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A PRE-CONTRACT SEARCHES

4.1 WHY DO SEARCHES?

Caveat emptor (let the buyer beware) remains a cornerstone of conveyancing in England and Wales. As such a buyer will need to find out as much as possible about the subject property before contracts are exchanged. The simple yet compelling reason for this is that the buyer must take the property in whatever condition it is in, at the point when there is a binding contract for the purchase. The law imposes a clear obligation upon the buyer to find out as much about the property in that the common law recognises that the seller has only a limited duty of disclosure. (However, see *Rignall Developments Ltd v Halil* [1988] Ch 190, in which it was made clear that there is a duty of disclosure if a seller is aware of a subsisting local land charge.) Because of this a prudent buyer needs to discover as much as possible about the property being purchased. Usually, this will be by both pre-contract searches and preliminary enquiries. The buyer must carry out all appropriate searches and enquiries before entering into a binding contract to purchase the subject property.

However, Parliament has deemed that a buyer has notice of encumbrances that are registered under various statutes. For example, many matters of major concern to an owner of property involve the local authority. These matters will be discussed later in this chapter but it is important to realise that they will bind a buyer whether or not a search is carried out. This is true for all searches normally made before contracts are exchanged and is of course the reason for making such searches before a binding contract is in place. Accordingly, it is essential that a buyer makes all necessary searches and not just the usual search with the local authority.

Practitioners must bear in mind that if they fail to carry out every appropriate search they will be liable in negligence for any loss suffered by their client as a result of their negligent conveyancing. The moral of the story for the practitioner is to carry out as many searches as you can, even if some of them seem obscure or unlikely to apply. The point is that any one of them might just throw up an onerous registration that could be of material consequence to the buyer (*Cooper v Stephenson* (1852) Cox M & H 627). Surely it is better from a practical point of view to err on the side of caution by making searches that may at first seem inappropriate. It might just mean that an outlay of £10–20 on an obscure search could avoid a negligence action costing thousands of pounds.

Also in this chapter there is a discussion of the need for a physical search or inspection of the subject property prior to exchange of contracts.

4.2 WHAT SEARCHES SHOULD YOU DO AND WHEN?

The following searches will be considered, all of which are required prior to an exchange of contracts:

- (a) Local authority search and enquiries (see 4.2.1).
- (b) Commons registration search (see 4.2.2).
- (c) Coal mining search (see 4.2.3).
- (d) Index map search (see 4.2.4).
- (e) Land charges search (see 4.2.5).
- (f) Company search (see 4.2.6).
- (g) Other searches dependent upon the location of the property (see 4.2.7).
- (h) Physical search or inspection of the property. (see 4.2.8).

4.2.1 Local authority search and enquiries

No conveyance or remortgage should proceed without a search of the local land charges registry along with enquiries of the local authority. Such is the importance of these two that the procedure should come up automatically at the start of any new purchase. A local search should be made by every purchaser before exchange of contracts. It will disclose public charges, many of which are not matters of title and so not within the seller's duty of disclosure (see 3.4 for further details). These charges will be registered by the local authority whose obligation it is to record them. Standard Condition 3 of the Standard Conditions of Sale makes a sale subject to local land charges. Accordingly the buyer must search to make sure full details are obtained from the council of all relevant information affecting the property concerned. The search is made at the local authority accompanied by a plan if the land is not easily identifiable from the postal address. The search also directs important enquiries to the local authority concerned with subjects within their control such as road schemes, notices or planning matters. The search and enquiries are usually sent by post but if the matter is urgent you can carry out a personal search of the local land charges register. Unfortunately not all councils will answer all the enquiries on a personal basis. If a complete set of answers is not going to be available, a personal search should be avoided because there will be no official search result upon which a buyer can seek to rely. (For further details see 4.2.1.2.) Detailed consideration will therefore be given to the two elements of the process, namely, a search of the local land charges register and then enquiries to be made of the local authority.

4.2.1.1 The local land charges register

This search is of such consequence and importance that it must be made in every single conveyancing transaction both large and small, commercial or domestic. Why should this be? Essentially this is because of the effect of statute. The Local Land Charges Act 1975 requires each district, metropolitan borough and London borough

council to maintain a register of local land charges being matters or burdens registered with them and disclosed on the public registers. From a practical point of view the importance of the register to the practitioner is that these matters or burdens are registrable within the local land charges register and nowhere else. Furthermore, an owner of property affected by such a registration is deemed to have full knowledge of it. Accordingly, a buyer must make a local land charges search to be fully in the picture about these matters or burdens before exchanging contracts.

Before considering the various parts of the register two points of confusion should be clarified. While local land charges registers were originally established by the Land Charges Act 1925 practitioners must not confuse this search result with the land charges search, the details of which will be examined at 4.2.5 below. Land charges searches of this nature will also feature later when consideration is given to pre-completion searches. Secondly, practitioners will habitually refer to a local land charges search result, but this will also include replies to standard or 'additional' enquiries included with the form of local land charges search. These enquiries are answered by the local authority when issuing the result of the search in the local land charges registry. Indeed in many search results there are no entries to disclose in the register but there are fundamentally important answers to enquiries that will be of major concern to a buyer. These will be considered later in this chapter at 4.2.1.2. To begin with, we will examine the local land charges register.

So what are these important matters or burdens in the register? They are identifiable from and set out in the search within 12 constituent parts of the register. They are generally of a financial nature or relate to the use of the land. The 12 parts are:

1. General financial charges.
2. Specific financial charges.
3. Planning charges.
4. Miscellaneous charges.
5. Fenland ways maintenance charges.
6. Land compensation charges.
7. New towns charges.
8. Civil aviation charges.
9. Open-cast coal mining charges.
10. Listed buildings charges.
11. Light obstruction notices.
12. Drainage of land scheme charges.

As will be immediately apparent from the list some parts of the register are more commonly encountered than others. Indeed in some ways, because of the different types of charges, results affecting rural properties will be different from urban properties.

The distinction between registered and unregistered land is irrelevant for the local land charges register; they apply across the board. The local authority can enforce all

these charges save for part 11, which remains the concern of the individuals concerned, and parts 8 and 9, which are predictably enforceable by the relevant statutory authority.

The list of the 12 parts highlights the kind of information that will be disclosed in the search result. This includes various financial charges that will affect the property, planning consents concerning the property and compulsory purchase orders as well as tree preservation orders. Additionally other registrations of consequence will be revealed such as whether or not the property is within a conservation area or smoke control zone. In the case of this last kind of restriction the client will need to be advised of the restrictive nature of the registration and how it might affect the property and its neighbourhood.

Once the search result is issued, it should be appreciated that there is no priority period for the result or indeed any other form of protection given by the search! Clients should be made aware of the fact that if an adverse entry is made the day after the search result is issued there is absolutely no protection available. In effect, all the search result gives is an indication of the entries in the register at the time of the issue of the search result and nothing else. However, s. 4 of the Local Land Charges Act 1975 does provide a limited form of protection. Should an error or omission be made in the search result there are limited rights to claim compensation. An entry in the register remains lawful notwithstanding the error or omission and an owner of the subject property will still be subject to it. To address this difficulty, search validation schemes have arisen. These exist to offer protection to a buyer so that on payment of a premium, insurance cover will be available against onerous entries being made after the date of the search result and before exchange. The compensation available is for the loss in value as a result of the registration. Because buyers prefer a 'clean' situation, that is to say where there is a clear search result rather than the possibility of compensation, these schemes have not been particularly successful.

For the busy conveyancing practitioner the following entries should in particular raise alarm bells and require further action. However, this is not an exhaustive list and all entries disclosed in the search result should be read carefully and considered before the result is put away in the client's file.

(a) *Compulsory purchase orders.* This speaks for itself. The buyer cannot proceed as the local authority intend to compulsorily purchase the property.

(b) *Conservation areas.* This topic is considered further at 4.2.1.2 below in the context of question 12 raised in the enquiries directed to the local authority.

(c) *Financial charges.* These are of major consequence as a buyer will not want to proceed with a purchase where there is money due to the local authority. If the purchase does proceed, either the seller must contract to pay off the council or an allowance should be made in the contract with the buyer then taking over the liability. A typical financial charge is one arising out of the local authority having made up the road abutting the property and where there are outstanding moneys payable by the owner for this road-making.

(d) *Listed building registration.* Buildings can be deemed to be of special historical or architectural merit. If one falls into this category the Planning (Listed

Buildings and Conservation Areas) Act 1990 controls the use and alteration of the property. These controls can be significant and a buyer must be informed of these details from the search result.

