OFFER TO SELL – VACANT POSSESSION

Guidance Notes

Introduction

The approach taken by the PSG in the drafting of the Offer to Sell - Vacant Possession presupposes that (a) the Seller accepts that it needs to provide a full package of titles and other due diligence information, and that some warranties/confirmations will need to be given to the Purchaser and (b) the Purchaser accepts that it will be expected to do full due diligence and satisfy itself as to title, planning etc from the documentation supplied to it by the Seller.

The Offer is designed to be used when selling property with vacant possession, and where there are no preconditions.

The parties and their solicitors are encouraged to use the PSG Due Diligence Questionnaire, available from the PSG website at www.psglegal.co.uk which assists in organising and monitoring the due diligence process.

Everything that is exhibited to the Purchaser by the Seller, which the Purchaser examines and satisfies itself on, then becomes "Disclosed Documents" on which the Purchaser is deemed satisfied, and which are listed in the Schedule to the Offer.

The aim is to have a reasonably balanced document, akin to a negotiated end product, that purchasers and sellers alike will find reasonably acceptable to enable the parties to conclude missives more quickly and with less argument.

However, unlike most of the other PSG documents (which are designed to be used unaltered, except where, for operational reasons or specific client requirements, changes have to be made) the PSG Offer to Sell should be regarded as a template into which transaction-specific wording can be inserted, but it is hoped that the parties will be able to agree most if not all of the standardised provisions that the Offer contains, unless they are unsuitable for transactional reasons. As each version of the Offer is likely to contain bespoke provisions, bear in mind that it may be necessary to adjust clause numbering or references to clause numbers to correspond to the numbering in the final version.

The Offer is also complemented by a separate set of Optional Clauses (also available in the Offer to Sell section of the website) which relate to other matters which need to be referred to in offers from time to time, but which are not necessarily always incorporated in every Offer.

1. **Definitions and Interpretation**

   Using defined terms in appropriate circumstances helps to streamline the text of the clauses in the Offer. Ideally any terms which are defined should appear in the Definitions section rather than within the body of the deed or document. The PSG has made an exception to this in the case of the environmental and employment law definitions, which are specific to those clauses only and which would otherwise clutter up the Definitions section at the start.

   You should also note that an additional general interpretation provision has been added in Clause 1.2.12 providing a definition of "reasonable consent".

   Additional definitions can be incorporated to suit particular circumstances.

The structure of the Offer includes a Schedule of several parts at the end which incorporates style documentation referred to, lists of the Title Deeds and the Disclosed Documents and other information.

2. **Price**

The Offer provides for the Price to be paid by telegraphic transfer of funds. While this is the usual method for commercial property transactions, any alternative method of settlement that the parties decide on would need to be provided for.

There has been much discussion in the profession recently about the approach to take in relation to penalty interest provisions, following on the decisions in 2006 in the cases of *Black v McGregor* and *Wipfel Limited v Auchlochan Developments Limited*.

The PSG has considered the issues carefully, and also consulted with Professor Kenneth Reid and Professor William McBryde, both of the University of Edinburgh, in connection with their approach.

The Offer provides in the usual way for interest (at the normally agreed rate of 4% over base rate) to be payable on the Price, if the Purchaser does not pay on the Date of Entry.

If, however, the Seller decides that it wants to rescind the Missives and re-sell the Property, the approach which the PSG has taken is that the Seller would no longer be entitled to any interest, and instead, it would look to recover costs and losses actually incurred, which it is entitled to do at common law. Several heads of loss are identified: re-marketing costs; any shortfall in the price, and generally other financial losses that are actually incurred because of the Purchaser's failure to pay on the Date of Entry. However this list is not exhaustive and the common law provides a degree of flexibility.

This approach avoids the issues that can be of concern in relation to previous penalty interest clauses, including penal rates of interest and liquidated damages.

3. **VAT**

As the Offer to Sell is in relation to a sale with vacant possession, and on the assumption that the sale of the Property does not form part of a larger sale of a business, there will not be any transfer of a going concern complications. The Seller has three options when preparing the draft Offer:

Option 1 — Where no option to tax or real estate election has been made which affects the Property and the sale of the Property does not otherwise fall outside the exempt category of supply, no VAT should be payable on the part of the Price apportioned to the Property and Fixed Plant; or

Option 2 — Where the Seller has opted to tax the Property or made a real estate election which affects the Property, VAT will be payable; or

Option 3 — Where the Property is a standard-rated supply within paragraph (a) of the VAT Act 1994, Schedule 9, Group 1, Item 1 (i.e. new commercial buildings), VAT will be payable.

