GUIDANCE NOTES
OFFER TO SELL – VACANT POSSESSION

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 Offer 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 two additional general interpretation provisions have been added in clauses 1.2.12 and 1.2.13 providing a definition of "reasonable consent", and clarifying that interest (on late payment) does not run if the principal sum to which it relates is paid within the specified period of time.

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 is always concern, from an anti-money laundering point of view, when funds are sent to the seller's solicitors Bank Account direct from a purchaser. If this is unexpected, then delays can result while the seller's solicitors run anti money laundering checks, or the solicitors refuse to accept the funds from an unknown source, and there are often recriminations as a result. Property transactions are seen as a fertile source of money laundering activity. To address the practical issue, without adding further AML complications, it is made a contractual provision that funds must come either from a firm of solicitors, or, where the funds in question are loan funds for the purpose of acquiring the Property from a bank that is a shareholder of CHAPS Clearing Co. Ltd, from that bank direct. Thus the purchaser and his solicitor are on notice to route the funds in the appropriate way, and the seller's solicitors can legitimately decline to accept funds that do not come from the correct source.

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.

A corresponding entitlement has been reserved to the Purchaser to rescind the Missives by virtue of a material breach of contract resulting from the Purchaser being ready, willing and able to complete yet the Seller has failed to give entry timeously (assuming there is no fault on the part of the Purchaser).

3. **VAT**

As the Offer 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; 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 – VAT Exempt: 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 which constitute supplies which would be standard rated by virtue of paragraph (a) in Group 1, Item 1 of Schedule 9 to the VAT Act 1994, even though no option to tax has been made.

Paragraph (a) in Group 1, Item 1 of Schedule 9 to the VAT Act 1994 covers the sale of a heritable interest in a new commercial building or partly 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.legislation.gov.uk/ukpga/1994/23/contents

Note that this hyperlink is to the version of the VAT Act on the www.legislation.gov.uk website, which provides copies of legislation **as enacted**, and does not reflect any subsequent changes. As at the date of this Guidance Note (September 2015), 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 www.legislation.gov.uk 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**

Entry: Entry is granted by the Seller with vacant possession.

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.

The apportionment of rates is left for the local authority to carry out.

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 Business 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 1 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 Business 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**

Clauses 7.1 Encumbrances; 7.2 Minerals and 7.3 Outstanding Disputes

These clauses provide that the Seller should confirm that it is not aware of any Encumbrances (e.g. 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 Encumbrances being created at common law.

These clauses also contain fairly standard provisions as to burdens and minerals with which purchasers and sellers (and their solicitors) will be familiar. There is a confirmation from the Seller that there are no current disputes.

Clause 7.4 Possession

Under the new rules for realignment of rights, where a purchaser (B) acquires in good faith from a person (A) who is not the proprietor of a plot of land, but is entered in the proprietorship section of the title sheet as proprietor, and is in possession of the land (section 86 of the 2012 Act), it is a condition, for realignment to take effect, that the land has been in the possession, openly, peaceably and without judicial interruption, of either A, or of A and then B, for a continuous period of one year.

Although the situations where section 86 will need to be relied on are likely to be rare, it will never be apparent at the time of the dealing whether reliance on section 86 will be required. Since possession for at least one year is a key component, this clause provides on all occasions for confirmation of possession to be required.

In this way the purchaser will always check the possession requirement, so that, in the unlikely event of a challenge, it can be demonstrated that the section 86 requirement for possession has been confirmed, without jeopardising the good faith requirement.

Note that section 86 lists other conditions that must apply for realignment of rights to occur. Good faith and a minimum of one year's possession are the main conditions.

Clause 7.5 Community interests

There is confirmation from the Seller that it has not received any copy applications, or invitations to make representations in respect of an application by a community body or notice of the registration of any community interests in the Property or any part of it (a 2003 Act Notice).

From 15 April 2016, potentially any land in Scotland could be the subject of a community right to buy. The Purchaser’s solicitor may also want to ask if the Seller has any knowledge or awareness of any proposals to form a community body or the existence of one, with an interest in any part of the Property. However, the PSG did not consider it appropriate to incorporate such a provision in the contract, given the subjective nature of such knowledge or awareness, but it is included as a query in the Due Diligence Questionnaire.