(e) *Tree preservation orders.* Buyers must be informed of such an order as it prohibits the felling or lopping of specific trees without the permission of the local authority. Failure to obtain consent may lead to a heavy fine.

(f) *Various planning entries.* These include planning consents containing conditions. A pitfall for practitioners here can be that on seeing an appropriate consent the practitioner assumes that the consent is acceptable without checking the conditions. The trap is that the conditions could preclude the buyer from benefiting from the consent. Always check conditions attaching to planning consents.

The local land charges search is made by way of a standard requisition Form LLC1 through the post, and a prescribed fee will be payable to the local authority. The fee now varies almost annually. Unless the property is clearly identifiable by its postal description, a scale plan of the property should accompany the search request. In effect this means that long-established urban properties will not require a plan but new ones and rural properties almost certainly will. The search result may take several weeks to come back. At the end of the 80s when the property market was at its most frenetic, some results in London were taking up to 12 weeks to be issued. However, presently, three to four weeks seems to be the norm. Accordingly a practitioner should consider dispatching the search request at the earliest opportunity to ensure that delay to the conveyancing transaction is not occasioned.

It is possible to make a personal search of the register although not all authorities make this easy to do. The difficulty is not so much access but that there is no guarantee of the accuracy of the result as of course it has not been officially issued by the local authority. Because of this compensation under s. 10 of the Local Land Charges Act 1975 is unlikely to be available. Personal searches should only be made as a last resort when there is extreme pressure of time or when contracts are to be exchanged subject to searches with the possibility of a full and proper search result being available after exchange and before completion. A back-up form of insurance should also be considered in these circumstances and the client should of course be informed in writing of the risks attaching to a personal search. If a practitioner is also instructed by a lending institution as well as the buyer then, unless that institution specifically authorises the practitioner to proceed on the basis of a personal search result, the transaction should not proceed without there being an official search result to hand.

4.2.1.2 *Enquiries of the local authority*

There are 16 pre-printed standard enquiries on the Law Society's Form Con. 29, 'Enquiries of local authority' (see appendix 6), including questions about critical matters such as road schemes, outstanding notices, compulsory purchase, areas designated for slum clearance and planning applications and consents.

Form Con. 29 should always accompany the local land charge search request. The questions in themselves are straightforward but the problem for the practitioner

arises in the manner in which the local authorities answer them. Sadly, only a few actually answer the questions opposite an actual reprint of the question. In the main all that the answers represent is a rather confusing list of yes's and no's adjacent to the number of the question concerned. This therefore means that practitioners must either memorise the questions or, more practically, have a reminder list to hand when looking at the usually dislocated answers. In time a 'feel' through familiarity will be developed for the more important sections and alarm bells will ring if the answer is problematic. However, caution should be exercised as familiarity with the Form may induce a cursory look at the answers which might result in an important answer being overlooked.

To assist the busy practitioner in an understanding of the varying importance of the questions, they are now considered individually.

Part 1 Standard enquiries, applicable in every case.

Question 1 Development plans provisions

Look out for an indication of the primary use of the locality. If this is at odds with the particular use of the subject property, further investigations may be warranted. The answers given in this section will also highlight any impending changes proposed to the plan. A subsequent perusal of these proposals will then indicate whether or not the plans adversely affect the property to be purchased.

Question 2 Drainage

This will reveal if the subject property drains into a public or private sewer. It will also highlight the existence or absence of an agreement to adopt the sewers, under what was s. 18 of the Public Health Act 1936 and is now s. 104 of the Water Industry Act 1991, by the local water authority (see chapter 11). Practitioners should be aware that surface water drainage is a reference to rain water while foul drainage is what it appears; namely the drainage of waste matter. Similarly, a drain is understood to connect a property to a sewer while a sewer serves many properties and connects to many drains and ultimately to a sewage works. An understanding of these differences helps when considering replies given by the local authority. Where there is no connection for foul drainage it is important for the practitioner to check if there is a cesspool or septic tank at the property. Furthermore, if there is a septic tank used by the property to be shared with others, then the practitioner must check in the deeds to ensure there are rights of drainage, access for repairs etc. in relation to that septic tank.

Recently some local authorities have abdicated the responsibility for answering this enquiry and now refer enquiries about water supplies and drainage to the local water company. Where this is the case a letter must be sent off to the local water company with a fee of £23.50 (variable), requesting details of the water and drainage supplies for the subject property. For example, if a local authority search is sent to a council in north London, such as the London Borough of Camden, the water and drainage questions need to be directed in letter Format to Thames Water plc, the local water company. To avoid delay the letter to the water company should be sent off at the same time as the local authority search.

Question 3 Maintenance of roads etc.

This is an important section for the client in that it will say whether or not the local authority have adopted the road (i.e., will now maintain it at their expense), to which the subject property abuts, or, if not, whether there is or is likely to be a road-making agreement and bond. A road making agreement will usually be between a developer and the local authority setting out the terms upon which the roads in a new development are to be handled. Again this is of importance when the client is buying a property on a new estate (please see chapter 11 in relation to the particular concerns you need to be aware of when you are involved in a conveyance within a new estate). The practitioner will want to reassure the client that the road is maintained at the public expense or that it will be under the terms of a road-making agreement supported by an appropriate bond (Highways Act 1980, s. 38). The bond, a financial guarantee, is pertinent to ensure that no liability will fall on to the buyer to pay. If the property is not new but abuts an unadopted road, buyers should be made aware that if the local authority do decide to adopt it, the frontagers to the road could be liable for substantial road-making charges pursuant to s. 219 of the Highways Act 1980. (There can also be problems of access over such roads and rights of access must be carefully considered.)

Question 4 Road schemes

This is a critical enquiry and one to which great attention should be made. Answers will highlight road schemes within 200 metres of the property including alterations and improvements to existing roads as well as flyovers and underpasses. The question will also reveal proposals at the early stage of issue for public consultation. Clearly if there is a positive answer to any part of this enquiry, further details should be sought from the department concerned. Details of the department within the authority will be given in the answer. Exchange should be delayed until the buyer and any potential mortgagee have seen and accepted the road schemes in relation to the subject property. Wherever possible, plans of the road scheme should be obtained and shown to the buyer.

Question 5 Outstanding notices This enquiry is another example of a critically important question, particularly for buyers of commercial property. Answers here will disclose informal and formal notices issued by the council under the Public Health Acts, Housing Acts or Highways Acts. So, for example, if your client is buying a restaurant this is where you should look to see if the seller has got into difficulty with hygiene regulations. Optional enquiries 34 and 35 (see below) also deal with notices.

Question 6 Building regulations

This will reveal whether the council have authorised any proceedings in respect of any infringement of the building regulations of 1991. This is an important area to check when the client is buying a new or newly converted property. A buyer would not incur liability with the council as a consequence of the breach of these

regulations. However, proceedings of this nature would of course indicate that there were structural matters of concern to the council and therefore to the buyer.

Question 7 Planning applications and permissions

It is in this section that practitioners will be able to discover if the subject property is affected by any planning applications, permissions, listed building applications or permissions and any applications or permissions in respect of conservation area consents. These will all be of material consequence including conservation orders because they place very stringent restrictions on external alterations to properties affected by them.

Question 8 Notices under Planning Acts

This is another question of material importance that covers enforcement notices and stop notices. All such notices will be listed by the local authority and an answer to 8.3 will show if any that have been issued have been complied with to their satisfaction. Furthermore 8.4 will bring to light any other contravention of planning control. Where entries are disclosed, full details should be obtained from the planning authority to see how extensively the property might be affected.

Question 9 Directions restricting permitted development

This answer will reveal if the council have resolved to make a direction pursuant to art. 4 of the Town and Country Planning (General Permitted Development) Order 1995, which in effect deprives the owner of land of the right to permitted development in relation to the use classes defined within the Order. (For a further explanation of the nature and effect of the Town and Country (General Permitted Development) Order see 4.7.1.) Of course if an actual order has been made, it will be shown as an entry in the search result. If the council have decided to disallow permitted development rights of any particular class in the neighbourhood of the subject property then the buyer should be informed. The buyer can then consider if the restriction adversely affects the intended use of the subject property.

Question 10 Orders under Planning Acts

Answers here will disclose if the council have resolved to make orders revoking or modifying any planning consents or discontinuing an existing planning use. Of particular importance to residential buyers is 10.2, which will disclose if the subject property is going to be affected by a tree preservation order. If there is such an order, it would be prudent to advise the client to check with a surveyor to ensure that the tree does not and will not in the future adversely affect the property, either structurally or blocking light.

