

# OFFER TO SELL – INVESTMENT PROPERTY

## Guidance Notes



### Introduction

The approach taken by the PSG in the drafting of the Offer to Sell - Investment Property 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 which is subject to one or more occupational leases, 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](http://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 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 grace.

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. The Offer therefore 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.

In addition to interest, as the rents under the Leases are apportioned at Completion (whether or not that is also the Date of Entry), the Seller will be entitled to the rents for any delayed completion except to the extent that the Seller is responsible for such a delay. The PSG considers this to be a fair balance of the Seller's and the Purchaser's respective interests.

## 3. VAT

The Seller has five options when preparing the draft Offer:

- Option 1 Where no option to tax or real estate election has been made which affects the Property, the sale of the property does not otherwise fall outside the exempt category of supply and TOGC relief does not apply (e.g. the Purchaser is not going to carry on the same kind of business as the Seller), no VAT should be payable on the part of the Price apportioned to the Property and Fixed Plant; or
- Option 2 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, if the Purchaser is going to carry on the same type of business as the Seller, the sale of the Property should constitute the transfer of a business as a going concern ("**TOGC**") and no VAT should be payable; or
- Option 3 Where the Seller has opted to tax the Property or made a real estate election which affects the Property and, in either case, the Purchaser is going to carry on

the same type of business as the Seller, the Purchaser should be able to obtain relief under the TOGC provisions from VAT which would otherwise have been payable; or

- Option 4 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) and the Purchaser is going to carry on the same type of business as the Seller, the Purchaser should be able to obtain relief under the TOGC provisions from VAT which would otherwise have been payable; or
- Option 5 Where the Seller has opted to tax the Property or made a real estate election which affects the Property or where the Property falls outside the exempt category (e.g. new commercial buildings) and TOGC relief does not apply (e.g. the business to be carried out by the Purchaser is different from that carried out by the Seller), 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 - TOGC where the supply of the property would otherwise be 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.

In cases where no option to tax or real estate election has been made by the Seller and the sale of the Property does not otherwise fall to be treated as a standard rated supply for VAT purposes, the sale may nevertheless constitute a TOGC for VAT purposes. In such cases, unlike the situation where the sale would otherwise be standard-rated, it is not necessary in order for the sale to constitute a TOGC that the Purchaser opts to tax or makes a real estate election, notifies that option/election to HMRC and gives to the Seller notification that Article 5(2B) of the Value Added Tax (Special Provisions) Order 1995 does not apply to the Purchaser (in each case before the date on which the supply of the Property would have been treated as having been made).

In order for TOGC treatment to apply, if the Seller is a taxable person for VAT purposes (i.e. registered or liable to be registered for VAT), the purchaser must already be a taxable person or must immediately become a taxable person as a result of the transfer.

If for some reason the transaction fails to constitute a TOGC (for example, if the Purchaser does not carry on the property letting business), no VAT should be chargeable on the part of the Price apportioned to the Property and the Fixed Plant, as the supply should be an exempt supply for VAT purposes. However, 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 Clauses 3.1.4 to 3.1.8 should be included.

Although in either case no VAT should be chargeable and there should be no need for a VAT invoice in relation to the Property, whether the transaction is a TOGC or an exempt supply can have other VAT implications (for example, if the Property is a capital goods scheme item). The PSG recommends that specialist VAT advice should be sought where necessary.

**Option 3 – TOGC: Non-exempt – option to tax made by the Seller and TOGC relief applies:** Option 3 applies where the Seller has opted to tax the Property or made a real estate election which affects the Property.

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.

In this case, it is necessary in order for the sale to constitute a TOGC that the Purchaser opts to tax or makes a real estate election, notifies that option/election to HMRC and gives to the Seller notification that Article 5(2B) of the Value Added Tax (Special Provisions) Order 1995 does not apply to the Purchaser (in each case before the date on which the supply of the Property would have been treated as having been made). In addition, if the Seller is a taxable person for VAT purposes (i.e. registered or liable to be registered for VAT), the purchaser must already be a taxable person or must immediately become a taxable person as a result of the transfer.

If for some reason the transaction fails to constitute a TOGC (for example, if the Purchaser does not carry on the property letting business), VAT will be chargeable on the Price.

