Commercial Property Fact Sheet

This commercial property fact sheet has been drafted to highlight some of the key pieces of legislation introduced in recent times, particularly those that directly impact commercial property transactions.

The information provided is not intended to be read in isolation. The fact sheet contains general information and should be read in conjunction with the advice we will give you during your transaction.

Should you have any questions about any matters raised in this document, it is important you contact us before you authorise exchange or completion.

Fire Regulations

The Regulatory Reform (Fire Safety) Order 2005 came into force on 1 October 2006. This regime of fire safety enforcement affects those responsible for premises (defined in the legislation as "responsible person") and tenants in control of their premises.

In the past, the fire safety officer inspected to ensure that premises met the relevant fire safety standards. This has since changed, and at the core of the legislation now lies the fire risk assessment.

The fire risk assessment is an organised appraisal of premises to enable the responsible person to identify potential fire hazards and to decide who (including any employees, guests, visitors and customers) might be in danger in the event of a fire and their location.

The responsible person will then need to evaluate the risks arising from the hazards and decide whether the existing fire precautions are adequate or whether more needs to be done. The fire authority is responsible for enforcement and may also serve improvement, alteration and prohibition notices.

The Fire Safety Act 2021 was later introduced to clarify who is responsible for managing and reducing fire risks in different parts of multi-occupied residential buildings.

In partnership with other stakeholders, the government has produced several guides that will assist you in complying with the legislation. The law requires a responsible person to carry out or appoint a competent person to carry out a suitable and sufficient fire risk assessment of the risks to employees and others affected by their work or business.

We recommend clients employ an expert. A competent person or fire risk assessor does not need to possess specific academic qualifications but should understand the relevant fire safety legislation.

They should have appropriate education, training, knowledge, and experience of fire safety principles, an understanding of fire development and the behaviour of people in a fire, and understand the fire hazards, fire risks, and other relevant factors associated with occupants of particular risk within the property.

You must understand that the responsibility falls on you or the competent person (should you instruct one), and failure to comply with the fire regulations is a criminal offence.

Several local authority fire services offer advice concerning fire risk assessments, and there is a bulk of online material.

If you are obtaining mortgage finance for this transaction, and the seller or landlord has not produced a fire risk assessment, we will need to refer this matter to the lender for their consideration as part of our duty.

Indeed, even if the seller or landlord produces a fire risk assessment, there is no guarantee that this will comply with the fire safety regulations. Therefore, we are required to send a copy to your lender for their approval.

In the unlikely event that there was a fire at the property following exchange and a fire risk assessment had not been undertaken, there is a chance that the buildings insurance policy would be invalidated and the payout refused for failure to comply with the fire regulations.

Your lender may ask you to arrange for a fire risk assessment to be carried out prior to exchange.

It is important to remember that simply doing one fire risk assessment is insufficient to discharge your responsibilities under the legislation. You should undertake annual reviews and implement any recommendations that the assessment suggests.

You should also undertake further reviews whenever there is a material change to the property, be it alterations, change of ownership or otherwise.

If you do not need mortgage finance and instruct us to proceed without a fire risk assessment, you will expose yourself to many risks for which SO Legal will not be held responsible.

Some examples of the risks:

- If you undertake your fire risk assessment after completion, it may reveal several matters that need to be addressed (new fire doors installed, extra fire escapes etc.) The cost of this work could run to thousands of pounds. If you are a tenant and have committed yourself to a full repairing lease, then all of this work will be your responsibility, and you will have to pay for it. Had you insisted on a fire risk assessment before exchange, this may have affected your decision to continue with the transaction, or it may have provided you with an opportunity to renegotiate the terms of the deal.

- If there is a fire at the premises and no fire risk assessment has been carried out, or you did not implement the recommendations, the insurance company may refuse to payout. If you are occupying the premises as a tenant, you may be in severe difficulties here. Most leases contain a clause obliging you to comply with all laws, and by not carrying out and implementing a fire risk assessment, you may find that the landlord will now be looking to you to meet the repair/remediation costs and expenses from your own funds and will sue you if you do not pay up. This could run into tens or hundreds of thousands of pounds.

- There may be criminal charges against you

- The fire authority may serve an improvement, alteration or prohibition notice on you.

We advise you to insist that the seller/landlord provides a fire risk assessment at their expense before exchange, and you take professional advice on it. We are not fire experts and are therefore unable to assist with this latter point. If the seller/landlord does not provide a fire risk assessment, you should carry out one before exchange.