Question 11 Compensation for planning decisions

The answer to this enquiry will disclose what compensation has been paid by the council under s. 114 of the Town and Country Planning Act 1990 for planning decisions restricting development other than new development. Because

of provisions in the Planning and Compensation Act 1991, s. 114 has been repealed from 25 July 1991. Consequently the possible answers to this enquiry are greatly limited.

Question 12 Pre-registration conservation area

This will confirm if the subject property is affected by a conservation area not disclosed in the official certificate of search. This will cover all such areas that were designated before 31 August 1974. The reason for this is that after that date conservation areas became land charges and are disclosed in searches of the local land charges registry. However, the question will also ascertain if the property is in a recently declared but as yet unregistered conservation area. A buyer will want to know if the property is in a conservation area as there will, as a result, be limitations on development. Even minor alterations can be disallowed in a conservation area and consequently this information may be critical to a buyer intending to alter, demolish or improve the property. In the past, grants have been available to homeowners in conservation areas to enable them to support the conservation of the property or to put it back into the condition it may have been in originally (e.g., the removal of modern window shapes and the replacement of them with the original style of windows).

Question 13 Compulsory purchase

Other than disclosed on the official certificate of search this answer will disclose if the subject property is likely to be affected by a compulsory purchase order issued by the local authority. (It should be noted that this answer will not cover other authorities entitled to obtain such orders, e.g., the utility companies such as a water company. Where there could be another authority involved a direct enquiry should be made of that authority.) Both proposed and actual orders will be disclosed. Either way an adverse answer will normally deter a buyer from proceeding.

Question 14 Areas designated under the Housing Acts etc.

The answer here will show if the property is in an area for slum clearance. If it is, then no buyer should proceed, especially if the original intention was to live in the property! While compensation will be paid there really is no good reason why a buyer would want to purchase the right to negotiate a slum clearance sale to the council. The answer will also reveal if the property is affected by provisions of the Housing Acts such as a housing action area, renewal area or general improvement area. Accordingly this is another important answer that should always be checked carefully when dealing with residential property within urban areas in particular. This is particularly so as in these circumstances grants to improve properties can be available to property owners.

Question 15 Smoke control order

If in the answer to this question the council confirm that the property is affected by a smoke control order then the client must be made aware of the provision and be advised that only smokeless or 'authorised' fuels can be burnt at the property. It

should be noted that if any smoke is allowed out of a property in a smoke control zone then the occupier is liable to a fine in the magistrates' court.

Question 16 Railways, formerly contaminated land

Under s. 78 of the Environmental Protection Act 1990 the government was going to require local authorities to maintain a register of contaminated land. Since then there has been a change of mind and the provision is not in force. The council will therefore not be required to answer a question about contaminated land. This should be directed in another form to the seller whenever the buyer has any suspicions that the land has contained and/or still contains any hazardous substances. Alternatively the buyer's surveyor should be asked to make all necessary checks and tests where this is a concern for the buyer, and a full environmental survey and soil test could be required. There are questions in part II of the enquiry Form directed to the local authority that cover much of the area relating to pollution.

Question 16 now asks about the possible construction of a railway within 200 metres of the property. The council are required to give details of schemes notified to them as well as their own schemes. The reply must include details of light railways and monorails as well as ordinary railway proposals. Plainly, if a reply indicates that there is a railway proposed then a prudent purchaser should seek a detailed plan of the proposed route to see how the property might be affected by the line of the railway. All schemes should be listed where the centre line of the railway is within 200 metres of the subject property. If your client intends to purchase a property close to a line within the London Underground system then you can request details from the Operational Property Manager, Townsend House, Graycoat Place, London SW1. A plan showing the location of the subject property will be required.

Part II Optional enquiries, answered only if selected

This part of Form Con. 29 includes questions 17 to 38 and will only be answered by the local authority if specifically selected on the Form and an additional fee is paid. The best guidance for practitioners is that they should consider the necessity for any of these additional enquiries in the context of the particular circumstances of each purchase. For example, if a rented property is being purchased it would be sensible to select question 25 dealing with houses in multiple occupation. Similarly, if the property is in the countryside, it would be sensible to select question 18, which covers public paths or byways over or adjacent to the property.

In relation to potentially contaminated land and the effects of pollution, question 34 asks for information about environmental and pollution notices. Moreover question 33 asks for details of all entries in the council's register kept pursuant to s. 28 of the Planning (Hazardous Substances) Act 1990. It is the presence of hazardous substances on land that requires consent. Finally in relation to environmental matters that could affect the property, question 36 asks if the property is in an area where precautions against the gas radon are required in new buildings. Buyers in parts of Devon, Cornwall, Derbyshire, Northamptonshire and Somerset are advised to ask this question as these are all areas that could be affected by natural

radon gas emissions. Radon gas might cause lung damage and possibly lung cancer. This question is therefore an important one to opt for in these particular areas. Finally, where a client is buying a business involving food, optional question 35 should be selected to see if there are any outstanding statutory or informal Food Safety Act 1990 notices that affect the property. (Under the provisions of this Act, Local Authorities can enforce a system of food law affecting all aspects of the food industry, from manufacturing through to advertising. The Act creates offences including the sale of food deemed unfit for human consumption. Notices enforcing the Act will therefore arise in this respect.)

Again it should be noted that there is no priority attaching to the answers given by the council. However, it would be liable in negligence for answers prepared wrongly or recklessly. The Form does include a disclaimer that seeks to limit the liability of the local authority, but this is subject to the Unfair Contract Terms Act 1977. The extent of the council's liability will be judged in each case on the facts. (The 1977 Act will disallow contract terms deemed by the court to be unfair, such as blanket disclaimers. The 1977 Act will also apply to preliminary enquiries. See 4.5.)

Some local authorities will answer these enquiries for personal applicants but they will not guarantee the accuracy of their replies! Perhaps of greater importance is that in many personal search applications the council will not answer all the questions in part I. As such, a personal result is really of very limited use and should really only be used as a last resort, with the client being made fully aware of the limitations of such a search result. It is unlikely that any mortgagee would accept a personal search result in these circumstances.

4.2.2 Commons registration search

G & K Ladenbau (UK) Ltd v Crawley and de Reya [1978] 1 WLR 266 brought home to conveyancers the need to always consider the necessity for a commons registration search. In that case it was held that a solicitor should make this search if the property had never been built on or was the subject of very recent development, and would be liable in negligence if he or she did not carry out the search. Accordingly if the subject property is unbuilt or newly built then this search must be made. The search should also be made if the subject property is located next to a village green or common. The search is in the register maintained under the Commons Registration Act 1965. It will disclose if the land in question is a village green or a common. If a registration is disclosed by the search result, the buyer should be informed as there could be the very real possibility of an adverse entry giving rise to such possibilities as grazing cattle on the front lawn! If the land is subject to a registration under this particular registration, it will almost certainly mean that no development or fencing off will be possible. The fact that planning consent may have been granted is irrelevant. It is for this reason if for no other that a commons search can be vital. A fee is payable and a standard search Form used (form CR21), which should be posted to the county council, metropolitan or London borough council in which the property is located. A plan will be required. There is no priority or protection available for the search result.

4.2.3 Coal mining search

The purpose of this search is to reveal if the property is within an area of past or present coal mining or indeed possibly future mining. This is of major importance as coal mining causes subsidence and subsidence damages buildings. Furthermore coal mining is and has been an activity in areas that one now does not normally associate with coal, such as Kent. In each case a prudent practitioner should consult the Law Society's *Coal Mining Directory* to see if the property is located within an area where a coal mining search is required. The Law Society's *Guidance Notes* of 1994 contain a list of towns and parishes that may be affected by mining either in the past, at present or in the future. However, in this regard the guiding principle should be, if in doubt, always make a search.

As from 31 October 1994 the Coal Authority succeeded to the British Coal Corporation pursuant to the Coal Industry Act 1994. These searches are now sent to the Coal Authority (on Form 29M). The fee is payable to the Authority for issuing the result, and a plan of the property can be required. On payment of an additional fee an expedited search result can be obtained. The result will highlight past workings, any subsidence arising and any proposed workings. There is no priority or protection available for the search result. A practitioner should carefully note all answers to the standard enquiries in a coal mining search result as they can sometimes appear complex. Even when simply stated the buyer should be advised of all answers, especially where future mining proposals have been disclosed. The buyer should be asked in these circumstances whether there is still an intention to proceed with the purchase notwithstanding the likelihood of future mining in the immediate locality.