**Option 4 – TOGC: Non-exempt – supply of Property is standard-rated within paragraph (a) of the VAT Act Schedule 9, Group 1, Item 1 and TOGC relief applies:** Where the sale of the Property constitutes a supply which would otherwise 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, Option 4 applies.

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 inserted in Clause 3.1.2(ii) as the likely default and Clauses 3.1.3 to 3.1.10 drafted accordingly. However, there are certain other categories of supply which fall outside the exempt category. These 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 Clauses 3.1.2 to 3.1.10 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](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.

As with Option 3, it is necessary in order for the sale to constitute a TOGC in this case that the Purchaser opts to tax or makes a real estate election, notifies that option/election to HMRC and gives to the Seller notification that Article 5(2B) of the Value Added Tax (Special Provisions) Order 1995 does not apply to the Purchaser (in each case before the date on which the supply of the Property would have been treated as having been made). In addition, if the Seller is a taxable person for VAT purposes (i.e. registered or liable to be registered for VAT), the purchaser must already be a taxable person or must immediately become a taxable person as a result of the transfer.

If for some reason the transaction fails to constitute a TOGC (for example, if the Purchaser does not carry on the property letting business), VAT will be chargeable on the Price.

**Options 3 and 4 - TOGC relief:** For both Options 3 and 4, whether a particular transaction constitutes a TOGC or not is not always clear (for example, where **part** but not all of the Property is let or where the sale of the Property occurs a short period after its acquisition by the Seller and rent has **not yet** been collected). In those cases, specialist VAT advice should be sought and specific reference should be made to the occupancy/letting situation in any approach made to HMRC for their determination on whether TOGC relief will be available.

It is important to establish that the Purchaser's business is the same as the Seller's. In particular, if there is any prospect of the Purchaser selling the Property immediately to a third party, occupying the Property itself or developing the Property, the VAT provisions should be thoroughly reviewed by a VAT specialist as TOGC relief may not apply.

The time by which the Purchaser must exercise and notify its option to tax, and make the Article 5(2B) notification to the Seller, may be affected by the making of a deposit or other prepayment, or the issue of a VAT invoice by the Seller, prior to Completion. In such circumstances, and before any such deposit or prepayment is made, or VAT invoice issued, the PSG recommends that advice should be sought from a VAT specialist.

The Purchaser and the Seller jointly confirm that the sale of the Property constitutes a TOGC and that the business of letting the Property is capable of being operated separately as a business.

If, however, HMRC direct that VAT is chargeable, the Seller is required to notify the Purchaser that this is the case within 5 Working Days and the Purchaser is to pay the VAT element to the Seller within a further 10 Working Days in exchange for a VAT invoice. The Purchaser is also responsible for any penalties and interest payable to HMRC subject to the Seller using its reasonable endeavours to minimise them.

**Option 5 – VAT payable:** Where this Option applies, VAT will be charged on the Price and a VAT invoice produced.

The Seller is required to confirm that it is registered for VAT and **either** 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 which has to be produced), **or** that the sale of the Property constitutes a supply which would otherwise be standard rated by virtue of paragraph (a) in Group 1, Item 1 of Schedule 9 to the VAT Act 1994. Delete the relevant Clause 3.1.2 which is not appropriate.

Where the Property is being acquired as part of the purchase of a larger business, that business transfer might be a TOGC whether or not the Property is opted/subject to a real estate election and advice should be sought from a VAT specialist to ascertain whether there are any adverse VAT consequences.

**Capital Goods Scheme:** This clause should only be included where the sale of the Property constitutes a TOGC.

It broadly applies where VAT is incurred by an owner on capital property expenditure of £250,000 or more and provides a mechanism for adjusting input tax over a period of years to reflect any changes in the taxable use of a capital item. Where a property is disposed of as a TOGC, the purchaser will take over responsibility for operating the Capital Goods Scheme in respect of any of the remaining intervals in the adjustment period and will therefore need details of the Capital Goods Scheme history of the property.

In relation to the capital goods scheme, the Seller confirms that the Capital Goods Scheme does not apply to any assets included in the transaction other than those listed in the specified part of the Schedule. The CGS rules are complex and the PSG therefore recommends that specialist VAT advice should always be sought.

#### 4. **Entry and Apportionments**

**Entry:** Entry is granted by the Seller subject to (and with the benefit of) the Leases and any Subleases.

**Apportionments:** All apportionments are carried out with effect from Completion, whether or not that is also the Date of Entry.

