title - Investigation of Title

The buyer's solicitor will review the title deduced to him, and will check, in particular:

• that the property is correctly described in the Property Register, and is correctly shown on the filed plan (if provided);

• (if there is a lease) that the details of the lease as set out in the Property Register accord with those in the contract and/or with the copy lease supplied by the seller and that no deeds of variation or other supplemental documents are referred to on the Register but are not referred to in the contract (or, if such documents are noted on the Register, the buyer has received a copy of them);

• any other entries in the Property Register, which may include rights benefiting the property, party wall declarations, and similar matters;

• the class of title (generally, the buyer will require absolute title, the best quality of registered title available, although where title is merely qualified, possessory or good leasehold, insurance may be available or the buyer may, in some circumstances, be prepared to accept a lesser quality of title, if that is all that is available);

• that the seller is the sole proprietor of the property (if the seller is one of joint registered proprietors, then the other joint proprietor will need to join in the contract as seller; if the registered proprietor is somebody other than the seller, then the buyer will need to be satisfied that the seller can in fact sell the property (for example, that he has taken a transfer of the property from the registered proprietor, or a transfer on first registration from the previous owner, and that transfer is in the course of registration at the Land Registry));
• that there are no restrictions, nor any cautions or inhibitions registered before the Land Registration Act 2002 came into force, noted in the Proprietorship Register (or, if there are, these will be removed at or prior to completion);

• any entries in the Charges Register, such as mortgages, notices, restrictive covenants, easements and other matters which the property is subject to (in the case of a mortgage, the contract should provide for this to be removed on or prior to completion; in the case of any other entry, the buyer will need to consider the effect of this, the availability of insurance cover (in some cases) and whether he is prepared to buy the property at the agreed price and on the agreed terms subject to the entry);

• any entries on the title which the buyer will be required, pursuant to the contract, to indemnify the seller against, and any indemnity covenants or other personal covenants given by the seller on completion of his purchase.

Registered titles within the range of title numbers between 1 and 7717 (without letter prefix) relate to land which was first registered under the Land Registry Act 1862 or the Land Transfer Act 1875. In the case of some (but not all) of such titles, the Land Registry will treat the application to register a transfer of such land as an application for first registration, and the buyer will need to deduce a full, unregistered title for the land as though it were the subject of an application for first registration. If a buyer comes across a title number within this range, he should immediately write to the relevant Land Registry (there is a lawyer at each District Land Registry, responsible for 1862 and 1875 Act matters), asking whether the title has already been “tidied up” (i.e. full, unregistered title deduced to the satisfaction of the Land Registry). In many cases, this will be the case, and accordingly nothing further need be done by the buyer, who can treat the title as any normal registered title. Where, however, the Land Registry do not provide such a reassuring response, the buyer will need to require the seller to deduce to him full, unregistered title to the property, and on completion, he will need to apply on Form FR1 (rather than AP1) [link to Land Registration Section of Portal] to register the transfer.
Unregistered Title – Deduction of Title

Where the property is not registered at the Land Registry, the seller will normally deduce title to the buyer by providing an epitome of title. This will consist of a front sheet listing, in date order, the copy documents provided, together with photocopies of conveyances and other title transfer documents (such as assents, grants of probate, etc.), starting with a good root of title (normally a conveyance on sale) at least 15 years old, and showing the movement of the title from the owner at least 15 years earlier, through any intermediate owners, to the seller. Other relevant documents, such as mortgages, deeds of grant of easements, etc., will also be included, together with copies of any documents which pre-date the root of title but which are referred to (without full details being given) in the root or in subsequent documents (such as documents containing details of old restrictive covenants) and Land Charges Act searches against the names of previous owners. It is possible for the seller to provide an abstract of title, rather than an epitome, which means that extracts from the relevant documents will be provided, rather than photocopies of the documents themselves, although the speed and convenience of just photocopying the documents has meant that abstracts of title are almost never seen nowadays.

Unregistered Title – Investigation of Title

(Link to Emmet on Title - the leading textbook on investigation of unregistered title.)

