

DUE DILIGENCE QUESTIONNAIRE

Purchase



Guidance Notes

Purpose and Status of Due Diligence Questionnaire

The purpose of the Due Diligence Questionnaire is to provide the Seller and the Seller's solicitors and advisers with a comprehensive list of the Purchaser's and the Purchaser's solicitors' due diligence requirements at an early stage of the transaction. The use of the standardised agreed format of Due Diligence Questionnaire should encourage the anticipation at the outset of any transaction of the requirement for these items and encourage Sellers and their advisers alike to anticipate the need to produce this information and make records, information and documentation available in as comprehensive a format as possible.

This Questionnaire is an information gathering exercise and is not a substitute for the normal conveyancing procedures. The Replies given are limited to matters within the Seller's actual knowledge after consultation with its solicitors and other advisers as identified in the reply to Question 23. The Questionnaire is not intended to form part of the Sale/Purchase contract, except where, or to the extent that they are expressly incorporated in any missives or contract following.

How to use and reply to the Questionnaire

Although the Questionnaire can be completed manually or replies contained in a separate document or separate correspondence, it has been designed to permit responses, and also incorporate further questions and further responses (which can be distinguished by the use of a different font or colour if wished) to be inserted within the body of the document, after the relevant Question, so that by the end of the transaction, a full record of the exchange of information may be preserved in a single document.

The main body of the Questionnaire deals with general fairly comprehensive commercial property enquiries relating to such matters as titles, property enquiries, fire regulations, planning and building control matters, insurance and the like. The detail of more specialised areas which may not necessarily apply to all transactions, namely VAT treatment of the transaction, Capital Allowances, Staff/TUPE matters and occupational leases are dealt with by way of an initial Question in the main body of the document followed by a referral to an appropriate detailed Annex, if these considerations apply. As well as avoiding repetition of "Not applicable" to a number of questions this also allows the recipient to detach the appropriate schedule and pass it to specialists in tax and employment, both within the solicitors' and the clients' offices, or to their managing agents or other advisers, to respond to or deal with specific areas of enquiry.

If desired you can tailor the Questionnaire to the circumstances of a particular transaction. However it is recommended that, to assist familiarity by users of the format and layout of the standard Questionnaire, the standard format be left untouched and where queries are "not applicable", that this be stated in the Replies with, if necessary, a brief explanation. **Changes should not be made to the main text of the Questionnaire and amendments should be restricted to replies inserted in appropriate Reply boxes.**

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To maintain consistency and encourage familiarity with the format, as well as maintaining the integrity of the paragraph numbering, any additional Questions should be added at the end of the main part of the Questionnaire.

In providing information in response to specific Questions, please bear in mind, where appropriate that in terms of the Data Protection Act 1998, information relating to an individual who can be identified from that information should generally not be disclosed without the consent of that individual.

Introduction

Points A to H confirm and clarify the purpose of the Questionnaire.

Question 1 - Title

These Questions are fairly self-explanatory and standard. Where a negative response is required (for example where there is already an adequate plan within the titles or the property is land registered), a simple "N/A" is all that is required in the response box. However avoid an "N/A" response where a "no" or "none" response would be more appropriate.

Some explanation may be necessary in respect of Question 1.12 - Long Leases (Scotland) Act 2012 (see also Question 20.1):

The Long Leases (Scotland) Act 2012 will convert "qualifying" long leases into tenants' ownership. For the purposes of the Act, "qualifying" leases are leases that (1) were let for over 175 years; (2) in the case of residential leases, have over 100 years left to run from the "appointed day" laid down under the Act; and (3) in the case of non-residential leases, have over 175 years left to run from the appointed day. In calculating the period for which a lease was granted, break options are disregarded, and landlords' obligations to renew are included.

The "appointed day" is 28 November 2015.

In addition to the criteria above, a lease is only a "qualifying lease" if: (1) it is recorded in the Register of Sasines or registered in the Land Register; (2) the annual rent does not exceed £100; (3) it does not include a harbour in relation to which there is a harbour authority; (4) it was not granted for the sole purpose of allowing the tenant to install and maintain pipes or cables; and (5) it is not a lease of minerals or a lease containing minerals in respect of which a royalty, lordship or other payment of rent determined by reference to the exploitation of those minerals is or may be payable.

The Act contains provisions for tenants to opt out of conversion and for landlords to claim compensation as a result of conversion.