4.2.4 Index map search

This search should be made in all transactions where the subject property remains unregistered. The search is made on HM Land Registry Form 96 and a fee is payable. A plan is required. The search is sent to the appropriate District Land Registry. The search is required because it will reveal if all or part of the property is already registered at the Land Registry. It will also reveal any pending applications for first registration or a caution against first registration. It will give details of all titles affecting the property, both freehold and leasehold. Plainly if the property is registered or registered in part, the seller must be asked to remedy what would seem to be a problem with the title before the buyer can proceed. A practitioner should also make sure that there have not been any dispositions that could give rise to first registration since 1 December 1990, when the whole of England and Wales became an area of compulsory registration. If there has been a conveyance for value since that time and registration has not thereafter taken place, the seller has no title to sell until registration has taken place. (See the Land Registration Act 1925 and *Pinekerry v Kenneth Needs (Contractors) Ltd* (1992) 64 P & CR 245). The Land Registry now have a telephone service available that allows account customers to obtain a

certificate of the result of an official search of the index map (a Form 96 result) by telephoning 0541 541 531.

4.2.5 Land charges search

This is a search of the Central Land Charges Register set up under the terms of the Land Charges Act 1925. The entries in this register in the main relate to unregistered land and searches of the register are usually carried out after exchange of contracts. However, if the seller deduces title before exchange a search will be possible and is to be recommended before rather than after exchange. This is because if a problem is disclosed by the search the buyer can always easily withdraw before there is a binding contract. A detailed examination of this search will be made later in the chapter dealing with pre-completion procedures.

Even where title has not been deduced a land charges search against the seller can be made and will disclose important matters including whether or not there are bankruptcy or other financial charges registered. Furthermore the search will also disclose in unregistered land if the spouse of the seller (if not a co-owner) has registered a class F land charge to protect rights of occupation in the property to be sold. Plainly if there is such a registration then it must be better to know about this as early as possible to allow time for negotiations to take place for the removal of the registration. (Under the Family Law Act 1996 a non-owning spouse has by virtue of his or her marriage to the owning spouse a right of entry and occupation of the matrimonial home. This right subsists with the marriage and in the case of registered land will be registrable as a notice in the charges register.) The search is made at the government land charges department in Plymouth against the names of the estate owners not the land, and for their periods of ownership stated as full years.

4.2.6 Company search

The Companies Register at Companies House contains the details of every private or public company registered in England and Wales. Where a buyer is purchasing a property from a company a search at Companies House is necessary, especially where the property being purchased is unregistered. The search result will confirm if the selling company has the power to sell property under the constitution of the company (in the memorandum and articles of association). The search result will also highlight whether the company is being wound up, which could prevent the company from contracting to sell property. A company search must be carried out after exchange, i.e., before completion, whenever a company is selling land, be it registered or unregistered land. Further details will be set out in chapter 8 concerned with pre-completion procedures and searches.

4.2.7 Other searches dependent upon the location of the property

England and Wales can be viewed as a patchwork of exclusive localities. Exclusive in the sense that each locality can have a speciality all to itself. Consequently

searches can be specialised or localised depending on the location of the subject property. Examples are:

(a) Limestone mining searches. If the property is located in Dudley, Sandwell, Walsall or Wolverhampton, a search should be sent to the local council asking about limestone mining. The result will reveal the presence or indeed absence of disused underground workings that could cause subsidence.

(b) Clay mining searches. If the property is located in Devon or Cornwall a search should be sent to English China Clay Company asking about clay mining. The result will reveal the presence or absence of any operations that could cause subsidence.

(c) Brine extraction searches. If the property is located in Cheshire or Greater Manchester, a search should be sent to the Cheshire Brine Subsidence Compensation Board asking about brine extraction works in the locality. The result will reveal the presence or absence of old workings that could cause subsidence.

(d) Tin mining searches. If the property is located in Devon or Cornwall a search should be sent to the Cornish Chamber of Mines asking about tin mining. The search result will reveal the presence or absence of disused mines that could cause subsidence.

(e) The New Forest. If the property is located in Hampshire (and possibly parts of Dorset too), and is in or near to the New Forest, then a search must be carried out with the Verderers of the New Forest. This is because by s. 11 of the Commons Registration Act 1965 the New Forest is excluded from the provisions of that Act. This search will confirm if the land is common land or is affected by common rights. You may care to note that in this locality the right of common pasture entitles the occupier to 'depasture' ponies, cattle and donkeys on the open wastes of the Forest. In 1994 the annual tail marking fee was £16 per head of stock!

Apart from the kind of localised searches listed above, there are other less common but country-wide searches that practitioners should know about. They can be of particular importance where the property is near to a river, canal or railway:

(a) Rivers. The National Rivers Authority or Environment Agency maintains details of all rivers, streams and brooks. If the subject property is next to a watercourse then a search will be necessary. It will provide details of liability for repairs of and maintenance of river banks as well as for floods from the river etc.

(b) Canals. The British Waterways Board maintains details of all canals in the country. If the subject property is next to a canal then for the same reasons set out in (a) a search should be sent to the Board. The search can also enquire about rights of way etc. affecting the towpath.

(c) Railways. If the subject property is alongside a railway or over a railway tunnel then a search can be made of Railtrack who should be able to provide information about any matters affecting the property. Items of concern could be tunnel routes, boundary maintenance and entrance for the purposes of carrying out repairs.

(d) Rent registration. If a buyer is purchasing a rented or partly rented property then a search should be made to check on registered rents under the Rent Act 1977. These should be directed to the local rent officer or rent assessment committee. It is an offence to charge more than the registered rent.

(e) Chancel repairs. This is an historical anomaly. If the subject property is in a parish with a vicar of a medieval church then there can be a liability to contribute to the cost of repairs to the chancel of that church. The client should speak to the local vicar and a letter should go to the Public Record Office. A chancel is the part of a church containing the altar, sanctuary, and choir, usually separated from the nave and transepts by a screen.

4.2.8 Physical search or inspection of the property

A buyer should always be advised to inspect the subject property prior to exchange. The reasons for the inspection are fivefold:

4.2.8.1 To check the state and condition of the property

No buyer should purchase a property without fully inspecting the condition of all buildings being purchased. In general a seller is under no obligation to reveal defects in the property. There is no warranty given about the state of the property and consequently all buyers should obtain their own survey report before contracting to purchase the property. Practitioners should always bear in mind that the common law principle of *caveat emptor* (let the buyer beware) still applies to conveyancing transactions. Indeed SC 3.1.3 states that the buyer accepts the property in the physical state it is in at exchange of contracts. A prudent buyer will therefore use the services of a professional advisor such as a chartered surveyor to inspect the condition of all buildings. Accordingly, it should also be carefully noted that in *Low v R. J. Haddock Ltd* [1985] 2 EGLR 247 it was held that a buyer suing over damage caused by tree roots might be contributorily negligent if that buyer did not arrange a survey at the time of purchase. It therefore follows that every buyer should obtain a full survey report. However, if buyers do not, what other forms of redress will be available to them?

If there is a fault in the structure can the buyer sue the seller? In general a seller is under no obligation to reveal defects in the property. There is no warranty given about the state of the property and it is of course for this reason that all buyers should obtain their own survey report before exchanging contracts. Remember that SC 3.2.1 provides that the buyer accepts the property in the physical state it is in at the date of the contract (unless the seller is building or converting it). However, if the seller has taken steps actually to cover up a physical defect then this might be deemed to be a fraudulent misrepresentation. The misrepresentation would be that the property is free of that defect and as a consequence the seller could be liable. See the case of *Gordon v Selico Co. Ltd* [1989] 1 EGLR 71.

If the buyer purchased with the assistance of a mortgage, is there the possibility of a claim against the lender's surveyor? Certainly a surveyor who is neglectful and

slack in his preparation of a survey report privately commissioned by the buyer is liable in negligence. (This is reinforced by s. 13 of the Supply of Goods and Services Act 1982, whereby a term is implied that the report will be carried out with reasonable skill and care.) The damages will be the difference between the contractual purchase price and the true market value (see *Perry v Sidney Phillips and Son* [1982] 1 WLR 1297). Also the surveyor will be under a duty of care, of course, to the lender. (See *London and South of England Building Society v Stone* [1983] 1 WLR 1242.) The question that must therefore be asked is can the buyer be entitled to a similar duty? The case of *Yianni v Edwin Evans and Sons* [1982] QB 438 clearly shows that a surveyor will also owe a duty of care to the proposed borrower as well as the lender. In this case it was held that if a report for a mortgagee was negligently prepared and as a result the buyer suffered loss, the buyer could sue the surveyor in negligence. In this case the buyer did not see the report but the court was of the view that the surveyor had missed obvious structural defects and owed a duty of care to the buyer. This was further confirmed by the House of Lords in the case of *Smith v Eric S. Bush* [1990] 1 AC 831. It was held that where a surveyor was instructed by the lender to survey a 'modest' house, the lender's surveyor did indeed have a duty of care owed to the borrower. It also had to be understood that the borrower would not be arranging his own survey and would rely on the lender's report. This case also highlighted the court's willingness to strike down exclusion clauses that are unfair and unreasonable and which contravene s. 2 and s. 3 of the Unfair Contract Terms Act 1977. Thus the report cannot exclude liability by the incorporation of an exclusion clause where a 'modest' house is concerned.