The buyer’s solicitor will review the title deduced to him, which is a considerably more onerous task than in the case of a registered title, and will check, in particular:

• that a conveyance on sale, or another good root of title, has been provided;

• that the epitome of title shows a complete chain of title, from the owner at least 15 years earlier, up to and including the seller;

• that the seller is the sole owner of the property pursuant to the last document in the chain of title (if this document shows the seller acquiring the property jointly with another person or
persons, then unless there is evidence of the death of that person or persons, he/they will need to join in the contract as seller);

• any memoranda endorsed on the documents (relating to sales off and other relevant transactions);

• that the correct amount of Stamp Duty has been paid on each document in the chain of title and, if appropriate, that a “Particulars Delivered” stamp has been endorsed on each of these documents;

• that any mortgages have been repaid and released;

• where there have been sales of part, that an acknowledgement for production of documents relating to the whole title have been given;

• any provisions contained in each of the documents in the epitome, in particular restrictive covenants, rights benefiting the property, rights burdening the property;

• any plans attached to the documents in the chain of title, that they show the property correctly (or include the property, where there are sales of part);

• that no transaction has been carried out since the area within which the property is situated became one of compulsory registration which would have required the property to be registered at the Land Registry (if such a transaction has been carried out, the seller should be required to register his title prior to completion).

At completion, the buyer’s solicitor (or the seller’s solicitor, if appointed as the agent of the buyer’s solicitor for this purpose,) will check each document in the epitome (or abstract) of title against the original of that document. On a sale of part, where the original documents of title will be retained by the seller, the solicitor will then mark each document in the epitome (or the summary of that document in the abstract) as having been examined against the original, adding the date and the name of the firm doing the examining. An examined abstract, or an epitome of title which has been examined against the originals, then itself becomes an original document of title, so that an epitome of title may incorporate a copy of a previously examined abstract or epitome of title.
Dealing with problems revealed by investigation of title

Any problems (or missing items) revealed by the buyer’s investigation of title will be raised by the buyer with the seller by way of requisitions on title or additional enquiries before contract (where the investigations are carried out prior to exchange of contracts). Clearly the buyer will need to be satisfied on all these points, and any changes that may be required to the contract will need to be agreed before contracts can be exchanged; where, however, contracts are exchanged before title is deduced, the seller will need to be extremely careful to ensure that there are no technical difficulties with his title, and that any such are properly reflected in the contract. For this reason, it is preferable from the seller’s point of view (as well as the buyer’s) for title to be deduced and investigated before exchange of contracts.

Title matters between exchange and completion

Provided that title has been deduced and fully investigated prior to exchange of contracts, as will normally be the case nowadays, the only title matters requiring to be dealt with after exchange of contracts are pre-completion searches and, in the case of unregistered land, the checking of the original deeds against the photocopies (or abstract) provided. Where, however, title was not deduced and investigated before exchange, the seller will deduce title on (or immediately after) exchange and the buyer will then investigate the title, raising requisitions in relation to any matters that are not clear or not satisfactory, in the same way as would have been done prior to exchange (but without the ability to alter the contract where necessary to reflect matters revealed by investigation of the title).
This section deals with those types of insurance that may be required to deal with defects in title, restrictive covenants and similar matters. There is a separate section dealing with insurance of the property itself.

Common insurance policies

It is potentially possible to insure against any contingency, so long as the insured has an appropriate interest in the item to be covered by insurance, except where the proposed insurance is contrary to public policy. However, there are certain matters relating to a property which are commonly covered by insurance, and these include:

- third party rights affecting the property;
- lack of necessary rights required for the benefit of the property;
- insolvency of a previous owner of the property (where there has been a transaction by way of gift or at an undervalue and that previous owner has since become insolvent, so that there is a possibility that the transaction could be set aside);
- lack of title to the property (in particular where a registered title is not title absolute);
- flying freehold (where there is a separately owned freehold title above or below the property, or part of it, so that there may be problems with repair or rights of support);
- absence of planning permission or other consents for works previously carried out to the property;
- restrictive covenants affecting the property;
- deeds or documents affecting the property which cannot be produced;
- absence of an official local authority search relating to the property, where contracts must be exchanged very quickly;
- the possibility that the property is liable for chancel repairs;
- the fact that the property has the benefit of planning permission but the period for a third party to challenge the grant of that planning permission by way of judicial review has not yet expired (this is most likely to arise in connection with a
Insurance (defective title)

conditional contract, where the condition relates to the obtaining of planning permission, but completion then takes place before the judicial review period has expired).