Although it is expected that situations where commercial property transactions are affected by a Community Right to Buy will be rare, the PSG considers that it will be of assistance to provide wording that caters for how the parties should tackle a CRTB application that arises around the time the parties are transacting. In the majority of situations, communities register a right to buy when there is no sale or marketing of the property taking place. However, there could be circumstances where a community becomes aware of a proposed sale of property which is or includes land in which they are

interested, or it might be that an application to register a CRTB is coincidentally made at the time of a sale taking place.

In these situations, where the owner has already "taken action with a view to the transfer of the land", the 2003 Act provides for a "late application" procedure. How a late application is dealt with, will depend on whether Missives have been concluded between the owner and a third party purchaser before or after Scottish Ministers receive the CRTB application.

When missives are already concluded, then on being advised of that fact, Scottish Ministers **must** decline to consider the application (section 39(5) of the 2003 Act). That will mean that the sale to the third party purchaser can proceed, unaffected. The Seller must provide Scottish Ministers with evidence of concluded missives. New clause 7.5.3 covers this situation.

If however, Missives have not yet been concluded, Scottish Ministers will consider the application, to decide whether or not to register the interest. They must make, and send a note of their decision to the community body and the owner within 30 days of receiving the late application (44 days if Scottish Ministers seek additional information from the owner). The effect of an application being a "late application" is that if accepted, the right to buy is immediately triggered. This might not suit the community body, who may not have been aware that their application was "late" and might not have made any funding arrangements. It is possible in those circumstances that the community body might decide to withdraw its application. The community body might also decide at a later stage in the purchase procedure that they won't proceed.

It might suit the owner and the third party purchaser to wait a while to see how the community body acts, since if it withdraws the application, the original sale can go ahead. However it would be unreasonable to expect the parties to have to wait around, possibly for several weeks or months, in a state of uncertainty, if they don't want to. Accordingly new clause 7.5.4 provides two options at this initial stage. Either:

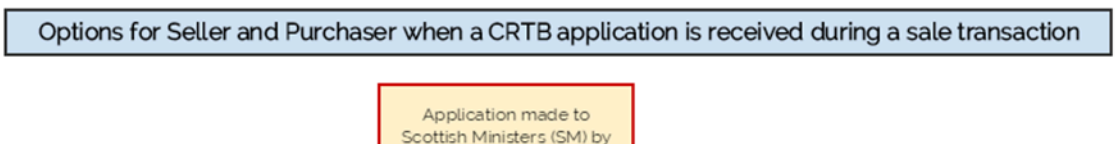
- either party can resile immediately (clause 7.5.4(a)); or
- they can wait to see if the application is refused, or withdrawn, and if it is, then the new Date of Entry is determined.

Where Scottish Ministers decide to register the application, it is still possible that it might be withdrawn or that the community body decides not to proceed, or Scottish Ministers decide at a later stage not to consent to allow the right to buy to proceed, for example if the result of the ballot shows that there is insufficient support in the community for the purchase. Again the parties might decide to wait and see what happens, but again since it is now known that the CRTB has been registered the parties might decide to cancel the sale at that stage. Accordingly clause 7.5.4(c) gives the parties a second opportunity to resile, provided they do so before the CRTB application is withdrawn or the community body indicates that it is not going to exercise the right to buy. A community body now has up to 8 months from the date on which it confirms to Scottish Ministers that it intends to exercise the right to buy, within which to complete the purchase and pay the agreed price.

However if the community body proceeds to complete the purchase of the property or the relevant part of it, then the sale to the third party purchaser cannot, of course proceed (unless of course the parties are able to agree to carve out the part of the property that is subject to the CRTB – see Guidance below). In that case the Missives will have to come to an end, and the seller should intimate this fact to the purchaser – clause 7.5.4(d).

If the timing is extremely unfortunate, then in a situation where there has been a same day conclusion of missives and completion for example, coinciding with prior or same day receipt of an application by Scottish Ministers, the effect of the 2003 Act could be that the disposition to the purchaser is void. If that is the case it may be necessary to unpick the transaction, withdraw the Disposition from registration and refund sums of money paid and received. Clause 7.5.5 sets out a mechanism for this, the purpose being to return the parties to the financial position they would have been in, had Completion of the sale of the Property not taken place. This includes a general provision to provide such deeds, document and evidence as may be required (such as for example a VAT credit note where VAT on the Completion Payment has to be returned) to achieve this outcome.

