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 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 Offers 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.

Clause 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, employment, community interests and capital allowances definitions, which are specific to those clauses or those parts of the schedule 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.

Clause 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 direct participant in the CHAPS system, from that bank directly. 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 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 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.

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.

A corresponding entitlement has been reserved to the Purchaser to rescind the Missives by virtue of the 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).

Clause 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 <u>not</u> 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 3.1.2 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: 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 (May 2023), 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 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.

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 Business Days and the Purchaser is to pay the VAT element to the Seller within a further 10 Business 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.

Note on transfers within the same VAT Group

Previous versions of Options 2, 3 and 4 provided for the Seller to confirm that at Completion the Seller and the Tenants will not be members of the same VAT Group. This confirmation was previously required where the parties intended there to be a TOGC, based on HMRC's view that a business could not exist if the only services performed were provided within a VAT group.

However, the English case of *Intelligent Managed Services Ltd v Revenue And Customs [2015] UKUT 0341* ruled that this view was incorrect and the nature of the businesses carried on by the individual members of that VAT group remain separate.

Current HMRC Guidance (VAT Notice 700/9 (last updated 31 December 2020)) https://www.gov.uk/guidance/transfer-a-business-as-a-going-concern-and-vat-notice-7009 provides:

> **"4.3 Transfers made to a VAT group**
>
> The initial transfer of a business, or part of a business capable of separate operation, to a company in a VAT group is a TOGC if that company both:
>
> - intends to continue to use the transferred assets to operate the same kind of business
>
> - will provide supplies of that business to other group members, and those other group members use or intend to use them to make supplies outside the group.
>
> This is also the case if, after the initial transfer into the group, the business is transferred between group members, provided that ultimately the services that it provides are made to a group member that makes or intends to make services outside the group.
>
> If the buyer uses the assets to make supplies directly outside the VAT group, this would also be a TOGC.

> Whether a TOGC has occurred will depend upon the facts of the particular case, but it is important that the assets transferred into a VAT group are used to make supplies outside the group and not merely consumed within the VAT group."

While the wording no longer appears in the PSG Offers, in circumstances where the transacting parties are in the same VAT group, they should ensure that the relevant qualifying criteria apply, if they intend to claim TOGC relief.

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.

Clause 3.6 – 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 at or above a statutory threshold (updated in July 2026 to £600,000) 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 depending on the particular use to be made of the property, may need details of the Capital Goods Scheme history of the property in order to make furture input tax adjustments.

There is a choice of two options in relation to the Capital Goods Scheme: the Seller confirms either that the CGS does not apply to any assets included in the transaction, or, where there are assets included in the transaction which are still subject to the CGS, it will provide any information in its possession that the Purchaser requires to allow the Purchaser to make any VAT adjustments required.

The CGS rules are complex and the PSG therefore recommends that specialist VAT advice should always be sought.

HMRC processing of Options to tax

From 1 February 2023 HMRC has stopped issuing option to tax notification receipt letters. Accordingly, sellers and purchasers will need to produce some other form of evidence that they have intimated the option to tax to HMRC.

By way of evidence, HMRC briefing (Changes in processing option to tax forms - GOV.UK (www.gov.uk)) recommends that an option to tax notification should be sent by email to optiontotaxnationalunit@hmrc.gov.uk and include the property address and effective date of the notification in the subject line of the email, meaning that the automated response to the email will have these details in the subject line, and will be your record of the date when HMRC received the notification.

Other methods of notification (e.g. by mail) will not be acknowledged. Accordingly, notifications by post should be send using some tracked form of delivery so that you have evidence of receipt by HMRC to exhibit.

4.1 Entry:

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

4.2 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 PSG has now provided an alternative basis of rent apportionment.

Option 1 presupposes that 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.

Option 2 proceeds on the basis of the actual payments received by the Seller as at Completion, with neither party being obliged to make any payment or allowance to the other on account of any arrears.

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 12 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.

Clause 5.1 Arrears

There may be arrears of other payments in addition to rent arrears and these other arrears may not necessarily be returned to the Seller. The suggested drafting in Clause 5.1.1 illustrates the most commonly encountered situation regarding arrears of rent and service charge for the current year but there could also be arrears of historic service charge, insurance premiums or sums due under a rent deposit agreement. It is advisable to set out in the offer the parties expectations with regard to any other arrears.