Option 1 - Exempt supply: The Seller is required to confirm that (i) no effective option to tax has been or will be exercised, (ii) no real estate election has been or will be made which affects the Property and (iii) the Property is not a property that falls outside the exempt category.

Where this option applies, there is no VAT payment, and therefore no need for a VAT invoice, in relation to the part of the Price apportioned to the Property and Fixed Plant . If the Seller is

registered (or liable to be registered) for VAT, VAT will be chargeable on the part of the Price apportioned to the Moveables and Clause 3.2 should be included.

Option 2 - Non-exempt - Option to tax made by the Seller: The Seller is required to confirm that it is registered for VAT, that an effective option/election has been made and notified to HMRC and that the option/election will not be revoked prior to Completion. Evidence of this has to be produced.

Clause 3.2 of this Option amounts to a confirmation from the Purchaser that the Property will not be used as a dwelling or for another residential purpose, and that the Property is not to be used for charitable purposes.

Where this Option applies, VAT will be charged on the Price and a VAT invoice should be produced, therefore Clause 3.3 should be included in the Offer.

Option 3 - Non-exempt - supply of Property is standard rated: This optional clause is aimed at sales of property that constitute supplies which would be standard rated, even though no option to tax has been made.

Paragraph (a) in Group 1, Item 1 of Schedule 9 of the VAT Act 1994 covers the sale of a heritable interest in a new commercial building or partially completed commercial building. This has been used in this Option as the likely default. However, there are certain other categories of supply which fall outside the exempt category. They are listed in paragraphs (b) to (n) in Group 1, Item 1 of Schedule 9 of the VAT Act 1994, each one covering a different situation where the supply on the sale of the Property would be standard rated and not exempt. If these other paragraphs are relevant, the PSG recommends that you consult a VAT specialist so that the wording of this Option can be amended as required.

For details of the categories of properties to which this Clause could apply see VAT Act Schedule 9, Group 1, Item 1 at:

http://www.opsi.gov.uk/acts/acts1994/ukpga_19940023_en_20

Note that this hyperlink is to the version of the VAT Act on the website of the office of Public Sector Information, which provides copies of legislation **as enacted**, and does not reflect any subsequent changes. As at the date of this Guidance Note (October 2008), none of paragraphs (a) to (n) of Item 1 Group 1 has been amended since the VAT Act was originally enacted, although paragraph (b) (developmental tenancies, leases and licences) has been prospectively repealed with effect from 1 June 2020. As a matter of practice however, versions of legislation on the OPSI website may not reflect the most up to date position.

Clause 3.2 of this Option amounts to a confirmation from the Purchaser that the Property will not be used as a dwelling or for another residential purpose, and that the Property is not to be used for charitable purposes.

Where this Option applies, VAT will be charged on the Price and a VAT invoice should be produced, therefore Clause 3.3 should be included in the Offer.

Capital Goods Scheme: No provisions have been inserted in relation to the capital goods scheme, on the basis that that aspect of VAT should not be relevant to sales with vacant possession (again, on the assumption that the sale of the Property does not form part of a larger sale of a business).

4. **Entry and Apportionments**

This clause is straightforward and uncontroversial. There may be no apportionments. As the Offer relates to property with vacant possession, there is no requirement to apportion rents etc. However, there may be certain outgoings which in the particular circumstances of the

Property require apportionment and this clause provides for those to be dealt with on an equitable basis.

5. **Disclosed Documents**

Once documents have been inspected by the Purchaser they will become "Disclosed Documents" and will be listed in Part 1 of the Schedule as such.

This clause provides that any Disclosed Documents are deemed to have been examined by the Purchaser, and that it accepts that it is purchasing the Property having satisfied itself on all matters disclosed in them, including the Title Deeds.