The following Flowchart shows the stages in a late application situation, and the options for the parties at each stage:



Where only part of the Property is affected

It is possible, perhaps even likely, that the property in which a community body is interested is only part of what is proposed to be sold by the Seller. In some circumstances, the Purchaser and the Seller may be prepared to proceed with the sale, by carving out the portion of the Property that the community body wish to buy. The 2003 Act provides that transfers of land which is not affected by a registered CRTB are prohibited, if the transfer also relates to land that is subject to a registered interest. Accordingly any disposition which includes both affected land and land that is not affected would be void.

How the parties decide to deal with these situations is a matter for discussion and negotiation according to the particular circumstances of the property, and the parties involved. Consequently the PSG has decided not to provide standard wording for this outcome in the Offer. However wording that might be suitable or which could be adapted according to circumstances is included in the Optional Clauses.

Where the CRTB application is known about before Completion takes place, the parties have the opportunity to discuss whether to proceed with the reduced area of the Property, and how that is to be dealt with. However matters are a little more complicated if the parties only learn of the application after Completion. The optional wording caters for that situation.

The approach taken is that the Purchaser will be entitled to request that the Seller provides them with an amended Disposition (and plan), conveying to the Purchaser that part of the Property which is unaffected by the 2003 Act Notice. In exchange the Purchaser will withdraw its application for registration of the original disposition (where the CRTB application only comes to light after Completion). The price is to be reduced by a sum equivalent to the value of the property affected by the 2003 Act Notice. The 2003 Act sets out criteria for determining that amount, and consequently there does not need to be any subjective evaluation of the effect on the price or value of that portion being removed from the Property.

Where the price has already been paid, the Seller must reimburse to the Purchaser an amount equivalent to the value that is determined for the property affected by the 2003 Act Notice, within [5/10] Business Days of that value being determined.

Clause 7.5.6 Community Asset Transfers

Part 5 of the Community Empowerment (Scotland) Act 2015 introduces the procedure for asset transfer requests to be made to relevant authorities by a community in relation to any land owned or leased by that authority. “Relevant authority” is defined by reference to a list of bodies in Schedule 3 to the Act, and includes, local authorities, Scottish Ministers, Scottish Enterprise, Highlands and Islands Enterprise, local Health Boards, National Park authorities and others.

An asset transfer request must come from a “community transfer body”, and can be made at any time. Once a relevant authority receives an asset transfer request, it must not sell, lease or otherwise dispose of the land to which the request relates to anyone other than the community transfer body. As there is no requirement, as there is for the community right to buy, to register an interest, or satisfy a public interest test, and the authority must agree to the transfer request unless there are reasonable ground for refusing it, when purchasing land from any relevant authority, it will be necessary to obtain confirmation from the Seller that it has not received any such request. As, once an asset transfer request has been received, a relevant authority may not contract with any third party in relation to the property affected any contract concluded in respect of land which becomes the subject of an asset transfer request, is void. However, if the land in question has already been advertised or exposed for sale, or negotiations for the sale are already underway, then the prohibition against selling or letting to a third party does not apply.

This clause is only required where the Seller is a relevant authority.

Clause 7.6 Community right to buy abandoned, neglected or detrimental land

The community right to buy abandoned, neglected or detrimental land under Part 3A of the Land Reform (Scotland) Act 2003 differs from the traditional community right to buy, in that it is a right to purchase the land that is triggered immediately, without the owner of the land having to put the land on the market. The community body must however have tried, and failed to buy the land direct from the owner, before they can apply to Scottish Ministers to exercise the right.

Parties entering into negotiations for the sale and purchase of land will have a pretty good idea about whether or not it is likely to fall into the category of "abandoned, neglected or detrimental". The

Regulations that define the criteria are therefore unlikely to apply to most commercial property transactions.

In many cases, the right to buy will not be applicable. The Offer therefore contains optional "default" wording that provides confirmation from the Seller that neither the Property, nor any part of it is abandoned, neglected or detrimental within the meaning of the Act and the Regulations.