4.2.8.2 *To check who is in actual occupation of the property*

This is critically important as the seller may not be the only person in actual occupation of the property and others could be entitled to occupy the property notwithstanding that they are not co-selling. It is of real importance to check that there are no undisclosed occupants within the property who could claim rights of occupation and thereby delay or indeed defeat completion. For example, a spouse may have registered a protective entry giving rights of occupation even though he or she is not a legal owner. (Indeed the new Family Law Act 1996 greatly extends those who are entitled to enjoy and claim rights of occupation.) Adult children may be in occupation and may have rights. Beneficiaries under a trust may be in occupation and yet the seller may be the trustee who is not in occupation. Whether the land is registered or unregistered will not affect the position in that in both cases a buyer will be concerned to ascertain details of third-party occupiers. Section 70(1)(g) of the Land Registration Act 1925 covers registered land. Unregistered land is governed by *Hunt v Luck* [1902] 1 Ch 428 and s. 199(1)(ii)(a) of the Law of Property Act 1925. As well as physically inspecting the property, a buyer will also raise written enquiries about who is in occupation. This is dealt with below at 4.5.

4.2.8.3 *To check the boundaries*

A buyer will want to be sure that the contract correctly describes the property and that the boundaries on the ground are the same as those shown on the title and in the contract.

4.2.8.4 To check on rights and easements affecting or benefiting the property

Patent defects in title (i.e., those apparent on inspection) do not need to be disclosed by a seller. Such a defect could be a right of way affecting the property. It is therefore important to inspect the property for evidence of rights of way such as signs, a stile, used pathways or gates. If the buyer finds any evidence of easements adversely affecting the property then of course these should be referred to the seller without delay.

4.2.8.5 To check that the fixtures and fittings contracted to be sold are in the subject property just prior to exchange

The contract for sale may include a list of items included in the sale or there could be items listed in replies to enquiries. In either case the buyer will want to be sure that the listed items actually exist and are within the subject property.

4.3 THE EFFECT OF THE PROTOCOL

The 3rd edition of the National Conveyancing Protocol (1994) reversed the previous specifications contained within the first two editions that the seller should obtain a local authority search on the subject property. With effect from 1 May 1994 the Protocol now reverts to the old traditional position of requiring the buyer to obtain the local authority search at the buyer's sole expense. The Law Society has said that a seller can still carry out this search provided notice of such an intention is given at the start of the transaction. The fee can be recovered as a special condition in the contract for sale. Accordingly, the Protocol now really has little or no effect on traditional conveyancing practices. It is still the case that a buyer must carry out at his or her own expense all necessary searches. Indeed it always was the case that the Protocol did not pass this responsibility to the seller for any other search beyond the local authority search. At least now the Protocol is consistent so far as all pre-contract searches are concerned. (Having said this it should be noted that the Protocol does stipulate that if the title is unregistered, the seller's solicitor must make a land charges search against the seller and any other appropriate names and also make an index map search. In practice it would seem that this is rarely done.) The full text of the Protocol is set out in appendix 1.

KEY POINTS SUMMARY: PRE-CONTRACT SEARCHES

- Unless otherwise agreed the practitioner acting for the buyer should always make a local search.
- Reflect upon the location of the subject property to enable you to decide which other searches are relevant to this particular property, i.e., is it in an urban environment or is it located in a rural setting? Location is also crucial when considering the necessity for a coal mining search and other unusual searches.
- On receipt of the local authority search always make a double check of the result. First carefully scan the land charges disclosed in the result and then carefully check all answers provided by the local authority, taking care to have

in mind any specific instructions from the client, e.g., concerning planning requirements etc.

- In unregistered land always carry out an index map search. Is the property in an area of recent compulsory registration and only partly registered? If it is, consider the necessity for an index map search.
- Always advise clients of any onerous or unusual replies or results to any of the searches and request their written instructions in response.
- If the Protocol is being used and the land is unregistered, the seller's solicitor should effect both an index map search and a land charges search.

B PRELIMINARY ENQUIRIES

4.4 WHY RAISE ENQUIRIES?

As has been said at the start of this chapter (and because it is so important it is worth repeating), *caveat emptor* (let the buyer beware) remains a cornerstone of conveyancing in England and Wales. As such, a buyer will need to find out as much as possible about the subject property before contracts are exchanged. The simple yet compelling reason for this is that the buyer must take the property in whatever condition it is in, at the point when there is a binding contract for the purchase. The law imposes a clear obligation upon the buyer to find out as much about the property because the common law recognises that the seller has only a limited duty of disclosure. The buyer must carry out all appropriate enquiries before entering into a binding contract to purchase the subject property. If a buyer does make all necessary enquiries of the seller, and gets sensible answers, an informed decision can then be taken about the nature and suitability of the property based on all the information obtained prior to exchange. However, this does mean that conveyancing practitioners acting for the buyer will raise vast numbers of enquiries on the basis that if they do not they might be seen as acting negligently. It is not unusual to see such enquiries stretching over 20 or more pages and comprising dozens of multi-sectioned questions. Of course a seller can refuse to give answers, but if this happens then a buyer may immediately back out of the proposed transaction on the basis that the seller must have something to hide.

Preliminary enquiries have been greatly affected by procedural changes ushered in by the Law Society's National Conveyancing Protocol (see 4.6). Practitioners should acquaint themselves with the contents of the old-style printed traditional Forms of enquiries before contract as well as the new Property Information Forms. By doing this you will come to appreciate the ways in which the Forms differ and how the conveyancing process has been, to a limited extent, streamlined with the adoption of the Protocol approach.

Many conveyancing practitioners have adopted the Protocol 'enquiry' Forms even when they are not actually using the full Protocol process. However, many remain traditionally minded and use pre-printed, or their own in-house preliminary enquiry Forms. These questions, sometimes called preliminary enquiries and sometimes

called enquiries before contract, are listed in duplicate and submitted to the seller. (Two copies are issued as a convenient and helpful practice enabling the seller's practitioner to retain a copy of the questions with replies as a file copy.) Whatever Form is used, the intention remains the same: to seek out answers from the seller, about any matters that affect or could affect the subject property.

There is some overlap between enquiries and planning in that there should always be planning enquiries appropriate to most if not all transactions. This overlapping area is dealt with in 4.7 and 4.8.

4.5 WHAT ENQUIRIES SHOULD YOU RAISE AND WHEN?

A cynic might say that a prudent conveyancing practitioner should practise defensive lawyering and issue as many enquiries as possible. Adopting the blunderbuss' approach is not uncommon amongst practitioners. Those who adopt this Format are driven by the view that if they ask as many questions as possible, they can say that they have done all in their power to protect the interests of their client. This is a possible argument but one that does nothing to speed up the conveyancing process or to enhance the reputation of conveyancing practitioners. Indeed with a little care and prior preparation, enquiries can be made specific to each property being purchased. Indeed as has been noted by the Law Society when it started to prepare the Protocol, many questions asked of the seller can be answered elsewhere and in many cases are better directed elsewhere (see 4.6).

One sensible way of selecting appropriate enquiries is to adopt a set of enquiries that will be issued for all properties, i.e., core enquiries, with a second more selective set tailored to the subject property. If this style is adopted, the following core enquiries are suggested as being appropriate to all properties:

(a) *Boundaries and fences.* The buyer will want to know about the ownership of all the boundary walls and fences as well as repairing responsibility if this differs from ownership. This should include boundaries comprised in hedges and ditches and the internal boundaries of flats and maisonettes.

(b) *Disputes.* Clearly a buyer will want to know all about past and present disputes of all kinds affecting the property. Indeed it is now clear that the seller would be liable in damages for misrepresentation for not informing the buyer that there has been a dispute with the neighbours giving rise to complaints about noise. (See an article about *Darville v Lamb* (1996) *The Times*, 20 March 1996, where Violet Lamb was ordered to pay £15,000 costs and £15,000 in compensation to the Darvilles. They had purchased her property without knowing about a noisy neighbour and where there was clearly a dispute with that neighbour that had not been disclosed at the time of sale.)

(c) *Notices.* Similarly a buyer will also want to know about and see copies of all notices affecting the subject property and clearly, if the seller has received any, he or she must be under a duty to disclose. All correspondence with the local or other competent authority should be copied to the buyer.