The rents under the Leases are apportioned on a daily basis over a year (365 days) to mitigate some of the inequities which may otherwise arise if the apportionments were carried

out on a monthly or quarterly basis, particularly given the uneven lengths of the old Scottish quarter days. In accordance with HMRC guidelines, any VAT on the rent is not apportioned.

The parties' solicitors should explain to their clients the basis on which the apportionments will be carried out.

The Purchaser receives from the Seller the rents due under the Leases from Completion to the next rent payment date under each of the Leases, whether or not such sums have been paid by the Tenants. Accordingly, if the Tenants have not paid the current quarter's rent or if there are any other arrears under the Leases, they remain the Seller's responsibility and Clause 5.1 deals with their recoverability.

The Purchaser receives the rents under the Leases for the actual date of Completion on the basis that the Seller receives the Price on that day.

If there is an outstanding rent review under any of the Leases, the passing rent payable under that Lease is apportioned at Completion and Clause 5.4 deals with the apportionment of any uplift once the review has been determined.

If there is a turnover rent under any of the Leases, then this will need to be dealt with in a new Clause 4.2.4. The exact wording will depend on the nature of the turnover provisions in the Leases but usually the base rent will be apportioned at Completion. A new Clause 5.5 should also be inserted dealing with the apportionment of the turnover element once it has been determined and verified.

The apportionment of any service charge is dealt with in Clause 5.2, insurance in Clause 11 and the apportionment of rates is left for the local authority to carry out.

All other payments under the Leases and any outgoings for the Property which require apportionment are to be dealt with on an equitable basis.

## 5. Other Payments

**Arrears:** As the Seller retains responsibility for all arrears under any of the Leases, it is entitled to pursue the Tenants for these arrears in the same way as any other debt. However, in recovering any arrears, the Seller is not entitled to go so far as to sequestrate or appoint a receiver/liquidator to the Tenants except with the Purchaser's prior agreement.

Clause 5.1 provides that the Purchaser is (at the Seller's cost) to help the Seller to recover any arrears from the Tenants.

**Service Charge:** Clause 5.2 is only required where there is a service charge under any of the Leases. It sets out a common, well established procedure which is to be adopted but it should be carefully explained to the Seller and the Purchaser to ensure that both parties (and their respective managing agents) are satisfied that it reflects the arrangements which they wish to apply.

In general terms, in addition to the Purchaser having the right to obtain information, the Seller has to produce an interim reconciliation of the service charge for the current year which is then updated at Completion. This shows the service charge payments received from the Tenants and the service charge expenditure actually or anticipated to be incurred before the Date of Entry and, very broadly, if the payments received exceed the expenditure, then the difference between the two is the sum which should be handed over by the Seller to the Purchaser at Completion. The Purchaser needs to be satisfied the expenditure is properly incurred and thus recoverable from the Tenants. The Seller is responsible for the service charge attributable to unlet space.

As a matter of practice, the Purchaser should obtain a copy of the service charge accounts for the last three years.

If there are any sinking funds, delete the first option in Clause 5.2.12 and incorporate the alternative provisions dealing with the transfer of the sinking fund and delivery of the associated accounts and financial paperwork.

**Rent Deposits:** If the Seller holds any rent deposits under any of the Leases, delete the first option in Clause 5.3 and incorporate the alternative provisions dealing with the transfer of the rent deposits and delivery of the associated accounts/financial paperwork.

The Seller is required to deliver the Assignment of Rent Deposits duly executed at Completion (Clause 10.2.15) and the Purchaser is required to execute and intimate it to the tenant within the timeframe stipulated in Clause 5.3.4.

**Rent Review:** If there are any outstanding rent reviews under any of the Leases, the rent is apportioned on an interim basis at the passing rent, subject to the payment of any uplift once the review has been determined. The conduct of outstanding rent reviews is dealt with in Clause 9.4.

Clause 5.4 assumes that the rent reviews under the Leases will be upwards only. If this is not the case, this clause will need to be amended to cater for the possibility that the Seller may have to pay the shortfall to the Purchaser if the reviewed rent turns out to be less than the passing rent.

## 6. **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, Leases and any Subleases.

However the statement to this effect in Clause 6.1 is subject to Clauses 7 and 10 which make provision for the Purchaser to have an agreed number of Working Days within which to examine the Title Deeds, Leases 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 6 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 7 and 10 for that due diligence exercise without any objections having been raised, that the deeming provision in Clause 6.1 will apply.