Where there is a possibility that the right to buy might apply – and it is of course possible that there might be a part of a larger property or area of land that qualifies – the alternative wording provides for the Seller to confirm that:

- it has no knowledge of any proposals to form a Part 3A Community Body. Before an application can be made to Scottish Ministers, the community body must obtain approval from the community. This is likely to be widely publicised locally, but it will depend on individual circumstances whether the particular seller is likely to have any knowledge;
- it has not been approached by a Part 3A Community Body to buy the land. This will be a matter of fact. The community body cannot apply to Scottish Ministers until it has approached the owner with a request to buy the land, and been refused; and
- it has not received any copy application by the Part 3A Community Body.

Any pending application by a Part 3A Community Body should appear in the Register of Applications by Community Bodies to Buy Land. The offer provides that there is no entry affecting the land in that Register. The Legal Report should include a search in that Register.

If missives for the sale of the land have been concluded, then the transfer can go ahead even if an application is subsequently made before Completion.

It is possible of course that even if negotiations for the sale are at an advanced stage, an application may be made before missives are concluded. Once a pending application appears in the Register the owner is prohibited from transferring or taking steps to transfer the land. In these circumstances the sale cannot proceed and the negotiations must come to an end.

The Offer caters for the situation where an application is made very close before the Conclusion Date, but the parties are not aware of it. If the parties proceed to Completion, when the existence of the pending application subsequently comes to light, the transaction is a prohibited one, and so will need to be reversed, with repayment of the Price to the Purchaser, and removal from the Property and refund to the Seller of any sums received by the Purchaser.

Alternatively, the parties may become aware of the prior application once missives have been concluded, but before the transaction has completed. In those circumstances, the Purchaser may decide to resile and, as the transaction is a prohibited one, it should be entitled to do so. But the parties may decide to wait and see if the community body proceeds with the purchase, or indeed if the purchase is approved by Scottish Ministers (since it is unlikely that a purchaser would want to buy abandoned, neglected or detrimental land merely to keep it in its same condition, it may be that the plans which the Purchaser has for the land could be sufficient to introduce doubt regarding the requirement that Scottish Ministers must be satisfied that the achievement of sustainable development in relation to the land would be unlikely to be furthered by the owner of the land continuing to be its owner). If so, the new Date of Entry would be 5 Business Days after the community body decide not to proceed, or their application is declined.

Where an application is made after the Conclusion Date, but before Completion, while the parties are free to proceed with the transaction, the Purchaser may wish to have the option to resile, anticipating that the community body will probably re-apply to acquire the land from the Purchaser as owner.

However the Purchaser may have plans to put the land to productive use, such as where it is part of a larger development site, and may therefore want to proceed. If the Purchaser has plans to return the land to some productive use, it is likely that a further application by the community body to buy would not meet the relevant criteria for such applications. Where the transaction proceeds in this situation, the disposition in favour of the Purchaser must contain a declaration to the effect that it falls into one of the categories of transaction that is exempt from the prohibition:

"The Seller declares that the transfer effected by this disposition is excluded from the operation of Regulation 12 of the Community Right to Buy (Abandoned, Neglected or Detrimental Land) (Eligible Land, Regulators and Restrictions on Transfers and Dealing) (Scotland) Regulations 2018 by virtue of Regulation 13 [insert relevant sub-paragraph] of the 2018 Regulations; [If, but only if, the exempting paragraph is (a) (gift), (d) (group company transfer), or (g) (partnership or trust transfer) insert the following: The Seller further declares that the transfer effected by this disposition is not negated by Regulation 13(2) of the 2018 Regulations;]"

Clause 7.7 Occupancy rights

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 7.6.

Clause 7.8 Advance Notices

An advance notice (AN) is a notice in the Registers of Scotland that protects an intended deed between two or more parties for a 35 day period. Only the person who may validly grant the intended deed (or someone with that person's consent) can apply for the AN. The AN protects the intended grantee against competing deeds registered within the 35 day protected period and against the granter being inhibited within the 35 day protected period. The protected period will begin on the day after the AN appears in the application record.