However the statement to this effect in Clause 5.1 is subject to Clauses 6 and 8 which make provision for the Purchaser to have an agreed number of Working Days within which to examine the Title Deeds and other matters which would allow the Purchaser, if not satisfied, to raise queries or requisitions in respect of them. Accordingly the statement in Clause 5 is qualified to that extent and the Purchaser is given the opportunity to conduct a full due diligence exercise. It is only on the expiry of the time limit within Clauses 6 and 8 for that due diligence exercise without any objections having been raised, that the deeming provision in Clause 5 will apply.

6. **Documents to be Disclosed**

This clause provides for Title Deeds, property enquiry certificates (including those provided by private searchers), coal mining search and other usual documentation (which require to be listed in Part 4 of the Schedule) to be exhibited to the Purchaser as soon as reasonably practicable after the date of conclusion of Missives.

The ninety day time limit for coal authority reports is based on current Law Society guidance. There is no equivalent guidance for Property Enquiry Certificates. The PSG consider that a sixty day expiry limit for PECs is a reasonable balance, since there are different risks associated with the information contained in PECs and coal authority reports. In all cases it will depend on the circumstances whether either expiry limit is appropriate, depending upon the nature of the Property, the terms of the information contained in the report and the Purchaser's plans for the Property.

The PSG takes the view that, where applicable, a comprehensive package of planning documents, including plans, should be included in the due diligence items produced by the Seller. These should cover at least the previous 5 years, but a longer period may be appropriate, depending on the age of the buildings at the Property.

Depending on the nature and complexity of the Property and its title, the Seller should provide a reasonable number of Working Days from receipt of each of the items for the Purchaser to satisfy itself. If the title is not yet registered in the Land Register for example, the Purchaser's solicitors will almost certainly require a longer period of time within which to examine and report on title, particularly if it is of a complex nature.

The Purchaser will be entitled to resile from the Missives during the period allowed, if the Title Deeds and any other matters disclose anything materially prejudicial. However once the period of time has elapsed without any intimation of dissatisfaction or the Purchaser resiling, all of the items exhibited will become Disclosed Documents for the purposes of the Missives and the deeming provision in Clause 5.1 will apply.

7. **Title**

This clause provides that the Seller should confirm that it is not aware of any servitudes or similar rights of way affecting the Property other than those disclosed in the Title Deeds. This is because the Purchaser may not be able to ascertain from an inspection of the Property that such rights are being exercised which may result in servitude rights being created at common law.

This clause also contains fairly standard provisions as to burdens, minerals and Land Register requisitions with which purchasers and sellers (and their solicitors) will be familiar. There is a confirmation from the Seller that there are no current disputes and that it has not received registration of any community interests in the Property or any part of it.

The Offer contains a standard provision confirming that none of the "family law" legislation (i.e. Matrimonial Homes (Scotland) Act 1981; Family Law (Scotland) Act 1985 and Civil Partnership Act 2004) affects the Property. There may be occasions, however, where the Property incorporates some residential element and the Optional Clauses contain an alternative form of words suitable for these circumstances, which can be substituted for Clause 7.5.

The parties may choose to dispense with delivery of a physical Land Certificate and instead rest with the updating or creation of the Title Sheet in the Land Register. Clause 7.6 reflects this as an option.

8. **Completion**

This clause lists all of the items which the Seller is required to deliver to the Purchaser in exchange for payment of the purchase price and provides a useful checklist for both parties of the items that they are expected to deliver or receive.

Clause 8.5 deals with the provision of companies searches against the Seller only, on the basis that, where the Property has already been registered in the Land Register there is no need to check charges etc searches against previous corporate owners, and in fact it will not be possible to identify previous owners from the title sheet once a property has been registered in the Land Register.

Where the Property being sold is still Sasine registered, so that the transaction will induce a first registration or where the Property is still undergoing first registration and a Land Certificate has not yet been issued, it would be appropriate for the Purchaser's due diligence to include a check against any other corporate owners of the Property during the prescriptive period. The Optional Clauses contain wording to accommodate this.

9. **Insurance**

This clause is prepared in fairly standard terms. It provides for the Seller to keep the Property insured until the date of Completion, and to do what it can to have the Purchaser's interest noted on the insurance policy until that time.

It states, for the avoidance of doubt, that the Seller is responsible for cancelling the insurances within 5 Working Days after Completion.