Who pays for the insurance policy

Where the need for insurance arises from a defect in the property, such as a missing deed or lack of title to the property, the buyer will expect the seller to obtain and pay for the insurance policy, although this will not always be agreed by the seller, particularly where the seller takes a different view in relation to the alleged defect. Where, however, insurance is required to cover the absence of an official local search, and the urgency to exchange is coming from the buyer, the buyer should expect to pay for his own insurance.

Points to bear in mind in connection with insurance

Level of cover

An insurance policy to cover one of the matters listed above is likely to be a single premium policy, which will benefit not only the buyer and his mortgagee but also subsequent owners of the property and their mortgagees. However, the level of cover is likely to be that which is considered appropriate at the time of the buyer’s purchase, and this may become inadequate over the years as the value of the property increases. This is obviously not a problem in the case of a type of insurance policy that, by its nature, will last only for a short period of time, such as where the property benefits from a planning permission that may be the subject of a judicial review challenge. Once the judicial review challenge period (three months at the most) has expired, the problem will no longer apply. However, in the case of a restrictive covenant, cover will be required for many years to come. Accordingly, it may be necessary for a subsequent owner of the property to obtain a further insurance policy so that the level of cover can be increased.

Nature of an insurance policy

It should not be forgotten that an insurance policy will normally cover the diminution in value of the property if the defect or other matter
Insurance (defective title)

which has been insured against materialises or is enforced - it cannot remove the defect. This may seem obvious, but for this reason, it may not always be appropriate to obtain insurance cover, particularly where the consequences of the defect or other matter are not solely financial in nature.

For example, there is no problem for the buyer in covering a possible chancel repairs liability by insurance, as any enforcement of the liability will simply result in money being due, which the policy will provide. However, where the defect or other matter insured against may adversely affect enjoyment of the property, money alone may not solve the buyer's problem. A third party right to cross the property, for example, may impact severely on the buyer's privacy and enjoyment of the property, particularly in the case of a residential property occupied by the buyer, and compensation for the reduction in value of the property may not be sufficient. In such a case, the buyer will need to consider the likelihood of the defect materialising or being enforced, as well as the availability of insurance cover.

Investigating defects that may be insured against

It should be remembered that excessive investigation of defects and other matters that may be insured against may make insurance cover unavailable. For example, insurers will normally be prepared to insure against old restrictive covenants affecting a property, subject to being provided with all the necessary information including, in the case of a development situation, a copy of the planning permission permitting the user of the property which breaches the restrictive covenants and details of any objections raised to the grant of that planning permission. Where, however, the seller or the buyer has actually approached third parties who may be entitled to the benefit of the restrictive covenants, the insurers may no longer be prepared to provide insurance cover, particularly where those entitled to the benefit of the restrictive covenants have become apparent and those third parties have become aware of their rights. The obtaining of copies of registered titles from the Land Registry may assist in finding out more about those who may be entitled to the benefit of restrictive covenants, but matters should normally not be taken further if insurance cover is to be sought.
Practical Conveyancing.co.uk 26 Searches & Enquiries

Leasehold Sales

Obtaining a defective title indemnity policy

A very large number of insurance companies provide defective title indemnity policies, including First Title Insurance plc, Royal and SunAlliance Insurance plc and Stewart Title. Alternatively, having regard to the Insurance Mediation Directive, solicitors may prefer to arrange such insurance policies through a broker.

There are also web-based services that provide defective title indemnity policies on-line, including Titlesolv.com.

The Law Society has set up a dedicated quotation system for the provision of defective title insurance through Countryside Legal Indemnities.

In the United States, it is not uncommon to insure against title defects as an alternative to carrying out lengthy (and expensive) legal due diligence on title, in order to make property a more liquid asset. In England and Wales, it is normal to insure against a particular defect which has come to light as part of the normal due diligence process, as referred to above. However, First Title [link to www.first-title.co.uk], in addition to providing defective title indemnity insurance, also provides “Portfolio Title Insurance”, in cases such as corporate acquisitions where the property assets are of secondary importance.