Question 2 – Community right to buy

If the Property is in an area affected by the community right to buy under Part 2 of the Land Reform (Scotland) Act 2003 the Purchaser will need to be satisfied that there is no community right to buy registered or pending registration in the Register of Community Interests in Land.

Question 3 – Common Good Land

From time to time when purchasing property that is or has formerly been in the ownership of a local authority, issues in relation to common good land arise. As much for the purposes of an aide memoire for the odd occasion when such issues arise, this question has been included in the Questionnaire.

While it is difficult to state definitively whether or not land forms part of common good land, positive indicators are:

- (a) the land or part of it is owned by a local authority; and

- (b) the land, or the relevant part of it was held by a Burgh at the time of the local government reorganisation in 1975; and
- (c) the land was not acquired using statutory powers or acquired and held under a special trust.

If it is established that the land is common good, then it may be necessary [for the local authority] to apply to the Sheriff Court for an Order under Section 75 of the Local Government (Scotland) Act 1973 to be able to dispose of the Property.

For the guidance on issues relating to Common Good land, the PSG recommends "*Common Good Law*" 2nd Edition by Andrew Ferguson, published in 2019 by Avizandum Publishing Limited.

Question 4 - Moveables

The response to this Question should identify at the outset what items the Seller intends to remove and obtain an assurance that there are no leasing, hire purchase or credit arrangements affecting any of the moveables.

Question 5 – Public Utilities

As much information as possible should be provided in relation to utilities, services and supplies and where available copies of supply contracts produced. This section should also identify whether there is a requirement for a servitude or other right permitting pipes, cables or other conduits to pass through land lying outwith the Property, and the nature of any consents required to ensure full legal entitlement to uninterrupted supplies of services.

Question 6 – Postcode

If available the postcode should be given. This is an item of information about properties which is being used more and more as a key or portal to more detailed information about that property.

Question 7 – Planning etc

This section is designed to be a combination of a shopping list for documentation and enquiry in relation to breaches or outstanding or uncompleted matters. It is anticipated that, depending upon the nature or complexity of the transaction, the documentation produced in response to this Question may be considered by specialists.

Question 8 – Fire Safety

In addition to production of any appropriate fire risk assessment and fire safety record documentation this Question also elicits information about fire escape routes and whether or not evidence of rights of escape over adjoining property are required, possibly necessitating examination of other title documentation. The Question also asks if an EWS1 is required confirming that any cladding does not pose a fire risk - see [External wall systems update | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk/external-wall-systems-update/) . This will apply to residential multi-storey buildings including new build properties.

Question 9 – Property Enquiries

This section covers provision of both Local Authority and Coal Authority enquiry reports. It is up to the parties to decide whether for this purpose property enquiry reports from the local authority will be accepted or, as an alternative, reports from private searchers.

Question 10 – Compliance with Statute

The fact that responses made are limited to matters within the Seller's actual knowledge after consultation with its solicitors and other advisers should be borne in mind in relation to this Question. Full disclosure of any enforcement or other documentation should be encouraged.

This section also includes questions about the National Security and Investment Act 2021 (NSIA) that came into force on 4 January 2022 and extends to the whole of the UK. It replaced the Government's powers of intervention under the Enterprise Act 2002, and establishes a new statutory regime for government scrutiny of, and intervention in, acquisitions and investments for the purposes of protecting national security. The regime applies to specified categories of transaction or investment that involve the acquisition of control over certain qualifying entities (any entity other than an individual) or qualifying assets (includes land).

It is possible that the notification requirement could be triggered by the Purchaser, but this question only concerns enquiry of the Seller.

The principal reason for including this question in the DDQ is to remind users to consider whether the transaction or the transacting entity(ies) could come within the regime. One of the sanctions available to the Government, if there are national security concerns, is the ability to unpick a transaction that has already been completed. It should be noted that the provisions of the NSIA apply retrospectively to transactions completed on or after 12 November 2020.

Question 11 – Reports etc

As far as possible, full copies of all Reports should be made available. Consideration may need to be given at this stage to whether or not Reports require to be re-addressed to the Purchaser. Similarly, where Reports and other investigations carry a duty of care, consideration should also be given at an early stage to whether assignments or novations of collateral warranties will be available to a purchaser.