10. **Damage or Destruction**

This clause displaces the usual common law provision that the risk of damage or destruction of property passes to a purchaser on conclusion of missives. It is now fairly standard procedure for the Seller to retain the risk until Completion and to maintain insurance until that time. This clause also provides what is to happen in the event that the Property is damaged or destroyed prior to Completion, providing that the Seller will pay the insurance proceeds to the Purchaser and assign its rights in respect of the insurance proceeds.

Consider whether the Property is a type where the Purchaser may want to proceed even if there is damage or destruction (e.g. where the Property is being purchased as a site for re-development) in which case the Purchaser would not necessarily want the Seller to have a right to resile. In these circumstances the reference to "either party" should be amended.

If the damage is so extensive (and the test suggested is that the extent of the damage be measured against an abatement of rent of at least 20% that would be allowed to a

hypothetical tenant), then either party can resile from the Missives, but notice to that effect must be given not later than midday on the date of Completion. This approach sets a level of expectation regarding what may be considered to be material. If the parties prefer, however, this issue can be left to common law principles.

11. **Statutory Matters**

The Purchaser will be deemed to have satisfied itself as to all statutory matters, but this is subject to exhibition to the Purchaser of the usual property enquiry certificates and that it will have the opportunity to check these before the deeming provision applies.

The relationship between the Seller and Purchaser in respect of any statutory notices which may be issued is established in this clause. Practice varies in different parts of the country as to whether liability for statutory notices passes to the Purchaser on conclusion of missives or at completion. The PSG has opted for the latter, with this Clause providing that, unless instigated by the Purchaser, any statutory notices issued prior to the date of Completion will be the responsibility of the Seller.

12. **Environmental**

In each transaction, the environmental provisions should be carefully considered to ensure that they reflect the Seller's and the Purchaser's respective intentions. Advice should be sought from environmental specialists as required.

The approach adopted by the PSG in the Offer assumes that there has already been agreement in principle between the parties, that on environmental issues, there will be a "clean break" at Completion with liability transferring from the Seller to the Purchaser at that date. The Purchaser will have conducted any necessary due diligence and carried out any appropriate surveys to satisfy itself about the extent, if any, of environmental issues affecting the Property.

If there are any existing environmental reports relating to the Property, the parties might want to consider whether these can be readdressed to the Purchaser, so that it can rely on the benefit of such reports.

13. **Moveables**

The structure of the Offer provides for a list of any moveable items to be attached to the Offer as Part 5 of the Schedule. This clause refers to this Part of the Schedule and confirms that such moveable items are included in the Price.

14. **No Employees**

In each transaction, the employment provisions should be carefully considered to ensure that they reflect the Seller's and the Purchaser's respective intentions. Advice should be sought from employment specialists as required.

For the purposes of the Offer, it is assumed that there are no employees who are transferring from the Seller to the Purchaser, and that therefore no TUPE issues arise. A confirmation to this effect is given by the Seller, with provision for immediate termination of any contract of employment that may be found to exist, and with attendant indemnification by the Seller to the Purchaser in connection with such termination. The Seller's indemnity will extend to any loss incurred by the Purchaser as a consequence of the Purchaser providing a corresponding confirmation to its contractors. It is particularly important therefore to ensure that the Seller is completely confident that there are no employees, as the consequences of failing to make correct provision could be damaging.

If there are employees and there are actual or potential TUPE issues, then advice should be taken from employment specialists to ensure that the appropriate checks and balances are in

place in the Offer, that the Purchaser receives appropriate assurances and information from the Seller, and that the Seller is clear as to the extent of any potential liability.

15. **Capital Allowances**

This clause provides alternative wording depending upon the actual circumstances relating to claiming capital allowances.

Where an election is to be made Part 6 of the Schedule contains a form of election notice for the parties to complete and sign. Further guidance is given in the note to Part 6 below.

16. **Access**

Provision is made in the Offer for reasonable access to the Property to be given to the Purchaser prior to the Date of Entry.

17. **Confidentiality**

This clause provides for the transaction and other details to be kept confidential prior to Completion and, if the parties require it, for the terms of any post-Completion press release to be agreed. Where confidentiality is required this should extend to agents and professional advisers as well.