## 7. **Documents to be Disclosed**

This clause provides for Title Deeds, Leases, any Subleases, property enquiry certificates (including those provided by private searchers), coal mining search and other usual documentation (which require to be listed in Parts 1 to 3 of the Schedule) to be exhibited to the Purchaser as soon as reasonably practicable after the date of conclusion of Missives.

Where either of the last two rent reviews under any Lease were settled by a third party, the Seller should provide the Purchaser with copies of the relevant submissions so that the Purchaser is aware of the arguments which were run at those reviews. These should be included in the Disclosed Documents listed in Part 1 of the Schedule.

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, Leases, any Sublease 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 6.1 will apply.

## 8. Title

### **Clauses 8.1; 8.2; 8.3; 8.5 and 8.6**

These clauses provide 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 clauses also contain fairly standard provisions as to burdens and minerals with which purchasers and sellers (and their solicitors) will be familiar. There is also 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 8.6.

### **Clause 8.4 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 8.7 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 8.7.1**

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 Working 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 8.7.2**

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 8.7.3**

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 (eg 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 (eg if another purchaser is available and a new AN is required) then the AN may simply be allowed to expire.

### **Clause 8.7.4**

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 8.7.5**

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 8.8**

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 8.8.1 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 8.8.2 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.

## **9. Leases**

**Confirmations:** Clause 9.1 contains a number of confirmations which the Seller should be expected to give as they are matters which cannot otherwise be readily ascertained or verified by the Purchaser. The PSG have sought wherever possible to avoid the use of the expression "so far as aware" because of the difficulty of establishing awareness, particularly where the Seller is a corporate entity.

The confirmations are not limited to the period of the Seller's ownership because such confirmations (which are not otherwise independently verifiable by the Purchaser) are fundamental to the investment value of the Property.

The Seller's Solicitors should check each of the confirmations carefully with the Seller to ensure that they are accurate and disclose against them as necessary in Part 4 of the Schedule.

The confirmations are given at the date on which the Offer is issued. From that date until Completion, the Seller is only required to disclose to the Purchaser any changes to the confirmations which arise during that period – it is not required to take any further action.

**Interim Management:** Clause 9.3 sets out the Seller's continuing obligations for the management of the Property during the period between conclusion of the Missives and Completion. The provisions are intended to give the Seller a reasonable measure of flexibility whilst at the same time ensuring that important issues are controlled.

Accordingly, the Seller is required to continue to manage the Property in accordance with the provisions of the Leases and the principles of good estate management but is not entitled without the Purchaser's consent to terminate any Lease; grant a new lease; vary any Lease; settle any rent reviews; serve any notices under any of the Leases; or carry out any alterations to the Property. The Seller is also allowed to complete any current management transactions, details of which are to be set out in Part 6 of the Schedule.

The Seller is not entitled to deal with any applications for consent made prior to Completion other than in accordance with the Purchaser's instructions. The Purchaser is required to act as if it were the landlord under the relevant Lease and is also to indemnify the Seller against any liability incurred as a result of the Seller following those instructions.

**Rent Reviews:** If there are any outstanding rent reviews under any of the Leases, delete the first option in Clause 9.4 and incorporate the alternative provisions dealing with the procedure for settling of the rent review and the transfer of any uplift once the review has been determined.

The procedure for settling the rent review is drafted on the basis that the Seller will have no say in or control over the conduct of the rent review, nor any approval of the proposed reviewed rent. Although this approach may appear one sided, bear in mind that it is not in the Purchaser's interest to agree anything other than the best rent that it can.

## 10. **Completion**

This clause lists all of the items which the Seller and the Purchaser are required to deliver to each other and provides a useful checklist for both parties of the items that they are expected to deliver or receive.

There is no need in Clause 10.2.3 to specify that the Leases and any Subleases should be principals/extracts. The form of each letting document should be specified when completing the inventories of the Leases and any Subleases in Parts 3A and 3B of the Schedule.

### **Clause 10.2.5 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 10.2.6 Charges Searches**

Clause 10.2.6 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 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.

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 10.2.6.