Air Conditioning

Government reports suggest that buildings account for almost half of the UK's energy consumption and carbon emissions.

The government are actively trying to reduce carbon emissions in the UK, and The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 ("the Regulations") go some way to assist that.

Air conditioning used in buildings can amount to a third of your annual electricity cost. Older, large or poorly maintained air conditioning systems may use more energy and cost more to operate than necessary.

The government has now introduced air conditioning inspections, and you must consider the implications of this in full before committing yourself to a property transaction.

Mandatory inspections have been introduced for all air conditioning systems with a rated cooling output greater than 12kW. This includes the combined output of one or more individual air conditioning units in a building.

If you have an air conditioning system with rated output greater than 12kW, inspections will be required every five years.

New systems installed on or after 1 January 2008 must be inspected within five years of the installation date.

Who does the inspection?

An accredited air conditioning assessor must carry out all inspections. The assessor should give you a written report providing advice and guidance on how to improve the system's energy efficiency as soon as practicable after the inspection.

Who is responsible for the inspection?

If you control a building with an air conditioning system, you will be responsible for compliance with the regulations. We will ask the landlord/seller to provide us with copied of any inspection reports, but if no reports are available the responsibility and cost will fall on you.

If your responsibility for controlling the system passes to another person, you should provide them with any inspection reports you have. If you do not provide an inspection report, the new person will be under a legal requirement to ensure the system is inspected within three months.

You will appreciate that you could incur significant expense in complying with these regulations. This is all the more reason to instruct an independent surveyor to conduct a survey on the premises to advise you on your maintenance and repair obligations.

Tax Savings and Loans

If you need to invest in new equipment, tax relief may be available in the form of Enhanced Capital Allowances. We strongly advise you to seek specialist advice from an accountant regarding your taxation liabilities and reliefs.

<u>Control of Asbestos Regulations 2006</u>

The above regulations place a duty to manage asbestos on those persons who manage non-domestic premises. You will be responsible for protecting others who work in the property or use them in other ways, i.e. your guests/clients/customers/staff, from the risks to ill-health that exposure to asbestos causes.

The duty to manage asbestos is contained in Regulation 4 of the Control of Asbestos Regulations 2006. It requires the person who has the duty (i.e. the "Duty Holder") to:

- Take reasonable steps to find out if there are materials containing asbestos, and if so, its amount, where it is and what condition it is.
- Presume materials contain asbestos unless there is strong evidence that they do not.
- Make, and keep up to date, a record of the location and condition of the asbestos-containing materials – or materials which are presumed to contain asbestos.
- Assess the risk of anyone being exposed to fibres from the materials identified.
- Prepare a plan that sets out in detail how the risks from these materials will be managed.
- Take the necessary steps to put the plan into action.
- Periodically review and monitor the plan and the arrangements to act on it so that the plan remains relevant and up to date
- Provide information on the location and condition of the materials to anyone who is liable to work on or disturb them.

Essentially, as a duty holder, you must understand that you must ascertain whether the premises contain asbestos and, if so, where it is and what condition it is in.

If you are in any doubt, you must presume that the materials contain asbestos. You will then have to assess the risk and make a plan to manage that risk and act upon it where necessary.

You may wish to refer to the Health and Safety Executive website www.hse.gov.uk/asbestos/ which is particularly helpful.

As with all these transactions, we strongly advise our clients to obtain their own full structural survey. You should ask your surveyor to comment on the control of asbestos regulations and the extent to which it applies to the premises.

As with the fire regulations, we will refer (if applicable) this matter to your lender to obtain their confirmation that this does not affect their decision to lend.

<u>The Control of Asbestos Regulations 2012</u>

The Control of Asbestos Regulations 2012 came into force on 6 April 2012, updating previous asbestos regulations to take account of the European Commission's view that the UK had not fully implemented the EU Directive on exposure to asbestos (Directive 2009/148/EC).

The following changes have now been implemented:

- Some non-licensed work needs to be notified to the relevant enforcing authority.

- Brief written records should be kept of non-licensed work, which has to be notified, e.g. copy of the notification with a list of workers on the job, plus the level of likely exposure of those workers to asbestos. This does not require air monitoring on every job if an estimate of the degree of exposure can be made based on the experience of similar past tasks or published guidance.

- All workers/self-employed doing notifiable non-licensed work with asbestos work with asbestos must be under a doctor's health surveillance. Workers who are already under health surveillance for licensed work need not have another medical examination for non-licensed work. However, medicals for notifiable non-licensed work are not acceptable for those doing licensed work.

