

Commentary

There is usually a considerable commercial market in the purchase and sale of properties that are subject to the occupation of lessees with some form of statutory security of tenure. This is particularly so in relation to property occupied by business tenants, but many of the special factors required in transactions involving commercial property will apply as well to properties sold with residential tenants. In essence, in addition to the matters of importance to a domestic seller or buyer, the terms of the letting will be of material importance in relation to the title, contract enquiries, and requisitions. You have been asked to make suggestions about what extra enquiries are required and so you must concentrate on that area. You have received a memo and so you should reply in the same style. Try to show a structure to your answer by using headings and structured paragraphs. Keep to relevant information only. An answer of this type could fool the weaker candidate into writing all they know about enquiries before contract. This is not going to do anything other than annoy the marker. Try to remain relevant to the details of the question at all times. So do not write about enquiries of the local authority as they form part of the local authority search and you are not being asked to discuss searches.

Suggested answer

OFFICE EMAIL

From: Trainee solicitor
To: Training partner

Re Bricks With Benefit (Property) Investments Limited - 5/5a David's Point Scunthorpe

I refer to your recent email and set out below my suggestions and comments about additional enquiries regarding the above property. I also comment on enquiry forms that relate specifically to commercial properties.

1. Additional enquiries generally

In addition to the standard enquiries that need to be made in this conveyancing transaction, it is critical that enquiries are made with regard to the two lessees in occupation. We also need to enquire about whether their rents are paid in advance or in arrears. It is therefore appropriate to request details of previous rent reviews along with copies of rent review memoranda recording the previous changes in rent. Service charge accounts should be requested for the last three years, with details of sinking funds and arrears that may exist in respect of these payments. Details should be requested of any permitted changes of use as these too could materially affect the future, or indeed current, rental potential. If the property is subject to VAT, details of the VAT position will need to be investigated along with accounts of VAT payments made by lessees or details of arrears. Insurance details need to be

investigated, particularly if the lessor insures the building and either or both lessees repay part of the premium. The seller should also be asked to consider detailed environmental and contamination enquiries about the property and the locality.

2. Additional enquiries – commercial

In addition to the standard enquiries that are always raised, it is appropriate to make further enquiries in relation to commercial lettings in so far as they may be affected or regulated by legislation. In essence, the buyer will want to know how far, if at all, the ground lease is influenced by Pt II of the Landlord and Tenant Act 1954. The buyer will want to know if there has been a court application and, if so, will want to see what order the court made. If the lease has been recently renewed under the terms of the Act, the buyer will want details to ascertain how the length of the term eventually granted was settled, along with the other terms of the lease. Perhaps of more consequence would be to see the basis upon which the rental was finally settled. Valuers' reports would be of use and copies should be requested. The buyer will also want to know if the lessor originally sought to oppose the grant of the lease and, if so, why. The ground for possession would be of material interest to the buyer, especially if it related to a breach of covenant or for arrears of rent. In the circumstances, detailed enquiries should be directed to the seller's practitioner seeking as much information as possible about the circumstances of any recent statutory renewal. Finally, if the lease was granted after 1 January 1996, on assignment an Authorised Guarantee Agreement may have been completed. Enquiries should be made as to the terms of this agreement.

Energy performance certificates, (EPC), and display energy certificates will be required pursuant to the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI 2007/991). These certificates are required for almost all commercial properties from 1 October 2008, the exception being display energy certificates for all public buildings with a floor area of less than 1000 square metres. Sellers need to be aware that r.5 stipulates that where a building is to be sold (or indeed rented to a lessee), a "relevant person" must make available at no cost to the prospective buyer or lessee a valid energy performance certificate. (There is also an obligation on a lessee to produce an EPC to a prospective assignee when intending to assign a lease.) The EPC must be made available before the contract for sale is made (or the assignment completed). Local Trading Standards Officers have the responsibility for the enforcement of this regime. The penalty for non-production is a fine of up to £5,000. Consequently enquiries need to be raised to see if these requirements apply to this property and if so whether the provisions have been complied with by the seller.

3. New enquiries

There are some standard enquiries for commercial properties. The Commercial Property Standard Enquiries (CPSEs) are a set of documents that have been drafted

by members of the London Property Support Lawyers Group under the sponsorship of the British Property Federation (BPF). We can use these documents quite freely and without charge, subject to us identifying them as being part of the suite of documents comprising the CPSEs. CPSE.1 is designed to cover all commercial property transactions and will (together with any additional enquiries relevant to the particular transaction) be sufficient if the transaction deals only with a freehold sold with vacant possession. Consequently the next form will be of more relevance to our client. It is CPSE.2 and should be used where the property to be purchased is to be sold subject to existing tenancies

4. Additional enquiries – residential

In addition to the standard enquiries, it is appropriate to make further enquiries in relation to residential lettings in so far as they may be affected or regulated by legislation. The buyer will want to enquire as to the status of the tenant in occupation of the first and second floors, and in particular whether the tenant can claim any form of statutory protection providing any element of security of tenure. After 28 February 1997, s 96 of the Housing Act 1996 makes all subsequent residential tenancies assured shorthold tenancies, and they are so without the need to comply with any particular formalities such as formal notices etc. This is not retrospective and only applies to new tenancies granted after this date. Accordingly, the date of creation of the tenancy is a crucial item of information which needs to be disclosed to the buyer and should be elicited through a specific preliminary enquiry. This is all the more so as different forms of security of tenure will apply to tenancies depending upon when they were created. If the tenancy arose prior to 28 November 1980 the tenancy will be covered by the Rent Acts and will be a protected tenancy with full security of tenure. If the tenancy commenced after this date but before 15 January 1989, it could either be a protected tenancy under the Rent Acts, or it might also be a protected shorthold where there is limited security with the lessor being entitled to a mandatory ground for possession. If the tenancy arose after 15 January 1989 the Housing Act 1988 applies, and the tenancy will usually be an assured tenancy with full security or an assured tenancy again with limited security. This is not a complete listing as this is an area of great complexity. Please let me know if you require anything further on this particular point.

Finally, further enquiries should be made as to the statutory control of the rents payable by the residential tenant. Tenancies granted after 28 February 1997 will have minimal control as a consequence of the Housing Act 1996. Tenants in these circumstances can merely, and only during the first six months of their tenancy, refer the rent to a rent assessment committee for scrutiny. Tenancies created previously will have differing elements of statutory control of rents depending on when the tenancy was first created.

Please let me know if there is anything more I can do to assist you with this transaction.

Trainee solicitor: time engaged 55 minutes.