(d) *Services.* The buyer will want to know about the gas and water supply and whether or not mains drainage is available. If it is not, questions must be asked about the private drainage facility, e.g., a septic tank. Conveyancers in large towns and cities can all too quickly forget that many properties in rural environments will not be on main drainage and enquires will therefore be important to check on the necessity of easements if this is the case. Furthermore a recent development is the growing installation of water meters. Again a buyer will want to know about this possibility especially if the client is likely to be a high-volume consumer of water (e.g., a family with several small children), and thereby incur greater expense as a result of the presence of the meter.

(e) *Guarantees.* If the property is new or recently built (i.e., within the last 10 years), the buyer will want to be reassured that there is in existence a 'Buildmark' guarantee issued by the National House Building Council (for further details on the NHBC see chapter 11). Without such a guarantee many lending institutions simply will not lend. A buyer will also be concerned to find out about the existence of specialist wood treatment and damp-proofing guarantees and any other guarantees such as those given for double glazing.

(f) *Exclusive facilities.* The subject property may enjoy an exclusive facility such as a right of way to and from it and the buyer will most certainly want full details. While the copy deeds will confirm the existence of the right they may not provide details of any payments made for it or indeed the possibility of increase or arrears. This is the kind of information to be sought in this enquiry.

(g) *Shared facilities.* Following on from the previous enquiry, a buyer will need to know about facilities used in common with owners or occupiers of adjoining or adjacent land. The same kind of detail will be required as for exclusive facilities.

(h) *Occupiers.* This is a critical enquiry. A question should be raised that refers to any possible rights accruing to a non-owning occupant. The immediate example is of course the non-owning spouse or cohabitee who could very well have rights of occupation which have not been highlighted in the copy deeds supplied. Clearly a prudent purchaser will want a list of all adults in occupation of the property and possibly all those near adulthood together with an indication of what rights they might have or be claiming. (See 4.2.8.2 above.)

(i) *User.* A buyer will want to be reassured that the permitted use for planning purposes is the use to which the buyer intends to put the property after completion, and that the actual use is the permitted use. See 4.7 and 4.8 below for further details.

(j) *Fixtures and fittings.* This is an area fraught with difficulty. When is a fixture a fixture? Clearly a buyer will want to know what the seller is going to take and what is to be included in the sale. However, what this entails is not entirely clear! Cases that have gone all the way up to the Court of Appeal have used a two-question test. First, how securely has the item been attached to the land, and secondly, why was it attached? So in *TSB Bank plc v Botham* [1996] EGCS 149 the bath and taps were fixtures and the kitchen cabinets were held to have become fixtures. However, fitted carpets and curtains were mere fittings as were the light fittings. Perhaps the simplest guidance that can be provided to the client is to indicate that, unless otherwise agreed

with the seller or buyer, fixtures are deemed to be included in the sale of the property whereas fittings are not.

Where the subject property is leasehold and in particular a flat or maisonette, prudent practitioners will also utilise a set of standard preliminary enquiries about the maintenance and service charges including the insurance arrangements for the property. The following enquiries are suggested as being most of the core leasehold enquiries we consider appropriate to such properties:

(a) *Relevant names etc.* It is a great help for the buyer and the buyer's conveyancer if the seller can accurately confirm the names and addresses of the lessor, any superior lessor, the lessor's managing agent, if any, and the lessor's solicitors.

(b) *Ground rent.* The buyer will want to see a clear last receipt for ground rent to make sure that there are no outstanding disputes or claims and to ensure that the rent is paid up to date.

(c) *Service charges.* This is a critical area for buyers who will want to be sure that they are not taking over any service charge arrears. Similarly, buyers will want to know if there are any large bills looming up on the horizon which they will have to pay. It is not unknown for a seller to decide to sell just before the landlord embarks upon a large painting scheme of the block containing the subject property!

(d) *Insurance arrangements.* This is another important area as lending institutions will always want to be sure that the property is insured for the full reinstatement value and for a comprehensive set of perils. Normally leases stipulate that a lessor must insure and not the lender who would otherwise insure. This being so a full copy of the current policy should be requested.

(e) *Covenants.* The buyer will want the seller's written confirmation of the absence of breaches of covenant known to the lessor and indeed any that exist but have not come to the attention of the lessor. For example, if the property has been altered or if there have been any additions to it then those works may have required the lessor's consent. In the absence of such consent there will be a breach of covenant.

Some printed Forms of preliminary enquiries try to limit liability by including a disclaimer of responsibility for inaccuracies. Practitioners will immediately appreciate that if such a disclaimer is allowed it would greatly enhance the chances of limiting liability when dealing with replies to enquiries. It would seem that s. 11(3) of the Unfair Contract Terms Act 1977 puts the burden of proof on practitioners in these circumstances, which militates against the effectiveness of such a clause. In *First National Commercial Bank plc v Loxleys* (1996) 93 (43) Gazette 20 it was held that the solicitors were required by the Act to show that it was fair and reasonable for the firm to rely upon the standard disclaimer to release them from all liability having regard to all the circumstances of the case. The decision in the case was that there was a reasonable cause of action and that the disclaimer did not prevent the case from

going to trial. In effect it is clear that the courts will not view disclaimers with any great sympathy and will use the Act to strike them down wherever possible. The moral for the busy practitioner is to ensure the accuracy of all answers given rather than to rely upon a disclaimer.

Finally as a comment on the whole subject of preliminary enquiries we would like to refer you to a letter in the *Gazette* of 7 September 1994 in which it was suggested that all enquiries before contract could be reduced to just one, namely: 'If we asked the usual silly questions would you give the usual worthless answers?' (LSG 91/32 7 Sept 1994, p. 14).

4.6 THE EFFECT OF THE PROTOCOL

The modernised system of conveyancing was ushered in by the Law Society in 1990 in the Form of the National Conveyancing Protocol. The intention of the Protocol was to streamline and thereby expedite the system of conveyancing. The hope was that by introducing the Protocol the time between the buyer making the offer and contracts being exchanged would be greatly reduced. To ensure that the Law Society's intention was fulfilled the Protocol envisaged the adoption of standardised documentation. In the case of pre-contract enquiries this meant the introduction of new enquiry Forms that were to be used in all Protocol conveyancing cases. These were called by the Law Society 'Property Information Forms'. The critical change and indeed the novel element brought in by the Protocol was that these were issued and completed by the seller's practitioner with, of course, the assistance of the seller. The old-style preliminary enquiry Forms have been replaced by the client questionnaires. These are the Seller's Property Information Form Part I (form Con. Prop. 1), the Seller's Leasehold Information Form Part I (form Con. Prop. 4) and the solicitor's questionnaire (forms Con Prop. 4 and Con. Prop. 5, being Part II for the Forms mentioned previously). There is a continuation sheet available (this is the 'missing' Form Con. Prop. 3). (The Forms are, for ease of reference, reproduced in appendix 7.)

One further Form in the Protocol system is the standard Fixtures Fittings and Contents Form (Con. Prop. 6). This has proved in practice to be a useful and straightforward Form. It must be completed directly by the seller. It lists the kind of usual items that might be in or around a property to be sold and then in three columns allows the seller to indicate if the item is included in the sale, excluded or not present at the property. Of additional help is the guidance note at the top of the Form suggesting to the seller that if any of the items are not included in the sale but could be for sale separately, then the proposed amount can be listed in this column. There is even a section at the end of the Form on p. 6 for other items not listed to be referred to by the seller. Practitioners should note that the Standard Conditions of Sale, 3rd ed., include a special condition numbered 4, which states that the chattels set out on any attached list are included in the sale. It is therefore intended that the enquiry Form is actually attached to the contract and is to Form part of the written agreement. (By attaching and referring to the list there can be no question of the condition falling

foul of the provisions of s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 in that the written contract will thereby incorporate all the agreed terms.)

The Property Information Forms are certainly easier to understand than most traditional Forms of preliminary enquiries and in this respect are a real improvement on the conventional Forms of pre-contract enquiries. However, one main criticism of preliminary enquiries is their length. Several stretch over far too many sides of densely printed paper and raise questions that would be better directed elsewhere. It is therefore interesting to note that the 3rd edition Property Information Form is longer and more detailed than in the first two editions. There is also a new final question, which is written in such broad terms that it could well lead to litigation. This question, question 13, reads 'Is there any other information which you think the buyer may have a right to know?' Is this really a question that can safely be passed on to a client without first providing very detailed guidance on how it should be answered? Furthermore, there still remains the difficulty of reconciling the professional obligation on the buyer's conveyancing practitioner to make all proper and reasonable enquiries on behalf of the client with the aim of the Protocol of streamlining the enquiry process. The difference between this element in the Protocol procedures and the buyer's conveyancing practitioner's overriding duty to the client now appears to be very slender. It seems inevitable that either the printed Protocol Forms will continue to expand or they will be accompanied by copious extra enquiries raised by anxious or perhaps prudent solicitors. It is only natural for careful practitioners to incline towards more rather than fewer questions. This is perhaps done in the vain hope that, notwithstanding the Property Information Forms, by asking as many questions as possible, practitioners might be able to avoid negligence claims by dissatisfied clients.