The Disability Discrimination Act 1995 (the "DDA")

When running a business, it is important to be aware of the provisions of the DDA. The DDA aimed to try and end the discrimination that many disabled people face and give disabled people rights.

These rights place an onus on service providers (including businesses such as hotels, shops, and factories) to make "reasonable adjustments" to tackle physical features that act as barriers to disabled people who want to access their services.

This may mean removing, altering or providing a reasonable means of avoiding a building's physical features, which make access impossible or unreasonably difficult for disabled people. Common examples include:

- Putting in a ramp to replace steps
- Providing larger, well defined signs for people with a visual impairment
- Improving access to toilet or washing facilities

It is unlawful to discriminate against disabled people by:

- Refusing to provide a service without justification.
- Providing a service to a lesser standard without justification.
- Providing a service on worse terms without justification.
- Failing to make reasonable adjustments to the way services are provided for disabled people.
- Failing to make reasonable adjustments to the physical features of service premises to overcome physical barriers to access.

The DDA has been amended since its original implementation, and you must keep abreast of any further changes as it will affect how you run your business.

The government set up the Equality and Human Rights Commission (ERHC) to help secure civil rights for disabled people, and it produces guidance and further information on which aspects of life are covered by anti-discrimination laws for disabled people.

The EHRC has a website that publishes useful guidance for businesses which can be found at www.equalityhumanrights.com.

The EHRC also publishes guidance that can be accessed from the website, and we would strongly advise you familiarise yourself with such guidance prior to exchange of contracts. You may want to re-inspect the property when you have had read through the guidance.

Survey

In the strongest possible terms, we advise you to instruct a surveyor to prepare a report for you on the premises you are about to take on.

Please contact a surveyor as soon as possible, certainly prior to exchange, for advice. The surveyor has a duty to consider the appropriateness of the level of the survey being undertaken (Hart v Large [2021] EWCA Civ 24) and will advise you accordingly.

If you are about to become a tenant under a full repairing lease, you will be responsible for the repair and maintenance of the premises, irrespective of the state of the premises at the commencement of the term. When you return the premises to the landlord, it must be fully maintained and repaired.

You may find that the premises are entirely clean, tidy, and presentable on the face of it. However, a surveyors report may suggest otherwise. An expert surveyor will advise you on the current state of the premises and the likely cost of complying with the repairing and maintenance provisions in the lease. The surveyor should also be able to advise you on the various regulations mentioned in this fact sheet.

If you are buying a property and obtaining mortgage finance, you must appreciate that your lender will be carrying out their own valuation. However, this is intended to be for the benefit of your lender, and you should not place any reliance upon it.

The lender's valuation is not a survey and is not intended to reveal any defects with the property. It is always advisable when buying a property to obtain your own independent full structural survey.

Having read your surveyors report, you may find that the cost of complying with your repairing and maintenance obligations was higher or lower than you had anticipated, and you can adjust your budget accordingly. Alternatively, you may wish to use the report to assist you when renegotiating the terms.

If you do not know any local surveyors, we can recommend one. We are entirely independent and do not get any commission or fee for referring you.

During or at the expiry of the lease term, the landlord may serve what is called a Schedule of Dilapidations on you. This will inevitably be prepared by the landlord's surveyor and will detail what you need to do to ensure the property is in full repair.

The lease will provide that you are responsible for all of the landlord's costs in connection with that Schedule, including their surveyors. It is usual for there to be a period of negotiation following service of the Schedule, but it is not uncommon for tenants to be required to spend considerable amounts of money reinstating the property or paying the landlord a sum of money in lieu of those works.

Therefore, it is all the more important that you instruct a surveyor now because whilst the state of repair of the property may not be an issue now, the landlord may pursue you for a large dilapidations claim in the future.

If you have any questions in respect of this particular issue, or if you would like to discuss this further, please do not hesitate to contact us.

Planning Permission Building Regulations

It is considered part of good conveyancing practice to inspect all planning permissions and all building regulation consents. We shall need to see these before finalising our report to you (and any lender).

Planning Permission

We need you to tell us if you consider the property you are leasing/buying has been altered or extended in any way so we can be sure that it complies with planning permissions. Certain issues may be revealed by our local search (if you have instructed us to undertake searches), and where decisions are revealed, we will ask the other parties' legal representatives to produce copies for us to check with you.