Clause 7.8.1

We have provided that the AN for the Disposition must be in the form adjusted with the Purchaser because the Purchaser will want to ensure that the Purchaser is correctly designed in the application for the AN and that the property it is purchasing is correctly identified. If the Purchaser's name is incorrect the Disposition will not be protected by the AN. Particular care will be required if title is to be taken in the name of a nominee to ensure that the disposition in favour of the nominee is protected by the AN.

There is no statutory guidance on when the application for the AN should be submitted and it will be for the parties to consider what is an appropriate time in the circumstances of their transaction.

We have suggested that the AN is entered on the application record no earlier than 5 Business Days prior to the Date of Entry. This will provide the Purchaser with around 30 days of protection after completion in case there is any delay in the Disposition being registered. Requisitions will be very rare under the 2012 Act. The Keeper must reject any application which does not meet any of the general application conditions (set out in section 22 of the Act) or conditions of registration (set out in sections 23-28 of the Act) as at the date of application. This is known as the "one shot rule". The Purchaser will need to have sufficient protection under the AN in case the application is initially rejected.

For an AN for a Disposition inducing first registration and for some sales of part (where a plan is required for example) the application for the AN must be made on paper because electronic submission will not be possible. This means that the Seller will need to ensure that the application is submitted to allow for delivery by traditional mail, if necessary, to comply with whatever time period is specified in the missives.

The Seller will receive an acknowledgement of the AN (electronically if submitted online and by traditional mail if submitted on paper). The Seller may exhibit this to the Purchaser as confirmation that the AN has been submitted, and in addition the Purchaser has the comfort that the Seller must exhibit property searches at settlement disclosing the AN for the Disposition.

Clause 7.8.2

The Purchaser needs the Seller's consent before it can apply for an AN for any deeds that it intends to grant over the Property such as standard securities.

Clause 7.8.3

Missives are sometimes concluded very close to the Date of Entry and an AN may need to be submitted before missives are concluded. In such circumstances the Seller may want to obtain the Purchaser's consent to the discharge of the AN if the transaction does not proceed.

The Purchaser will need the consent of the person to whom the intended deed protected by the AN would be granted (e.g. the lender for an AN for a standard security), to discharge the AN if the sale falls through, otherwise the Purchaser will not be able to comply with the obligations to remove any AN submitted by them if the purchase aborts.

An AN expires at the end of the 35 day period so if there is no immediate requirement to clear the application record (e.g. if another purchaser is available and a new AN is required) then the AN may simply be allowed to expire.

Clause 7.8.4

If completion is delayed it may be necessary to submit another AN to protect the Disposition. This clause specifies who will pay for the AN depending on the reason for the delay in settlement. We have not specified a timescale for making the application for the new AN as it will vary from transaction to transaction, depending on how much time is left under any existing AN and how much of the protected period the Purchaser wants available post settlement.

Clause 7.8.5

No letter of obligation will be provided by the Seller's solicitors in a transaction where an AN for the Disposition is provided. This is because the AN provides the protection which the letter of obligation used to give to the Disposition.

Clause 7.9 Land Register Requirements

As the Keeper will not deliver a physical Land Certificate, this Clause provides for the updating or creation of the Title Sheet in the Land Register. Invalid applications for registration will be rejected by the Keeper under the "one shot rule" referred to above. Clause 7.8.1 is therefore aimed at ensuring that all documents and evidence which may be required to support the application for registration will be delivered by the Seller. Clause 7.8.2 makes it clear that the Seller will only be required to deliver such items after Completion if the Disposition has been presented for registration within the standard period of 14 days.

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 8.4 Legal Reports

The Purchaser will need to see a Legal Report or Legal Continuation Report brought down as close as possible to Completion disclosing the AN for the Disposition and otherwise clear of any entry adverse to the Seller's interest in the Property. It is not clear if an AN is an entry adverse to the Seller's interest in the Property so we have specifically provided that there will be no other AN other than those submitted by the Purchaser.

Clause 8.5 Charges Searches

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 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 title sheet has not yet been created, 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.

Prior to the 2012 Act the Seller's Solicitors' letter of obligation would contain an undertaking on behalf of the Seller to provide the updated charges search. However there is already a contractual obligation on the Seller to provide these updated searches, and as letters of obligation will no longer be given, the obligation on the Seller to provide these updated searches will rest entirely on the contractual provisions set out in Clause 8.5.