Question 12 – Works/Alterations etc

If there have been recent works carried out to the Property, Annexe 4 should be completed. Again as full a disclosure of available documentation as possible should be made at this stage. It is anticipated that the majority of documentation elicited by the Questions in Annexe 4 will be passed to Construction specialists for consideration. They may well have additional questions or requirements to make after an initial perusal of the documentation.

This Question includes providing details of any common repairs to tenement type properties for which the Purchaser may be liable to contribute towards the cost if a notice of potential liability for costs is registered under the Tenements (Scotland) Act 2004 within the appropriate timescales.

Question 13 – Rates and Other Outgoings

Factual information and relative records are sought in relation to this section. All available information should be provided.

Question 14 – Insurance

Although the Purchaser will usually be responsible for arranging new cover from the date of settlement or other appropriate date, it is always of use to have details of existing cover, exclusions etc as well as ensuring that cover is in force in the period between conclusion of missives and the date of completion. Details of circumstances in which cover have been refused, or claims made are also of relevance and interest to a Purchaser.

Question 15 – VAT Treatment

The general Questions raise a single query on the likely treatment of the transaction for VAT purposes. Annexe 1 contains more detailed Questions where the property is potentially standard rated and to cover circumstances where the transaction may be treated as a TOGC.

Question 16 – Capital Allowances

Again the general Question identifies whether or not there are items of plant and machinery or industrial, scientific research or hotel buildings forming part of the Property on which Capital

Allowances could be claimed. If there are, the parties Capital Allowances advisers will need to liaise with each other to gather sufficient information to determine the availability and value of those allowances.

Question 17 – Environmental

This section is a fact finding section containing requests for copies of authorisations and permits and details of actual notices, proceedings etc as well as requesting details of any breaches, whether actual, alleged or potential. It is not seeking information or warranties which are outwith the Seller's knowledge. If a Seller is cautious about making environmental disclosures then negative responses to this section should flag at a comparatively early stage the requirement for a Purchaser to make other enquiries or to press specific points with the Seller.

Question 18 – Management/Maintenance/Service Contracts

Self-explanatory request for all relevant contracts.

Question 19 – Staff/TUPE

In the event that staff and transfer of undertakings regulations are an issue, Annexe 2 contains more detailed Questions and requests for information. These questions have been updated to deal with the Scottish Employment Appeals Tribunal decision that an employee's contract can be split and transferred to a number of different employers on a part-time basis when the business is split post-transfer (*McTear Contracts Ltd v Bennett & Ors*). This could be relevant on a sale of part of a property.

Question 20 – Letting

Question 20 is self-explanatory. If there are no occupational leases or other similar document, Annexe 3 can be ignored. Where the Property is affected by occupational leases, Annexe 3 should be completed.

This Question also deals with agricultural tenancies. If the Property is subject to an agricultural lease governed by the Agricultural Holdings (Scotland) Act 1991 then the tenant is entitled to register a notice of interest in the Agricultural Tenant's Interest Section of the Register of Community Interests in Land. Once registered the tenant has in effect a right of pre-emption and on a potential sale the property must be offered to the tenant.

Question 21 – Stamp Duty Land Tax/Land and Buildings Transaction Tax

This Question is designed to ascertain if there are any potential liabilities for the purchaser for SDLT/LBTT which was deferred at the time of the seller's acquisition of the Property e.g. where overage was payable.

Question 22 – Asbestos

This Question requires the Seller to produce the survey and management plan for the management of asbestos in the Property which is a requirement since Regulation 4 of the Control of Asbestos at Work Regulations 2002 came in to force on 21 May 2004 (subsequently replaced by and re-enacted in the Control of Asbestos Regulations 2006, and now re-enacted in the Control of Asbestos Regulations 2012). If the Property is let the responsibility may rest with the tenant(s) and an additional question has been added at the end of Annexe 3 dealing with this.

Other "deleterious materials": The PSG has been considering whether additional questions need to be added to the DDQ to deal with issues such as flammable cladding and RAAC, both of which have been in the spotlight recently. The Group is of the opinion that these (and issues with other deleterious materials used in construction) are matters on which *surveyors* should advise, rather than solicitors, and are more likely to be considered as part of separate technical due diligence should they be relevant. Accordingly no changes have been made to the DDQ in respect of these matters.

Question 24 – Miscellaneous

This section specifically requests confirmation of who the Seller consulted in connection with preparation of the Replies. This will clarify, for example, whether parties such as managing agents who have not been consulted ought to be consulted to provide more detailed or relevant information.

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