Where there is a retrocession of assignment of rents, it will need to be intimated to the Tenants. To avoid the Seller having to prepare additional letters to each of the Tenants, the intimation of the retrocession has been included in the Notice of Change of Landlord contained in Part 7 of the Schedule.

## 11. **Insurance**

This clause is prepared in fairly standard terms. It provides for the Seller to keep the Property insured in accordance with its obligations as landlord under the Leases 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 Working Days after Completion and refunding any repayments of insurance premium due the Tenants within 5 Working Days after receipt of the refund from the insurance company.

## 12. **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 Leases are about to expire and 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.

### 13. **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 or the responsibility of the Tenants under the Leases, any statutory notices issued prior to the date of Completion will be the responsibility of the Seller.

From 28 January 2013 an owner or occupier of a property can 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.

It is not yet clear how practice will develop when dealing with green deal issues in the conveyancing process. Accordingly in this version of the PSG Offer to Sell – Investment Property: version 8 (January 2013), Clause 13.4 sets the default position that there is no green deal plan affecting the property. It is expected that this will be the situation in the majority of cases for commercial properties.

Where there is a green deal plan in place, a key requirement in terms of the missives is an acknowledgement from the purchaser, using the statutory style provided in The Green Deal (Acknowledgement) (Scotland) Regulations 2012 (SSI 2012/214). This provides that the acknowledgement has to be given and signed by the purchaser personally (and not by its solicitors or other agents), and section 14 of the Energy Act 2011 provides that the seller must ensure that the acknowledgement is contained in the contract. For the purposes of an offer to sell, therefore, the PSG suggests that this could be achieved by obtaining a signed acknowledgement from the purchaser (in duplicate) before the principal offer to sell is issued so that the duplicate acknowledgment can be incorporated in the offer to sell as an annexure. On acceptance of the offer, the acknowledgement is thus clearly included in the contract. It is suggested that the acknowledgement should be signed in duplicate, so that the seller can retain the principal acknowledgement and, because the duplicate is attached to the offer to sell, it will be retained by the purchaser's solicitors.

As this area settles, the PSG Offers to Sell will be updated to reflect any changes in practice.

### 14. **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.

Each of the sub-clauses is intended to address different issues. Clause 14.2 introduces a type of agreement envisaged by Part IIA of the Environmental Protection Act 1990 and the accompanying statutory guidance (together, the contaminated land regime) which allows parties to agree how to allocate liability under the Act. The primary purpose of the sub-clause is to give effect to how the parties have agreed to divide liabilities between themselves. However, for the sub-clause to operate successfully, at least in the contaminated land context, a certain set of qualifying criteria must be met.

Clause 14.3 represents one of the tests for exclusion of liability included within the contaminated land regime. Again a set of qualifying criteria must be met in order for the sub-clause to operate successfully in practice; if the conditions are satisfied the Seller should be excluded from liability under the regime.

Each of clauses 14.2 and 14.3 will apply only in situations where a competent authority has taken action 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 (eg air or water legislation). The aim of Clause 14.4 is to plug that gap. The all-encompassing nature of the indemnity as drafted, in addition to ensuring that the preceding sub-clauses operate in the way that they are intended to, ensures that expenses associated with a third party claim against the Seller (in, for example, nuisance) or liabilities arising under other regimes can be recovered.

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.

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.

## 15. **Moveables**

The structure of the Offer provides for a list of any moveable items to be attached to the Offer as Part 12 of the Schedule. This clause refers to this Part of the Schedule and confirms that such moveable items are included in the Price.

## 16. **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.

## 17. **Guarantees**

If the tenants' obligations under any of the Leases have been guaranteed (whether in the lease or by a separate guarantee), the guarantees should be assigned to the Purchaser.

It is unlikely that the consent of the guarantor will be required to the assignment of any guarantee but this should be checked. If the guarantor's consent is required, both Clause 10.2.13 of the Offer and the Assignment of Guarantees will need to be amended (along the same lines as the consent provisions in Clause 10.2.14 and the Assignment of Service Contracts) and arrangements made for the Assignment of Guarantees to be signed by the guarantor before Completion.

The Seller is required to deliver the Assignment of Guarantees duly executed at Completion (Clause 10.2.13) and the Purchaser is required to execute and intimate it to the guarantor within the timeframe stipulated in Clause 17.

## 18. **Service Contracts**

Where the Purchaser is taking over any existing service, maintenance and/or management contracts, they should be identified in Part 14 of the Schedule.