9. **Post Completion**

This Clause provides that if the Disposition has been presented for registration timeously the Purchaser's title will not be subject to any exclusion or limitation of warranty and will contain no prejudicial entries other than those created by or against the Purchaser or previously accepted by them prior to Completion.

10. **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 its insurances within 5 Business Days after Completion.

11. **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 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.

12. **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.

Energy Performance

Issues concerning energy performance of buildings are increasingly relevant. All buildings (other than those that are exempt) require an Energy Performance Certificate, and sight of a copy of this will usually be one of the purchaser's due diligence requirements.

The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 (www.legislation.gov.uk/ssi/2016/146/contents/made) apply on the occasion of a sale or new lease of a non-exempt building, or building unit with a floor area of more than 1,000 square metres from 1 September 2016. In addition to the requirement for an EPC, the owner must obtain an action plan containing a programme for implementation of measures to improve the energy improvement of the building, and reduce emissions from it. Energy performance and emissions targets are set, and recommended improvement measures are specified The action plan will contain recommendations for meeting the targets, and the owner must either have a programme for carrying out the improvements, or alternatively they can implement operational rating measures, by assessing and recording the actual energy consumption of the buildings and documenting the results in a display energy certificate on an annual basis.

Where the Regulations apply to the Property being sold, the action plan must be exhibited to the prospective purchaser. As the purchaser will become the owner, it will be a matter for discussion and negotiation between the parties how the terms of the action plan will be taken forward, and which of the options available to the owner of the building are to be adopted. When the Property is already subject to an action plan that is in the course of implementation, then a full disclosure of the measures already implemented, and those still to be carried out, will require to be produced, or, where the operational ratings measures option has been chosen, details of the assessments and records, and copies of display energy certificates and any advisory report should be produced.

As there are a number of ways in which the parties may agree to deal with the terms of the action plan, particularly if it has only recently been commissioned, the PSG has not sought to predict the approach that should be taken. Instead we have provided a default position that the Property is not affected by the Regulations. This will require disclosure of the position and documentation, in cases where the Property is affected. It should already be apparent from any sales particulars that an action plan has been obtained.

From 28 January 2013 an owner or occupier of a property could apply for a green deal plan, by which energy efficiency improvements are made to the property, and paid for by way of instalments over a subsequent period of time (which may be years), by way of payments through the energy bills for the property. The liability for payment remains with the property, so when the property changes hands it will be the new owner or occupier who pays the energy bills who will be liable for future payments.

Since its introduction there has been little or no take-up of the green deal for commercial properties. The offer contains similar default wording that the Property is not affected by any green plan, which will invariably be the position. In the unlikely event that a green deal plan applies, a previous version of this guidance (Version 10, September 2015) provides further guidance of how to deal with the transfer of responsibilities from the seller to the purchaser.

13. **Environmental**

Overview

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**.

There is a general assumption that 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. This general assumption is reflected in the position taken in Clause 13. If that general assumption is not correct and a different allocation of liability is agreed, Clause 13 should be amended to reflect the agreed position. **As always it is for the parties to negotiate in the particular circumstance of their transaction whether the environmental clauses remain in the offer as drafted, in amended form or not at all**.

The approach now adopted by the PSG in the Offer differs from the stance previously taken. The Offer seeks to transfer liability under only the UK's contaminated land regime (contained within Part IIA of the Environmental Protection Act 1990 and the accompanying statutory guidance) from the Seller to the Purchaser at Completion. The wording previously adopted was significantly wider (relating to regulatory liability under all environmental laws) and the PSG now considers it appropriate that liability under this head be more limited and directly connected to the land which forms the subject of the purchase.

It should nevertheless be noted that the provisions in Clause 13 are not absolute; instead they only provide for the transfer of contaminated land liability to the extent allowed under the contaminated land regime. Clients should therefore be made aware that the inclusion of Clause 13 may not entirely relieve them of contaminated land liability, but it will achieve the best position available under the contaminated land regime. The limitations of Clause 13 are explained further below.

Commentary on revised Clause 13

As a starting point, each of Clauses 13.2 and 13.3 will primarily apply only in situations where a competent authority has taken action under the contaminated land regime against one or both of the parties in relation to harm (or a potential for harm) being caused by hazardous substances on or attributable to the relevant property. Neither sub-clause covers environmental claims by third parties, nor does it cover liabilities which may be incurred under other environmental legislation/regimes.