INFORMATION POINT

Insurance Mediation Directive Since 14 January 2005, the Insurance Mediation Directive has imposed additional duties on solicitors and other intermediaries who arrange insurance on behalf of third parties, which may apply to the arrangement of, and advice in connection with, defective title indemnity policies.

PRACTICE POINT
Where the property being purchased is leasehold, that is the buyer is to take an assignment of an existing lease, a number of additional considerations arise, of which the most significant are set out below.

Title

There are two separate aspects of the title, namely the seller's title to the leasehold property and his landlord's title to the reversion immediately expectant upon the determination of the lease (and if this reversionary title is not also the freehold interest in the property, the superior reversionary title(s) may also be relevant).

Where the leasehold title is registered with title absolute, deduction and investigation of title will be identical to that in relation to a freehold property, except that in addition to the entries on the registers of title, the lease itself (together with any documents supplemental to it, such as deeds of variation, licences to assign, licences for alterations, etc.) will form part of the title. There is no need to investigate any superior title – the fact that the property is registered with leasehold title absolute means that the landlord's title (and that of any superior landlord) has been checked and is guaranteed by the Land Registry, and any relevant entries on the registers of the superior title(s) will be set out in the registers of the leasehold title.

Where, however, the leasehold title is registered with good leasehold title, the buyer, although able to rely on the ownership of the leasehold property by the person registered as proprietor of the property at the Land Registry, cannot rely on the title to the immediate or, if relevant, any more distant reversion. Accordingly, the buyer will want to see title deduced to the immediate reversion and, if that is not the freehold interest in the property, to any superior reversions up to and including the freehold reversion, in order to ensure that the lease was properly granted by the person entitled to grant it and also in order to find out what matters affect the property (such as restrictive covenants, easements, etc.) since these will be binding on the buyer even though they are not noted on the leasehold title to the property.

Where the leasehold title is unregistered, the buyer will need to investigate both the seller's title to the lease (which will normally be
very straight-forward, consisting simply of the lease itself, together with any assignments, licences to assign and notices of assignment) and the title to the reversion (as in a case where the leasehold title is registered with good leasehold title).

Where the leasehold title is unregistered, but will be subject to compulsory registration on completion of the assignment to the buyer, the buyer should ensure that he will be able to comply with...
any requirements of the Land Registry on first registration. In particular, the Land Registry have stringent requirements in relation to plans of the property, and if the original lease plan does not satisfy those requirements, it may need to be substituted, which will require the co-operation of the landlord as well as the seller and the buyer.

Landlord’s Consent

If the lease contains a covenant prohibiting assignment, or requiring the landlord’s consent to be obtained before an assignment takes place, the seller will need to obtain the landlord’s consent before assigning to the buyer. If he does not, the assignment of the lease will (subject to what is said below in relation to the landlord unreasonably withholding consent to assign) be a breach of a tenant’s covenant, entitling the landlord to forfeit the lease, and accordingly it will be very much in the interests of the buyer that the necessary consent is obtained.

It is normal in a commercial lease for the landlord’s consent to be required to any assignment of the lease, except in a very long lease. However, it is relatively unusual in a long residential lease for the landlord’s consent to be required to assign the lease, except in the last few years of the term. In each case, the lease will need to be carefully checked and any specific obligations relating to assignment and consent for assignment carefully complied with.

Where the landlord’s consent is required for an assignment of the lease, but such consent must not be unreasonably withheld, the parties may consider proceeding with the assignment notwithstanding that the landlord’s consent has not been obtained. If the withholding of consent was indeed unreasonable, there will be no breach of the tenant’s covenant in relation to assignment, and accordingly the landlord will be unable to forfeit the lease. However, there is generally at least some uncertainty as to whether or not the landlord is acting unreasonably in withholding consent. For this reason, it would be most unwise for a buyer to proceed with the taking of the assignment without the landlord’s consent being given (or a declaration being made by the court that the landlord is indeed acting unreasonably), particularly where he is required to pay a premium for the assignment, since he runs the risk of the lease being forfeited (in which case he will not be able to recover his premium).
Occupiers - vacant possession

The conditions of sale normally provide for the seller to apply for landlord’s consent and for either party to be able to rescind the contract if the consent is not forthcoming after a specified period. This is generally acceptable in the context of a commercial lease, but when dealing with a residential lease where landlord’s consent is required for the assignment, it is generally preferable for exchange of contracts to be delayed until confirmation is forthcoming that the landlord is going to consent to the proposed assignment.