KEY POINTS SUMMARY: PRELIMINARY ENQUIRIES

- Which Forms are you using or should you use, Protocol or not, pre-printed or not, core and/or additional?
- What extra questions need to be asked that are specific to the subject property?
- What specific enquiries should you raise consequent upon any particular instructions you may have received from the client?
- Always advise your client of any onerous or unusual replies or results to any of the preliminary enquiries and request written instructions in response.

C TOWN AND COUNTRY PLANNING

4.7 PLANNING AND CONVEYANCING

The current extensive town planning legislation seeks to control the development of land and buildings (s. 57(1) of the Town and Country Planning Act 1990). In particular, this section stipulates that 'planning permission is required for the carrying out of any development of land'. Development is defined by s. 55 as being

of two kinds: first 'the carrying out of building, engineering, mining or other operations in, on, over or under land', and secondly 'the making of any material change in the use of any buildings or other land'. By this definition legislation has been put in place to control almost all aspects of the use, enjoyment and redevelopment of land throughout the country. As a consequence it is important that practitioners know the basics of planning law in sufficient detail to enable them to advise their clients about any effect the legislation might have on the subject property.

If a client intends to carry out development in the manner defined by the Act then planning permission will be required. This can be obtained in one of two ways, either by a permission deemed to have been given as a consequence of the effects of the Town and Country Planning (General Permitted Development) Order 1995 or by a formal application for planning permission submitted to the local planning authority. If the Town and Country Planning (General Permitted Development) Order 1995 does not apply then an express application will be needed.

4.7.1 Permission under the Town and Country Planning (General Permitted Development) Order 1995

This Order grants a blanket permission for certain kinds of specific development. For example, the erection of fences is a development that will not (subject to height restrictions) require express planning consent. Similarly the exterior painting of a property is covered by the Order, subject to the painting not amounting to advertising. Perhaps the most important blanket approval is that for small extensions to an existing dwelling house. These small extensions, such as a rear kitchen extension, are subject to restrictions on size and position but otherwise can be made without the necessity for express planning permission. The Order contemplates various classes of permitted development such as class D within part 1 of the Order, which permits the erection or construction of a porch outside any external door of a dwelling house. However, the Order includes detailed limitations to the dimensions of several of the classes of permitted development. These limitations affect size and height as well as external appearance.

Planning authorities can exclude the effect of all or part of the Order if they deem it expedient to do so. Action under this provision is termed an 'Article 4 Direction'. This is so because of course art. 4 of the Order provides authority for such exclusions. The purpose of this restrictive provision is to allow a planning authority to control all aspects of development in great detail. This allows the authority to control even minor development activities such as the installation of double glazing or a plastic front door where it is appropriate to do so, say, in a conservation area. The Secretary of State will normally be required to consent to the creation of an Article 4 Direction, but not in relation to listed buildings.

4.7.2 Planning permission given by the local planning authority

An applicant has the choice of making either an application for outline planning permission or for full planning permission. An outline application will elicit a

response from the planning authority without the expense of having to prepare a full and comprehensive application involving full plans. The planning authority can impose conditions attaching to the outline consent. If an outline consent is granted it can be expressed to be subject to 'reserved matters' thereafter being resolved to the satisfaction of the planning authority. Reserved matters will relate to the detail of the application such as the external appearance of the property or perhaps means of access to it.

If there are reserved matters, it will mean that a full application will be necessary to obtain approval for the applicant's proposals in relation to the reserved matters, which must be made within three years of the outline consent. Moreover the work itself must start within five years from the outline consent (s. 92 of the Town and Country Planning Act 1990).

The alternative to an application for outline approval is of course a full planning application. The planning authority can impose conditions attaching to the full planning consent. As for outline consents, the work itself must start within five years from the date of the full planning consent. Practitioners should advise applicants who intend to delay that the planning authority have further powers under s. 94 of the Town and Country Planning Act 1990. If the work has started but not progressed very far, and/or if the authority is of the view that the development will not be completed within a reasonable period, the authority can serve a completion notice upon the owner or developer. This notice stipulates that the planning permission will cease to have effect after the expiry of a stated period which must not be less than 12 months. If work is carried out after the end of the notice period, it will in effect be unlawful as the consent will no longer be valid.

4.8 CHANGES OF USE

A buyer may be unaware of a change of use at the subject property even though that current user is unlawful, i.e., has come about without permission for the new use from the local planning authority. A property, for example, a new flat above a shop, can appear on inspection to be quite in order. However, the prior use may have been retail or offices and in the absence of any consent for a residential flat, there may have been a material change of use where planning consent should have been obtained. It is therefore crucial that a conveyancer is satisfied that the existing use is the permitted use authorised by the local planning authority. An even more difficult example is the conversion of a house into flats. Although the whole property user remains residential there is in fact a material change of use requiring planning permission as the property is now in multiple occupation (see s. 55(3)(a) of the Town and Country Planning Act 1990). Types of use are defined within the Town and Country Planning (Use Classes) Order 1987 lists 16 separate classes. The following are of greatest importance to a conveyancing practitioner. Changes of use *within* a class do not require planning consent while changes *between* classes will do so:

(a) *Class A1 shops*. This class includes a post office, travel agency, sandwich bar, hairdressers, dry cleaning agency and the retail sale of goods *other than* hot food.

Thus no planning permission is required for a former greengrocery to be used by a travel agent because they are in the same class. This class will also include a retail warehouse used as a point of sale of goods to the public even though the size is such that it is not exactly a shop! This will still be the case even if a part of the building is used for storage. (If, however, the main element is storage then A1 cannot apply and the class will be B8 covering storage and distribution centres.)

(b) *Class A2 financial and professional services.* This allows property to be used for the provision of financial services or professional services (not being health or medical services) or any other service appropriate to a shopping area where such services are intended for visiting members of the public. This class has been declared in an effort to support the growing advice and financial services industry. Accordingly insurance brokers, solicitors, accountants, surveyors, architects and mortgage brokers will all be covered by the one class. Furthermore the class will also include betting shops and law centres as well as banks and building societies. However the critical element is the availability of the service to visiting members of the public.

(c) *Class A3 food and drink.* This class covers all elements of the sale of hot food or drink on or off the premises and therefore goes way beyond the limited cover for food sales in A1 above. The class will therefore cover pubs, wine bars, restaurants, snack bars and cafés where hot food is prepared and sold for consumption on or off the premises.

(d) *Class B1 business.* This class covers offices other than those covered by A2 above, for research and development of products or processes or for any other industrial process. At first inspection this would seem a very wide class. However, there is a very restrictive condition in that the use is only permitted if it can be carried out when in a residential area without detriment to the amenity of the area. This detriment could be by way of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit. Accordingly, this Form of business use is clearly going to be a problem if it is intended for an area that is primarily residential and the use could be noisy etc.

(e) *Class B2 general industrial.* This is the class that permits any use for the carrying on of an industrial process not covered by B1 above or by other provisions in the Order covering special industrial processes (e.g., alkaline works and other types of heavy industry that tend to emit noxious fumes or effluent).

(f) *Class C1 hotels and hostels.* This class clearly covers the use of buildings as hotel or hostel and will include boarding houses as well as guest houses. However, none of these will fall within this class if the use includes a serious element of care for persons in residence. In these circumstances class C2 below will apply. There is a definition of 'care' within art. 2 of the Order.

(g) *Class C2 residential institutions.* This class covers buildings used for the provision of personal care or treatment as well as residential educational facilities.

(h) *Class C3 dwelling houses.* This class will allow the use of property for the accommodation of a family as well as the coming together of up to six individuals as a single household. This would therefore allow the accommodation of five persons suffering from a disability with a warden or other person caring for them. The limit is fixed at six and the property must be used as a single household. This ensures that

other forms of multiple occupation cannot fall within this class. As mentioned above, the use of a single dwelling house as two or more separate dwellings (i.e., the conversion of a house into several flats) is stated by the Act to be a material change of use for which planning consent will be required (Town and Country Planning Act 1990, s. 55(3)(a)).