Where 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 5.1.2 provides that the Purchaser is (at the Seller's cost) to help the Seller to recover any rent arrears from the Tenants.

Clause 5.2 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 they wish to apply.

The PSG has now introduced various definitions which are bespoke to this Clause, in particular:

Certificate: this is the formal reconciliation of service charge which may be available at some point after Completion; and

Statement: this is the less formal statement showing the income and expenditure attributable to each lettable unit.

The drafting pre-supposes that the Purchaser has received and satisfied itself on the applicable due diligence paperwork, usually:

- current year's budget
- historic service charge accounts (as a matter of practice, the Purchaser should obtain a copy of the service charge accounts for the last three years)
- applicable liability of each lettable unit
- details of cap and fixed service charge, RPI uplift calculations
- anticipated expenditure
- reserve fund statement (if applicable)
- expenditure to date
- corresponding service charge collected to date.

Clauses 5.2.4 – 5.2.6 provide for (a) delivery of the Statement at Completion (b) any surplus to be made over to the Purchaser (c) the respective parties responsibilities as regards Service Expenditure and (d) treatment of any shorfall.

Clauses 5.2.7, 5.2.10 and 5.2.11 address the arrangements as regards delivery of the Certificate to the Purchaser and the corresponding surplus/shortfall situations.

Clause 5.2.9 allows for the possibility of the Certificate being disputed by the Purchaser.

Clause 5.2.18 anticipates the possibility that the existing managing agents may not be retained by the Purchaser following Completion.

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.

Clause 5.3 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 Assignation of Rent Deposits duly executed at Completion (Clause 10.2.14) and the Purchaser is required to execute and intimate it to the tenant within the timeframe stipulated in Clause 5.3.4.

Clause 5.4 Outstanding Rent Reviews

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.

Clause 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 Business 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.

Clause 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 considers 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 five 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, 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.

Clause 8 – Title

Clauses 8.1 Encumbrances; 8.2 Minerals and 8.3 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 8.4 Possession

Under the rules for realignment of rights (Part 9 of the Land Registration etc. (Scotland) Act 2012), 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 8.5 Community Interests

The Offer provides wording to deal with the three types of community right to buy, and asset transfer requests, which can be found in Part 16 of the Schedule. For detailed notes see the Guidance for Part 16 of the Schedule.

Clause 8.6 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 8.6.

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

The PSG has 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.

The PSG suggests that the AN is entered on the application record no earlier than five 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 colloquially 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. The PSG has 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 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 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.

Clause 8.8.3 is an "assist" clause designed to ensure that, if the application is rejected, despite the transaction having settled, the Seller will assist the Purchaser (at the Purchaser's expense) in procuring whatever is necessary, including if required executing a fresh disposition, to ensure that the Purchaser is able to complete its title in the Land Register.

Clause 9 – Leases

Clause 9.1 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 has 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.

Clause 9.3 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.

Clause 9.4 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.

Clause 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 the PSG has 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 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 10.2.6.

Where there is a retrocession of assignation 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.

Clause 10.2.7 and Part 20 of the Schedule

The PSG has provided for a search in the ROE to be provided where the Seller is an overseas entity, to reflect established practice for obtaining information from registers. It is up to the parties to agree whether this will be by way of a formal search provided by a firm of professional searchers, or by way of a full printout from the relevant part of the Companies House website provided to the Purchaser's solicitors by the Seller's solicitors (or vice versa).

Clause 11 – 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.

Clause 12 – 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 five Business Days after Completion and refunding any repayments of insurance premium due the Tenants within five Business Days after receipt of the refund from the insurance company.

Clause 13 – 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.

Clause 14 – 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 has varied 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.

Clause 14.3 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 the PSG has 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.

There was little or no take-up of the green deal for commercial properties, and the green deal scheme has been effectively disbanded. 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 9, September 2015) provides further guidance of how to deal with the transfer of responsibilities from the seller to the purchaser.

Clause 15 – Environmental

<u>Overview:</u>

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 15. If that general assumption is not correct and a different allocation of liability is agreed, Clause 15 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 15 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 15 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 15 are explained further below.

Commentary on revised Clause 15:

As a starting point, each of Clauses 15.2 and 15.3 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 15.2 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 15.2 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 15.2 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 15.2 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 Clause 15.2 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 are concluded the Purchaser is still required to complete and assume the Part IIA liability.