Occupiers - vacant possession

The contract may provide for the property to be sold with vacant possession. In that case, not only the seller (and his family, in the case of a residential sale) but also any existing tenants or other occupiers will need to vacate the property on or before completion. The seller should not agree to sell with vacant possession unless he is able to require any existing tenants or other occupiers to vacate the property by completion.

PRACTICE POINT

Bear in mind that having the legal right to require a party to vacate is not the same thing as obtaining actual vacant possession of the property. The seller may wish to allow an additional period after an occupier is legally required to vacate the property, in order for actual vacant possession to be obtained, otherwise the seller may be in breach of his obligation to provide vacant possession on completion.

In the case of a residential property, it is normal for adult residents of the property (other than the seller) to sign a release of rights or to join in the contract. Such persons may merely be in actual occupation of the property and accordingly have overriding interests; alternatively, they may have contributed to the purchase of the property, whether directly or indirectly, and accordingly they may have an equitable interest in the property. In any event, the buyer will wish to ascertain the position and to have the benefit of a release of rights from, or a direct contractual relationship with, such persons.
Both the [Standard Conditions of Sale](#) and the [Standard Commercial Property Conditions](#) provide two alternatives – either for the property to be sold with vacant possession, or for the property to be sold subject to the leases or tenancies listed in the contract. If the property is sold subject to leases, the contract will need to contain provisions relating to the management of the property [between exchange of contracts and completion](#). The buyer will wish to investigate the terms of each of the leases, and will raise specific enquiries in relation to them.

### Special Circumstances

#### Particular types of seller

Particular requirements and restrictions apply to the sale of property by particular types of seller. Some of the more common of these are:

- **Charities**

  Except in the case of an exempt charity, no transfer of the charity’s property can be made without an order of the court or of the Charity Commissioners unless the requirements of the [Charities Act 1993](#), in particular those set out in Sections 37-40, are satisfied. Basically, these require a surveyor’s report, the advertising of the property, a decision by the trustees that the terms of the sale are the best that can be obtained, and the incorporation of prescribed words in both the contract and the transfer.

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**PRACTICE POINT**

Where the consent of the Charity Commissioners is required, as it will be in the case of a sale by a non-exempt charity which is not on the best possible terms, contracts can be exchanged with completion being conditional upon the consent being obtained.
Where the charity is exempt, wording to this effect should be inserted in the contract and the transfer. So long as the requisite wording is included in the transfer, the buyer may rely on the accuracy of the prescribed wording and on a certificate in the transfer that the trustees have the power to enter into the transfer and have complied with Section 36 of the Charities Act 1993.

**PRACTICE POINTS**

Where land is vested in the Official Custodian for Charities, the sale contract will be entered into by the Trustees of the Charity, who will agree to procure execution of the transfer by the Official Custodian. The transfer will then be executed by the Trustees in the name, and on behalf, of the Official Custodian. All the trustees will need to sign the transfer unless two or more of them have been authorised to do so under Section 82 of the Charities Act 1993.

It should be noted that the protection for the buyer where the prescribed wording (confirming the trustees’ powers and compliance with Section 36 of the Charities Act 1993) is inserted only applies to the transfer and not the contract, even if the prescribed wording is also inserted in the contract - see Bayoumi v. Women’s Total Abstinence Educational Union Limited [2003] EWCA Civ 1548. If the buyer is to be able to rely on the contract being enforceable against the charity, therefore, he will need to check specifically that the Charities Act requirements have been complied with.

- **Companies**

**Regulated by the Companies Acts** - The powers of a company incorporated under the Companies Acts are governed by its memorandum and articles of association (the power to own and deal with land will normally be included in the objects clause of the memorandum of association). Normally these will require that a director and the secretary, or two directors, execute any document which takes effect as a deed.
Other UK companies - A company incorporated by Royal Charter effectively has the same powers as an individual. Where property is owned by a company incorporated by a UK statute, its powers will depend on the provisions of the statute.

Foreign - A buyer of property from a foreign company will need to check the powers of that company, and a foreign lawyer’s opinion will also be required, confirming that the company has the power to hold and deal in land (although the Land Registry will have checked that the company has the power to own land before registering it as proprietor of the property), that the company is not insolvent, and that the documentation has been properly executed on behalf of the company.