Clause 13.2 is a type of agreement envisaged under the contaminated land regime which allows parties to agree how to allocate liability between themselves (an "**Agreement on Liabilities**"). In the first instance the Agreement on Liabilities in Clause 13.2 allocates contaminated land liability between the parties and therefore creates a contractual liability that can be relied on should either party not comply with it.

Nevertheless the principal aim of Clause 13.2 is to direct the competent authority as to how it should allocate liability under the contaminated land regime. The contaminated land regime statutory guidance confirms that, if it is provided with an Agreement on Liabilities, a competent authority should generally allocate liability between the parties so as to reflect the terms of the Agreement. **This is however always subject to the following two limitations**:

- if either party challenges the application of the Agreement on Liabilities it could be ignored by the competent authority (note however that Clause 13.2 seeks to deal with this); and

- the competent authority should not give effect to the Agreement on Liabilities if it would increase the costs attributed to a party benefiting from a limitation on the recovery of remediation costs under the statutory guidance provisions on hardship or cost recovery.

The words "from Completion" have been inserted in 13.2 to clarify that Part IIA liability should only transfer to the Purchaser on the point of sale. However, it should be noted that where a contaminated land notice is issued in respect of the Property before Completion but after Missives have been concluded the Purchaser is still required to complete and assume Part IIA liability.

Clause 13.3 represents one of the tests for exclusion of liability included within the contaminated land regime. It seeks to exclude the Seller from liability where, even though it has caused or knowingly permitted contamination, it is selling the land in circumstances where it is reasonable that the Purchaser should bear the liability for remediation of the land.

Again a set of qualifying criteria must be met in order for the sub-clause to operate successfully in practice, which criteria are set out in the sub-clauses to Clause 13.3. If the conditions are satisfied the Seller should be excluded from liability under the regime to the extent that is possible. The full application of Clause 13.3 is however subject to the following limitations:

- the Seller and the Purchaser must be in the same liability group under the contaminated land regime;

- the drafting in Clause 13.3 will not apply if it would result in there being no person ultimately responsible for the remediation liability; and

- the degree/ extent of liability transferred will ultimately depend on the sufficiency of the information held or deemed to be held. If insufficient information is available that could result in only a partial transfer of liability.

Accordingly the inclusion of Clause 13.3 does not automatically mean that all contaminated land liability will be transferred from the Seller to the Purchaser. 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.

The Indemnity

The PSG has altered its approach to the matter of indemnity. This was originally included in the drafting as an additional protection for the Seller in case the statutory bodies did not give effect to the Agreement on Liabilities. The indemnity was a commercial protection agreed between the parties (much like in any other part of the sale process) and not part of the statutory mechanism by which liability for environmental damage can be apportioned.

However, advice from our environmental specialists is that an indemnity is not required for the purposes of transfer of liability in terms of Part IIA of the Environment Protection Act, 1990 and so, in order to align with current commercial practice, the PSG has decided to remove the provision altogether.

It is of course always open to the parties to include an indemnity provision in the missives, should they choose to do so.

The inclusion of such an indemnity will ultimately be subject to commercial agreement between the parties, but if the principle is accepted the parties might wish to consider the following points when drafting the indemnity:

- is the indemnity limited to losses arising under the contaminated land regime, general environmental law and/or third party claims in respect of environmental matters?

- what restrictions are to be placed on the ability to trigger the indemnity, e.g. can a claim only be raised where there is a regulatory proceeding or court action; are voluntary and/ or emergency works recoverable, etc.?

- what if any general limitations are to be placed on the indemnity regarding e.g. recoverability of specific heads of loss (e.g. indirect, consequential, economic, loss of profit etc.), financial thresholds and caps, time limits, notification and conduct of claim, obligation to mitigate losses, requirement to provide evidence of losses etc.?

- should there be an exclusion of claims in respect of losses etc. arising due to the indemnified party's actions (including their disclosures or whistle blowing) or which are recoverable under insurance or from third parties?

14. **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.

15. **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.