Clause 15.3 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 15.3. 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 15.3 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 15.3 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 15.3 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.

Indemnity

The PSG has altered its original 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 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?

Clause 16 – Moveables

The structure of the Offer provides for a list of any moveable items to be attached to the Offer as Part 10 of the Schedule. This clause refers to this Part of the Schedule and confirms that such moveable items are included in the Price.

Clause 17 – 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.

Clause 18 – Guarantees

If the tenant's 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 assignation 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 Assignation of Guarantees will need to be amended (along the same lines as the consent provisions in Clause 10.2.14 and the Assignation of Service Contracts) and arrangements made for the Assignation of Guarantees to be signed by the guarantor before Completion.

The Seller is required to deliver the Assignation 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 18.

Clause 19 – Service Contracts

Where the Purchaser is taking over any existing service, maintenance and/or management contracts, they should be identified in Part 12 of the Schedule.

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

The Seller is required to deliver the Assignation 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 19.2.2.

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.

Clause 20 – Capital Allowances

The Offer provides wording to deal with capital allowances which can be found in Part 17 of the Schedule. For detailed notes see the Guidance for Part 17 of the Schedule.

Clause 21 – 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.

Clause 22 – 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.

Clause 23 – Overseas Entities

The Offer provides wording to cater for the possibility of either the Purchaser or the Seller (or both) being Overseas Entities. For detailed notes see the PSG Guidance Notes for the Register of Overseas Entities.

Clause 24 – General

The purpose of Clause 24.1 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.

Clause 25 – 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 2.3.2, 8.5, 8.7, 8.8, 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 9.1 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.

Clause 26 – 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.

Clause 27 – 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).

Clause 28 – Proper Law and Prorogation

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

Clause 29 – 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

A. 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.

B. Against Service Charge Information

Full details of any disclosures which the Seller needs to make to any of the confirmations at clause 5.2.12 about the propriety of the Service Charge Expenditure 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 a recorded delivery method as proof of postage. If there is no Retrocession of an Assignation of Rents then the fourth paragraph incorporating the intimation of it should 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, 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 10 – Moveables

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

Part 11 – Assignation of Guarantees

Where it is applicable, the Assignation of Guarantees should be completed incorporating details of the guarantees and any Leases which incorporate guarantees.

Part 12 – Service Contracts

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

Part 13 – Assignation of Service Contracts

Where it is applicable, the Assignation 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 14 – Assignation of Rent Deposits

Where it is applicable, the Assignation of Rent Deposits should be completed incorporating details of the existing rent deposits which are being taken over by the Purchaser.

Part 15 - Retrocession of Assignation of Rents

The draft of the retrocession of assignation of rents referred to in Clause 10.2.10 of the Offer should be inserted here.

Part 16- Community Interests

There are three community rights to buy which may affect a commercial property transaction:

- Community right to buy under Part 2 of the Land Reform (Scotland) Act 2003 ("**Part 2 CRTB**")
- Community right to buy abandoned, neglected or detrimental land under Part 3A of the Land Reform (Scotland) Act 2003 ("**Part 3A CRTB**")
- Community right to buy land for sustainable development under Part 5 of the Land Reform (Scotland) Act 2016 ("**Part 5 CRTB**").

Although the chances of a commercial property transaction being affected by a community right to buy are slim, since the rights to buy affect all land in Scotland the PSG has provided wording to cater for each right to buy. In addition the PSG has provided drafting for the situation where the property may be affected by an asset transfer request under the Community Empowerment (Scotland) Act 2015 (see below for more detail).

Paragraph 1 Community Right to Buy under Part 2 of the 2003 Act

Since 15 April 2016, any land in Scotland could be the subject of a Part 2 CRTB so Paragraph 1 begins with the Seller confirming 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 Part 2 Notice).

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 given the subjective nature of such knowledge or awareness the PSG did not consider it appropriate to incorporate such a provision in the contract. It is included as a query in the Due Diligence Questionnaire.