• Bankrupts

When a person becomes bankrupt, his property passes to his trustee in bankruptcy, with whom the buyer will deal. If the seller becomes bankrupt between exchange of contracts and completion, the trustee in bankruptcy will take over the seller’s obligations and rights under the contract, unless he disclaims the contract (which he cannot do without also disclaiming the property itself).

• Mortgagees

A mortgagee will have the power to sell the mortgaged property provided that he has a power of sale (which is implied in every mortgage made by deed unless specifically excluded) and that power has arisen and become exercisable. The buyer should therefore check that the mortgagee has a power of sale (which will be the case in respect of any registered chargee in relation to registered land, unless there is an entry on the register to the contrary), that the power of sale has arisen (this occurs on the legal date for redemption of the mortgage, normally specifically stated in the mortgage as a date shortly after the date of the mortgage) and that it is exercisable (this will occur when notice requiring repayment of the loan has been served and the repayment has not been made for three months, or when interest under the mortgage is due but unpaid for two months, or when some other provision in the mortgage has been breached). However, so long as the mortgagee has a power of sale and this has arisen, the buyer will acquire good title from
the mortgagee even if the power of sale has not become exercisable.

• Trustees

Where the property is held on a trust of land, any transfer of the land must be made by at least two trustees or a trust corporation, in order that the rights of the beneficiaries under the trust (i.e. the owners of the beneficial interest in the property) can be overreached. Where only one trustee (not being a trust corporation) remains, following the death or resignation of the other(s), a second trustee must be appointed in order to receive the proceeds of sale before a sale can proceed. The trustees have a duty to consult with adult beneficiaries – however, the buyer does not need to check that this duty has been complied with.

• Co-owners

Co-owners hold the property for themselves on a trust of land. Where the property was expressly held on a trust for sale before 1997, this will have been converted into a trust of land. It is still possible to create an express trust for sale, but this must be done expressly.

• Personal representatives

Personal representatives have the same powers as those of trustees of land, but can only exercise those powers during the administration. The buyer should ensure that the contract is entered into by all the personal representatives to whom probate of the deceased’s will was granted, as their powers are joint – a sole personal representative can, however, act alone (unlike in the case of trustees).

However, it should be noted that the Land Registration Act 2002 provides that the registered proprietor of land has power to make any disposition of any kind permitted by the general law in relation to the registered estate. Any fetter on these powers must be noted on the register as a restriction, in which case the buyer would need to ensure compliance with any such restriction. Accordingly, if no restriction is noted on the register, a buyer can deal with any of the above persons on the assumption that their powers are unrestricted.
Special Circumstances

Properties falling within Part I of the Landlord and Tenant Act 1987

Part I of the Landlord and Tenant Act 1987, as amended by the Housing Act 1996, grants rights of first refusal to the tenants of certain property where their landlord wishes to dispose of his reversionary interest in the property. The Act applies where:

• The property consists of the whole or part of a building;
• The building contains two or more flats which are let to qualifying tenants (a qualifying tenant is, basically, any residential tenant other than an assured or assured shorthold tenant, except where that tenant has leases of 3 or more flats in the building), and those flats exceed 50% of the total flats in the building;
• (Where the building contains both residential and commercial use) 50% or more of the internal floor area of the building is used for residential purposes;
• The landlord is the immediate landlord of the qualifying tenants (or the superior landlord, if the intermediate landlord is himself a tenant under a tenancy for less than 7 years or a tenancy terminable by his landlord within the first 7 years of the term) and is not a resident landlord (except in certain circumstances) nor a public body which is exempt from the Act.

The Act requires the landlord to serve notice on the qualifying tenants before disposing (or entering into a contract to dispose) of the property. If the requisite majority of the qualifying tenants respond positively to the notices, and satisfy the other requirements of the Act, then the landlord will be unable to sell the property for a specified period except to the tenants’ nominated purchaser.

It is a criminal offence for the landlord to fail to comply with his obligations under the 1987 Act. Further, any buyer from the landlord may be required to transfer the property to the tenants, if the landlord did not comply with his obligations under the 1987 Act.