Unfortunately, not all councils reveal all permissions in the search results.
We need to check that the original property (if built after 1 July 1948 – the date the current planning laws started) and any later changes are authorised. We also need to see the original permissions so that you can check if there are any apparent breaches of the conditions in the permission.

The council can seek to enforce a condition for up to ten years from the date of <u>breach</u> (not the date of the consent). If the other parties' legal representative will not for whatever reason supply these to us, we advise you to instruct us to obtain copies, at your expense, from the council to avoid any long delays. If this is something you would like us to do, then you must let us know as soon as possible.

If you are leasing a property, there will invariably be a clause in your lease obliging you to comply with all laws, including planning laws. As such, we need to ascertain whether or not your proposed use of the property is authorised, and we need to check that any alterations have been carried out in compliance with the planning laws.

If alterations have been undertaken without first obtaining the necessary consents, this will immediately put you in breach of your lease. If you are not instructing us to undertake the usual property searches, we will not be able to investigate this on your behalf and you will therefore be proceeding entirely at your own risk on this issue.

We always advise a planning search/report to be conducted. Please contact us for more information.

Building Regulations

Building regulations deal with how a property is built and are a series of detailed technical specifications to ensure people's health and safety in and around buildings. Normally when first built, there is some written evidence that the property met the then-current standards. However, not all councils kept all such records, and as time passes, some get mislaid.

The concern here is that if the original property or any more recent works were not recorded as having met those regulations, there could be structural problems that may arise, which would then be your responsibility as the new owner or tenant and the value of the property may be affected.

A survey is, of course, recommended as this may pick up any such problems. However, even if the records show the property met with the regulations, this is only a snapshot of the situation that day, which could have changed later. The current building regulations are more stringent than those applied from time to time in the past.

If you have any concerns about the structure of the property or how any work was completed, you will need to discuss these in the first instance with your surveyor.

<u>EPC Regulations in force from April 2018</u>

Both commercial and residential landlords must beware of MEES (Minimum Energy Efficiency Standards) that came into force on 1 April 2018. This may impact your right to let a property and require you to do works to put the property to a minimum standard.

Important changes

• Landlords must be able to provide an EPC rating of E or above (the minimum standard)
• Failure to comply may result in penalties costing as much as £4,000 for residential and £150,000 for commercial landlords
• A landlord will not be able to let a property without such a rating until they have a minimum E rating.

Exclusions or exemptions

There will be certain circumstances where failure to provide an EPC rating of E or above will not result in penalties:

- **Premises do not have an EPC**

  Where a property has not been transacted since EPCs were introduced in April 2008.
  Please note: From 1 April 2023, Commercial landlords will not be allowed to continue letting a non-domestic property on an existing lease if that property has an energy rating of F or G.

- **Landlord has undertaken improvements but remains below an E EPC**

- **Consent exemption**

  If a tenant or third party withholds consent to any relevant energy efficiency improvement being made, or consent provided with unreasonable conditions.

- **Devaluation exemption**

  A report prepared by an independent surveyor states that making the relevant energy efficiency improvements would result in a reduction of more than 5% in the market value of property

- **Temporary exemption in certain circumstances**

  For example, lease renewals under the LTA 1954, or lease extensions. The landlord will have six months to comply with the regulations or register an exemption.

- **All improvements made exemption**

  If you cannot improve your property to EPC E for £3,500 or less, you should make all the improvements that can be made up to that amount, then register an 'all improvements made' exemption.

Any exemption must be registered and proved with evidence. The landlord can only rely on an exemption for five years.

Penalties

The validity or enforceability of any provision in the tenancy will not be affected by a landlord that lets or continues to let "sub-standard" property (EPC below E). So if you have a tenant in occupation before the new requirements, they can continue, but this will not apply to renewals or new leases

Since 1 April 2018, enforcement authorities have been able to serve penalty notices.

Action required

From 1 April 2020 (residential) and after 1 April 2023 (commercial), landlords cannot legally continue to let property that falls below the MEES. This will require much work to be done on the energy efficiency of many properties. We advise you don't delay and get us to check your EPC and see where your portfolio needs work.

If, as a tenant, you have an obligation under your lease to repair the property and also to comply with legal requirements. On renewal, you may be required to comply with these regulations or in a schedule of dilapidations, so make sure your landlord does not give you a property in a poor state or reserve the right for them to have to pay for this work.

Please contact us for more information on how the EPC changes may affect you as a tenant under the lease or in taking or granting a new lease.