In the majority of situations, communities register a right to buy when there is no sale or marketing of a property taking place. However, there could be circumstances where a community becomes aware of a proposed sale of a property which is or includes land in which they are interested, or it might be that an application to register a Part 2 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 Part 2 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. Paragraph 1.3 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 after 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 will not 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 do not want to. Accordingly Paragraph 1.4 provides two options at this initial stage. Either:

- either party can resile immediately (Paragraph 1.4.1); 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:

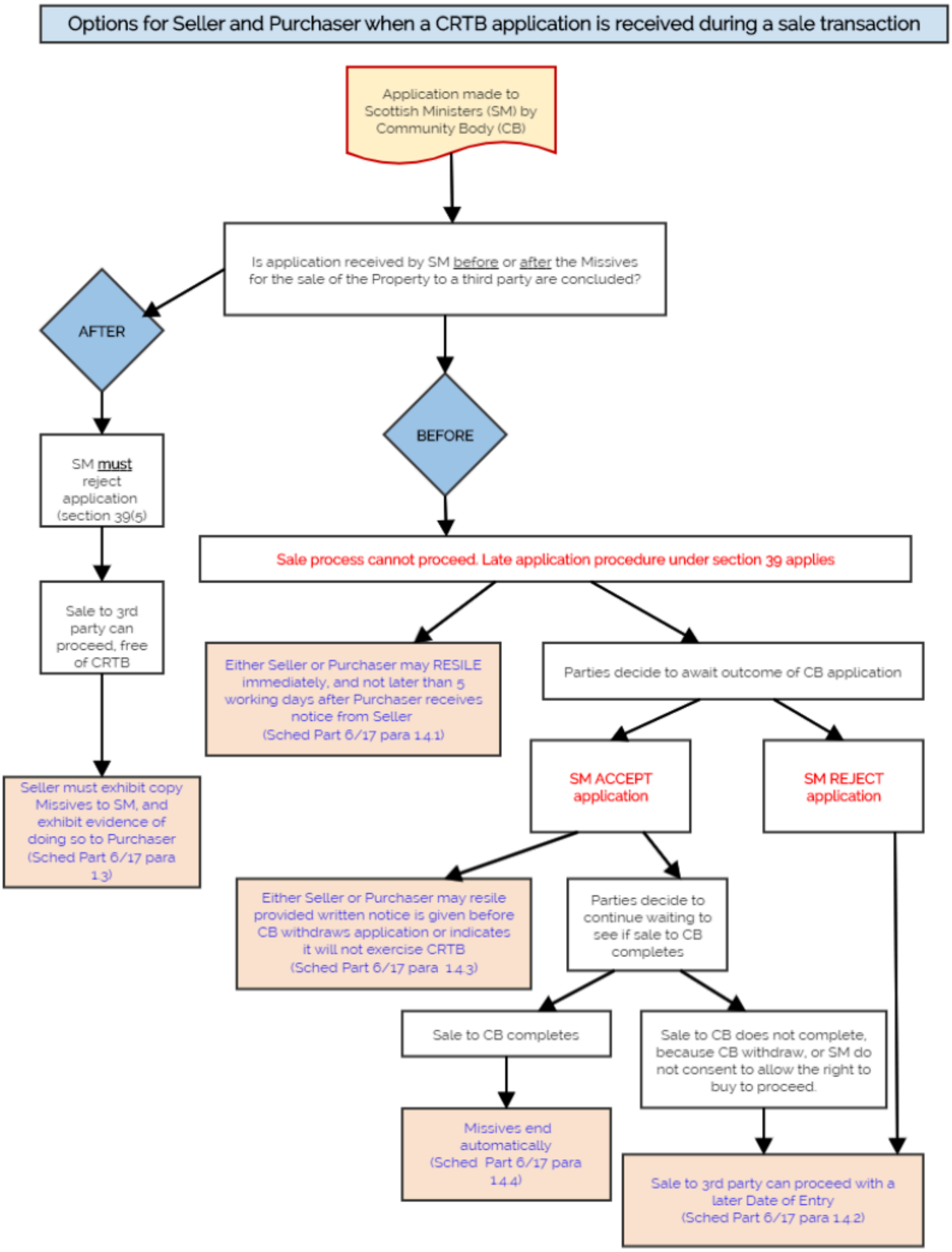
- it might be withdrawn, or
- that the community body decides not to proceed, or
- Scottish Ministers decide at a later stage not to consent to allow the right to buy to proceed, for example if the result of the ballot shows that there is insufficient support in the community for the purchase.