4.8.1 General permissions for change across classes authorised by the Town and Country Planning (General Permitted Development) Order 1995

The General Development Order also allows as permitted development specific changes between different Use Classes and the following should be noted as being particularly relevant:

<i>From</i>	<i>To</i>
A2, financial and professional services (In this case the subject premises must have a display window at street or ground floor level.)	A1 shop
A3, food and drink	A1 shop, or A2 financial and professional services

There are other approved changes involving B1, B2 and B8 (storage and distribution) and changes of use within those classes.

4.9 PLANNING ENQUIRIES

A buyer will want to be sure that the intended use for the subject property will be permitted under the planning laws. Similarly the buyer will want to consider if an application for planning permission will be necessary in the light of the buyer's intentions for the subject property so far as demolition, rebuilding, alterations and additions are concerned. Indeed a buyer will want to be sure that there are no onerous conditions attaching to a consent affecting the subject property. (This can be particularly important as planning authorities have been known to grant consents personal to the applicant and only mention this in the conditions!) Accordingly, enquiries will be required to cover all these concerns, although much of the relevant information will be disclosed in a local authority search result. Indeed if the local authority has taken enforcement action by way of an enforcement notice or stop notice, these will be disclosed in the local authority search result and in particular within the replies to the enquiries directed to the local authority. Ultimately, the reason behind planning enquiries is that substantial penalties may be incurred for breaches of the planning law.

The following is a list of enquiries that should be made of the seller and represents a core of appropriate questions to which specific enquiries should be added:

(a) *Alterations and additions.* A prudent buyer will want to know if there have been any alterations and/or additions and if so, when they were made. In this way the

buyer can decide if a planning consent needs to be seen authorising those building works. It is still the case that small-scale alterations or additions can fall within the Town and Country (General Permitted Development) Order 1995 where this Form of blanket consent is available for small changes such as a simple shed or garage. (However, in conservation areas specific planning consents will still be required notwithstanding the Order.)

(b) *User.* The seller should be asked to confirm two points; first the nature of the current use (and when this commenced), and secondly that this is the permitted use for planning purposes. This will be in addition to any information disclosed in the local authority search and will therefore disclose any discrepancies between the information from these two sources. If any such discrepancies come to light they must of course be investigated with the local planning authority and the seller.

(c) *Advertising.* Because s. 55(5) of the Town and Country Planning Act 1990 stipulates that the use of an external part of a property for advertising will require planning consent, if there is any advertising on the subject property, questions should be asked about planning consents for the advertising hoarding. This enquiry will apply to both residential and commercial property, for example, end-of-terrace properties with a hoarding attached to the flank wall, and flats located above shops.

4.10 ENFORCEMENT NOTICES AND STOP NOTICES

If the local authority becomes aware of a breach of planning control it has the power to issue and serve an enforcement notice. Failure to comply with an enforcement notice can amount to a criminal offence for which magistrates can impose a fine of up to £20,000. Accordingly where development has been carried out without permission or a condition has not been complied with, the authority can serve such a notice upon the owner or occupier or anyone else interested in the subject property. Usually the notice must be served within 10 years of the breach. However, in particular circumstances the period is reduced to four years. The four-year rule applies to the change of use of a building to a single dwelling house. The four-year rule also applies to building works such as a flat conversion. If a notice is validly served then the recipient can appeal to the Secretary of State on one or more of the grounds for appeal set out in s. 174 of the Town and Country Planning Act 1990. These grounds include indicating that planning permission ought to be granted and that the proposals, if they occur, do not constitute a breach of planning control.

While an enforcement notice is under appeal it has no effect. The consequence of this is that the alleged improper use can continue. If the authority wish to terminate the use forthwith upon service of an enforcement notice then they must also issue and serve a stop notice. The planning authority can rely upon s. 183 of the Town and Country Planning Act 1990, which empowers them to issue stop notices which effectively prohibit any use or activity contained or mentioned in the allied enforcement notice. A stop notice will not prohibit the use of any building as a dwelling house (s. 183(4) of the Town and Country Planning Act 1990). Accordingly, a stop notice will only arise in the context of an enforcement notice.

4.11 BUILDING REGULATIONS

Regulations about the standards for building works were issued in 1991 (the Building Regulations 1991), and came into force on 1 June 1992. Building works must comply with these regulations. Practitioners should advise their clients of the need to obtain Building Regulations approval as an entirely separate requirement from planning. It is in effect an additional requirement. Before the works start, the developer should advise the local authority and deposit with them plans of the proposed works. Once the works have been completed the developer should seek from the local authority a final certificate. This is a certificate of compliance confirming that the works have been carried out to the satisfaction of the local authority and in accordance with the regulations. If the local authority intend to take action as a consequence of any suspected breach of the regulations they must do so within 12 months of the alleged breach (Building Act 1984, s. 36(1); Public Health Act 1936, s. 65).

KEY POINTS SUMMARY: TOWN AND COUNTRY PLANNING

- Does the client want to make any changes to the subject property? If so, will the building works or change of use require planning permission?
- If a change of use is proposed, will it require formal consent or will it come within a use class or will it be allowed by the blanket approval available under the General Development Order?
- Does the client want to minimise cost by testing the waters with an outline planning application or is a full application more appropriate?
- If the property is newly built, always ask to see Building Regulations approval, the certificate of compliance, as well as a copy planning permission for the whole development.
- When checking planning consent ensure that all the conditions attaching to the consent are seen and be sure that they have all been complied with.
- Always advise clients of any onerous or unusual replies or results to any of the searches and enquiries in so far as they relate to planning matters and request the client's written instructions in response.

PRACTICAL CHECKLISTS

4.12 SEARCHES

Acting for a buyer

- Is the property rural or urban and is a plan required?
- If not sure or newly built, do a commons registration search.
- If rural or on the edge of a town or village, do a commons registration search.
- Check to see if the property is in an area of current or previous coal mining and do a coal mining search if necessary.

- Is the seller a company? If so, do a company search.
- Is the property unregistered? If so, do an index map search.
- Is the property unregistered? If so, do a land charges search.
- Has the property been physically inspected, and if so, with what result?
- Are any minor searches required, e.g., for a property in Cornwall, a clay mining search.
- Is the Protocol being adopted and if it is, will the seller provide any searches?
- If the Protocol is not being used, do all searches. If the Protocol is to be used, do all necessary searches having ascertained a response to the previous checklist item.
- When issuing a local authority search request decide upon which extra pre-printed questions should be asked in part II of the Form.
- In relation to the local authority search result, including replies to enquiries of the council:
 Check all local land charges disclosed and always advise clients of any onerous or unusual replies or results and request the clients' written instructions in response.
 Check all replies to enquiries and always advise clients of any onerous or unusual replies or results and request the clients' written instructions in response.
- Always make a file note of the date of dispatch of the searches made on a specific property file AND DO NOT exchange contracts until all search results are in and approved and the client has seen and approved full details.

4.13 ENQUIRIES

Acting for a buyer

- Is the Protocol being adopted and if it is, has the seller provided a full set of completed Protocol-style enquiry Forms?
- If the Protocol is being adopted and if the seller has provided a set of completed Protocol-style enquiry Forms, are there any specific additional enquiries you need to raise?
- If the Protocol is not being utilised, which Forms are you using or should you use, Protocol or not, pre-printed or not, core and/or additional.
- If the Protocol is not being utilised, what extra questions need to be asked that are specific to the subject property?
- What specific enquiries should you raise consequent upon any particular instructions you may have received from the client?
- Always advise your client of any onerous or unusual replies or results to any of the preliminary enquiries and request written instructions in response.
- Always make a file note of the date of dispatch of the enquiries made on a specific property file AND DO NOT exchange contracts until all enquiries have been answered satisfactorily and the client has seen and approved full details.

4.14 PLANNING

Acting for a buyer

- Have all appropriate enquiries been sent to the seller and to the local planning authority?
- Does the client want to make any changes to the subject property that will amount to 'development' as defined by the Town and Country Planning Act 1990?
- If so, will the building works or change of use require express planning permission?
- If a change of use is proposed will it require formal consent or will it come within a use class or will it be allowed by the blanket approval available under the General Development Order?
- Does an article 4 direction exclude the blanket approval so as to affect the subject property?
- If the property is newly built, obtain a copy of the Building Regulations approval as well as a copy of the planning permission and place these with the deeds on completion.
- Ensure that all the conditions attaching to a planning consent are seen and check that they have all been complied with.
- Always advise your client of any onerous or unusual replies or results to any of the searches and enquiries in so far as they relate to planning matters and request the clients' written instructions in response. **DO NOT** exchange contracts until all enquiries have been answered satisfactorily, consents seen and approved and the client has been supplied with full details of all planning matters and approves the position as reported.