The parties will need to establish whether the consent of any of the Service Providers is required to the assignment of any Service Contract. If so, the relevant provisions of the Assignment of Service Contracts should be retained and arrangements made for the Assignment of Service Contracts to be signed by the Service Providers before Completion.

The Seller is required to deliver the Assignment of Service Contracts duly executed at Completion (Clause 10.2.14) and the Purchaser is required to execute and intimate it to the Service Providers within the timeframe stipulated in Clause 18.2.2.

The Seller remains responsible for any existing service, management and/or maintenance contracts which the Purchasers are not taking over, and for any of their termination costs which will not be allowable expenditure under the service charge provisions.

## 19. **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 and advice should be sought from a specialist CA adviser.

We have suggested wording in the offer for the situation where the Seller has claimed CAs and the Seller and Purchaser have agreed a value for the transfer of CA which will be recorded in a section 198 election. Part 10 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 10 below.

If the Seller has not claimed CAs because it is not entitled to do so (for example because it is a charity or it is a property trader) the Purchaser can benefit from the unclaimed CAs provided that the Seller has pooled its expenditure on plant and machinery in a chargeable period before the sale. We have not provided wording for this scenario as bespoke wording will be needed and expert CA advice should be sought.

20. **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, subject to any access restrictions contained in the Leases.

21. **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.

22. **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.

23. **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 2.4, 8.7, 11, 15, 17 and 20 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.

It also provides that the lease confirmations in Clause 9 will remain in force for a period of six years. This is because it is most likely that any breaches of the confirmations will materialise during rent review negotiations with the Tenants. The six year period assumes a review cycle under of the Leases of five years plus an additional year to cover any delays in carrying out a review, and should be adjusted accordingly should the review cycles be longer or shorter.

24. **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.

25. **Assignment**

The Purchaser may not assign its interest in the Missives.

If in the particular circumstances of a transaction there is no objection to assignment, then this clause can be amended, but the parties would have to consider what requirements would be necessary in the event of assignment (e.g. consent of the other party).

26. **Proper Law and Prorogation**

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

27. **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, Leases, any Subleases, 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 6, 7 and 10 of the Offer.

### **Part 2 – 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 3 – Leases/Subleases**

An inventory identifying the leases and subleases (together with a description of whether they are principals, Extracts or quick/photo copies) and any relevant documents to the letting of any part of the Property (e.g. outstanding applications for consent) should be listed in Parts 3A and 3B respectively of the Schedule.

### **Part 4 – Disclosures against Lease Confirmations**

Full details of any disclosures which the Seller needs to make to any of the confirmations about the Leases should be provided here. If there are none, that should be stated.

### **Part 5 – Back Letters**

The drafts of all of the current Back Letters which are to be granted by the Purchaser to the Tenants at Completion should be incorporated here.

### **Part 6 – Current Management Transactions**

Full details of all management transactions which the Seller is entitled to complete should be provided here.

### **Part 7 – Notice of Change of Landlord**

A Notice of Change of Landlord will need to be completed for each of the Tenants. Although not essential, you may want to consider sending it by Recorded Delivery as proof of postage. If there is no Retrocession of an Assignment of Rents then the third paragraph incorporating the intimation of it needs to be deleted.

### **Part 8 – Disposition**

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

### **Part 9 - Plan**

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

### **Part 10 – 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 11 – Capital Goods Scheme**

The assets to be transferred to the Purchaser to which the Capital Goods Scheme applies should be listed here.

## **Part 12 – Moveables**

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

## **Part 13 – Assignment of Guarantees**

The Assignment of Guarantees should be completed incorporating details of the guarantees and any Leases which incorporate guarantees.

## **Part 14 – Service Contracts**

The existing service, maintenance and/or management contracts which the Purchaser is taking over should be listed here.

## **Part 15 – Assignment of Service Contracts**

The Assignment of Service Contracts should be completed incorporating details of the existing service, maintenance and/or management contracts which are being taken over by the Purchaser.

## **Part 16 – Assignment of Rent Deposits**

The Assignment of Rent Deposits should be completed incorporating details of the existing rent deposits which are being taken over by the Purchaser.

## **Part 17 - Retrocession of Assignment of Rents**

The draft of the retrocession of assignment of rents referred to in clause 10.2.11 of the Offer should be inserted here.