Again the parties might decide to wait and see what happens, but again since it is now known that the Part 2 CRTB has been registered the parties might decide to cancel the sale at that stage. Accordingly Paragraph 1.4.3 gives the parties a second opportunity to resile, provided they do so before the Part 2 CRTB application is withdrawn or the community body indicates that it is not going to exercise the right to buy. A community body has up to eight 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 proceed (unless, of course, the parties are able to agree to carve out the part of the Property that is subject to the Part 2 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 – Paragraph 1.4.4.

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. Paragraph 1.5 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 wishes to buy. The 2003 Act provides that transfers of land which are not affected by a registered Part 2 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 Part 2 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 Part 2 Notice. In exchange the Purchaser will withdraw its application for registration of the original Disposition (where the Part 2 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 Part 2 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 Part 2 Notice, within [5/10] Business Days of that value being determined.

Paragraph 2 Community Right to Buy Abandoned, Neglected or Detrimental Land under Part 3A of the 2003 Act

The community right to buy abandoned, neglected or detrimental land under Part 3A of the Land Reform (Scotland) Act 2003 differs from the Part 2 CRTB, 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 Part 3A CRTB is very unlikely to affect investment sales. If a property is let it is unlikely to qualify as abandoned or neglected, or indeed detrimental. Accordingly the PSG takes the view that it is unnecessary to include detailed wording in the Offer to Sell – Investment Property: If parties wish to include provision for this right to buy in the investment offer, they may adopt the wording from the Offer to Sell with vacant possession.

The Offer contains "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.

Paragraph 3 Community Right to Buy under Part 5 of the Land Reform (Scotland) Act 2016

Like the Part 3A CRTB the Part 5 CRTB is a compulsory purchase. However the community body must have tried and failed to buy the land directly from the owner before it can apply to Scottish Ministers to exercise a Part 5 CRTB. The Part 5 Community Body may also apply to buy the tenant's interest in the land which they are acquiring and must make a separate request to the tenant to buy the tenant's interest.

As the community body must try to buy the land before it can make an application, Paragraph 3.1 begins with a confirmation from the Seller that:

- it has no knowledge of any proposals to form a Part 5 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 Seller is likely to have any knowledge;

- it has not been approached by a Part 5 Community Body to buy the land, nor received a written request from a Part 5 Community Body. This will be a matter of fact. The Part 5 Community Body cannot apply to Scottish Ministers until it has made a written request to the owner in the statutory form, and been refused;

- it has not received any copy application by the Part 5 Community Body; and

- there is no pending application by a Part 5 Community Body in the Register of Applications by Community Bodies to Buy Land ("**RACBBL**") (Paragraph 3.2).

A Part 5 CRTB application may be made before missives are concluded. Once a pending application appears in RACBBL the owner is prohibited from transferring or taking steps to transfer the land and the negotiations must come to an end.

It is possible however that missives are concluded contemporaneously with a pending application appearing in RACBBL. Paragraph 3.3 of this Part of the Schedule caters for this situation where the parties were not aware of the Part 5 CRTB application until after the Conclusion Date.

If the parties become aware of the Part 5 CRTB application once the Missives have been concluded, but before the transaction has completed, either party may resile from the Missives (Paragraph 3.3.2). Alternatively 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. If so, the Missives will be suspended and the new Date of Entry will be five Business Days after the community body decides not to proceed or its application is declined (Paragraphs 3.3.3(a), (b) and (c)).

If Completion has taken place when the existence of the pending Part 5 CRTB application (made before missives were concluded) comes to light, the transaction is a prohibited one. The transaction 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 (Paragraph 3.3.4).

If a Part 5 CRTB application is made after missives for the sale of the land have been concluded, then the transaction is not prohibited by the Part 5 CRTB. 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 and Paragraph 3.4.2 provides for this.

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 10 of the Right to Buy Land to Further Sustainable Development (Eligible Land, Specified Types of Area and Restrictions on Transfers, Assignations and Dealing) (Scotland) Regulations 2020 by virtue of Regulation 10 [insert relevant sub-paragraph] of the 2020 Regulations; [*If the exempting paragraph is (a) (gift), (d) (transfer between co-habitants), or (g) (compulsory purchase, implementing Part 2 or 3A CRTB, implementing missives or option concluded before a Part 5 CRTB application was made) insert the following*: The Seller further declares that the transfer effected by this disposition is not negated by Regulation 9(4) of the 2020 Regulations;]"

Paragraph 4 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.