18. **Formal Documentation**

The purpose of this clause is to ensure that the Missives themselves are properly executed, and that the Missives record the complete agreement between the parties in relation to the purchase and sale of the Property.

19. **Supersession**

In accordance with usual practice the style of offer provides for the Missives to remain in force generally for only two years after the Date of Entry, thus preventing the Missives remaining in force for the period of the long negative prescription. It does however exclude the provisions in Clauses 7.6, 12, 14 and 15 which may take longer than two years to implement.

If the supersession period is to be less than two years, you should review all of the provisions of the Offer carefully to ascertain whether any other provisions need to be excluded from the shortened period.

20. **Exclusion of Personal Liability**

The purpose of this clause is to make clear that the Purchaser's solicitors and the Seller's solicitors are acting as agents only for the Purchaser and Seller respectively and is principally relevant where either or both solicitors act for foreign parties such as offshore and foreign registered companies and nominees.

21. **Assignation**

The Purchaser may not assign its interest in the Missives. If in the particular circumstances of a transaction there is no objection to assignation, then this clause can be amended, but the parties would have to consider what requirements would be necessary in the event of assignation (e.g. consent of the other party).

22. **Proper Law and Prorogation**

Reference is made to the Scottish Courts and Scots Law in relation to the Missives.

23. **Time Limit**

It is normal practice to impose a time limit for acceptance of the Offer.

The Schedule

Part 1 - Disclosed Documents

In this Part of the Schedule list the documents such as Title Deeds, property enquiry certificates and any other documentation that is exhibited or going to be exhibited to the Purchaser before the Missives are concluded, and on which, in the absence of intimation to the contrary, it will be deemed to be satisfied. They then become Disclosed Documents in terms of clauses 5, 6 and 8 of the Offer.

Part 2 - Disposition

It is suggested that a copy of the proposed Disposition be attached to the Missives at this Part of the Schedule.

Part 3 - Plan

A clear plan of the Property should be included here, where required.

Part 4 - Title Deeds

An Inventory identifying the title deeds (together with a description of whether they are principals, Extracts, or quick/photo copies) relating to the Property should be listed in this Part of the Schedule.

Part 5 - Moveables

The moveable items included in the sale and included in the Price should be listed here.

Part 6 - Capital Allowances Election

On the disposal of a property which contains fixtures on which the seller has claimed capital allowances, the seller is required to apportion part of the sale price to those fixtures. This apportionment will affect the amount of allowances available to the seller in the future and, in certain circumstances, could result in a tax charge. Equally, the purchaser will be required to apportion part of the price to the fixtures to determine the capital allowances which the purchaser will be able to claim on the fixtures going forward.

The purpose of an election under section 198 of the Capital Allowances Act 2001 is to fix the apportionment to the fixtures. Without such an election each party would have to apportion the purchase price on a just and reasonable basis and may have to agree a valuation with HMRC. An election once made is irrevocable and cannot be challenged by HMRC. The advantage of an election is therefore to give the parties certainty as to the correct apportionment.

Subject to two restrictions the parties can decide the part of the price that they wish to apportion to the fixtures. The restrictions are that the election cannot be for an amount greater than was originally spent on the fixtures by the seller or greater than the sale price of the property. Usually the election will be made for an amount that will allow the purchaser to benefit from any remaining capital allowances in respect of the fixtures, while allowing the seller to retain the benefit of the allowances it has already claimed. However, an election does not have to be made for such a figure and ultimately the decision will be a commercial one.

The part of the purchase price apportioned to fixtures must then be further apportioned on the section 198 election between fixtures which are integral features and those which are not integral features. Integral features are a special class of plant and machinery introduced into the legislation in March 2008. The definition of integral features can be found at section 33A of the Capital Allowances Act 2001 and means:

- An electrical system (including a lighting system)
- A cold water system

- A space or water heating system, a powered system of ventilation, air cooling or air purification and any floor or ceiling comprised in such system
- A lift, an escalator or a moving walkway; or
- External solar shading

The reason the apportionment in the section 198 election is necessary is that integral features attract a writing down allowance of 10% per annum whereas other plant and machinery fixtures will attract a writing down allowance of 20% per annum. If the apportionment is not made in the election this could therefore lead to a distortion of the tax treatment of the fixtures.