16. **Capital allowances**

Capital allowances (CAs) are tax reliefs on expenditure on plant and machinery and need to be considered in the sale of property containing plant and machinery. The CA rules which govern how CAs can potentially transfer from the seller to the buyer changed in April 2014.

Whether you are acting for the Seller or the Purchaser CAs must be considered at the outset of the transaction (ideally at the heads of terms stage).

Guidance on CAs is outside the remit of the PSG. We have, however, working in collaboration with tax colleagues at our respective firms, identified four commonly occurring scenarios for CAs. We have provided drafting as a starting point for each of these scenarios in Part 7 of the Schedule but this must be tailored for each specific transaction. Accordingly, the PSG recommends that CA advice should always be sought from a specialist CA adviser.

The Seller has a number of options when preparing the draft Offer:

Option 1: The Seller has claimed CAs and the Seller and the Purchaser have agreed to enter into a Section 198 election to determine the value of the CAs to be transferred to the Purchaser Part 6 of the Schedule contains a form of election notice for the parties to complete and sign. Further guidance on completing the election is given in the note to Part 6 below.

Where the Seller has claimed CAs and, although the Purchaser cannot claim them (eg because it is tax exempt), it still wants to safeguard the CAs for any onward sale, the suggested wording for Option 1 should also be used and amended as appropriate. The Seller and the Purchaser will need to agree the tax written down value for the transfer of CAs which will then be recorded in a section 198 election.

Option 2: The Seller has not claimed CAs because it was not entitled to do so and the Seller and the Purchaser have agreed that any unclaimed CAs are to be transferred to the Purchaser If the Seller has not claimed CAs because it is not entitled to do so (eg because it is a charity or it is a property trader) the Purchaser can benefit from the unclaimed CAs provided that, at the time it acquired the Property, the Seller (i) obtained the necessary information about CAs but (ii) did not enter into a Section 198 election for £1.

Option 3: The Seller has not claimed CAs but could have done so and the Seller and the Purchaser have agreed that any unclaimed CAs (where amount of qualifying expenditure is not known) are to be transferred to the Purchaser – An expert in the field of capital allowances (CA Expert) is appointed to determine a reasonable amount of qualifying expenditure incurred by the Seller on the General Pool Available Fixtures and the Special Rate Available Fixtures which are to be pooled and, once determined, recorded in a Section 198 election.

Option 4: The Seller is not the past owner[1] of the Property and entered into a £1 Section 198 election at the time it acquired the Property – If the Seller either:

- was not entitled to claim CAs and did not obtain any information about CAs at the time it acquired the Property (and cannot now obtain that information) and entered into a Section 198 election at £1; or
- would have been entitled to claim CAs but entered into a Section 198 election at £1

[1] The term "past" owner is used in the capital allowances legislation and essentially the "past" owner is the last person who was entitled to claim capital allowances as a result of incurring historic capital expenditure.

then (unless the Seller has itself incurred any further expenditure on fixtures during the time it owned the Property) no CAs are available to the Purchaser. Accordingly, no provisions dealing with CAs need to be included in the Offer and Clause 16 and Parts 6 and 7 of the Schedule can be deleted.

17. **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.

18. **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.

19. **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.

20. **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.

21. **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.

22. **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).

23. **Proper law and prorogation**

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

24. **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, and if it is to be attached to the Disposition (or otherwise to be registered in the Land Register of Scotland), then it must satisfy the Cadastral Mapping Deed Plan Requirements of the Land Register of Scotland (https://www.ros.gov.uk/services/registration/land-register/faqs/cadastral-mapping-deed-plan-requirements).

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 and, in certain circumstances, could result in a tax charge.

The purpose of an election under section 198 of the Capital Allowances Act 2001 is to fix the apportionment to the fixtures. If the parties are unable to agree on the apportionment, they may apply to the First Tier Tax Tribunal within 2 years of the transaction to have the apportionment fixed. If no election is made and no application made to the tribunal to fix an apportionment, the Purchaser will be treated as having acquired the fixtures for nil consideration and be unable to claim allowances. An election once made is irrevocable and cannot be challenged by HMRC.

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 8% per annum whereas other plant and machinery fixtures will attract a writing down allowance of 18% 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.

Part 7 – Capital allowances

See the notes above for Clause 16 – Capital allowances.