Paragraph 4 is only required where the Seller is a relevant authority. Delete if not applicable.

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. Once an asset transfer request has been received, a relevant authority may not contract with any third party in relation to the property affected therefore 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.

Part 17 - Capital Allowances

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

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

Guidance on capital allowances is outside the remit of the PSG. It has, however, working in collaboration with tax colleagues at its respective firms, identified four commonly occurring scenarios for Capital allowances. The PSG has provided drafting as a starting point for each of these scenarios in Part 17 of the Schedule but this must be tailored for each specific transaction. Accordingly, the PSG recommends that capital allowances advice should always be sought from a specialist capital allowances adviser.

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

Option 1: The Seller has claimed capital allowances and the Seller and the Purchaser have agreed to enter into a Section 198 election to determine the value of the Capital allowances to be transferred to the Purchaser:

Part 18 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 18.

Where the Seller has claimed Capital allowances and, although the Purchaser cannot claim them (e.g. because it is tax exempt), it still wants to safeguard the capital allowances 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 capital allowances which will then be recorded in a section 198 election.

Option 2: The Seller has not claimed capital allowances because it was not entitled to do so and the Seller and the Purchaser have agreed that any unclaimed capital allowances are to be transferred to the Purchaser:

If the Seller has not claimed capital allowances 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 capital allowances provided that, at the time it acquired the Property, the Seller (i) obtained the necessary information about capital allowances but (ii) did not enter into a Section 198 election for £2.

Option 3: The Seller has not claimed capital allowances but could have done so and the Seller and the Purchaser have agreed that any unclaimed capital allowances (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 £2 Section 198 election at the time it acquired the Property:

If the Seller either:

- was not entitled to claim capital allowances and did not obtain any information about capital allowances at the time it acquired the Property (and cannot now obtain that information) and entered into a Section 198 election at £2; or

- would have been entitled to claim capital allowances but entered into a Section 198 election at £2

then (unless the Seller has itself incurred any further expenditure on fixtures during the time it owned the Property) no capital allowances are available to the Purchaser. Accordingly, no provisions dealing with capital allowances need to be included in the Offer and Clause 20 and Parts 18 and 19 of the Schedule can be deleted.

Part 18 – 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 two 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 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

[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.

- External solar shading.

The reason the apportionment in the section 198 election is necessary is that integral features attract a writing down allowance of 6% 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 19 – Allowances Statement

Where the Seller has incurred expenditure on the Property that qualifies for structures and buildings allowances available pursuant to Section 270AA of the Capital Allowances Act 2001, the Seller should provide to the Purchaser an Allowance Statement in the form set out in this Part of the Schedule.

Part 20 – Overseas Entities

For detailed notes on the impact of the Economic Crime (Transparency and Enforcement) Act 2022 see the PSG Guidance Notes for the Register of Overseas Entities.

This Part of the Schedule deals with the confirmations required from an overseas entity, whether the Seller or the Purchaser, so that the other party can be assured that the overseas entity is registered in the Register of Overseas Entities (ROE) and has complied with the relevant duties.

The duties are:

(a) To update the ROE on at least an annual basis in accordance with the requirements of Section 7 of the 2022 Act; and

(b) To comply with any notice served by the Companies Registrar under Section 1092A of the Companies Act 2006 requiring the overseas entity to provide information to the Registrar for the purposes of determining whether it has complied with the necessary registration requirements.

The second of these duties was introduced into the 2022 Act by the Economic Crime and Corporate Transparency Act 2023, and came into effect on 4 March 2024.

These confirmations are important because the effect of failure to comply with either duty is that a Registered Overseas Entity will be treated as unregistered, meaning that the Keeper must reject an application for registration of the relevant deed.

The confirmations are backed up by the requirement to exhibit a search in the ROE (and a continuation Search brought down as near as practicable to Completion). It is up to the parties to agree whether this will be by way of formal search provided by a firm of professional searchers, or by way of a full printout from the relevant part of the Companies House website provided to the Purchaser's solicitors by the Seller's solicitors (and/or *vice versa*).

It is important to note that a search will not disclose the existence of a Section 1092A notice, and that the ROE will only disclose where an entity has failed to comply with the notice, at which point it will be deemed to be unregistered. It will be essential therefore to ensure that the relevant confirmations are given and that the ROE is checked as close to Completion as possible – the ROE is publicly available and free to view.