



ANDERSON
LONGMORE
& HIGHAM

**Property
Update**

Introduction

It has been another difficult and unpredictable year for those of us involved in the property market. There have been peaks and troughs, the latter making it feel like the end of the world is nigh! Despite the general doom and gloom, and depending on what figures you read (I have chosen Nationwide's!), house prices are 1.6% higher than a year ago. Of course, there are other organisations with different figures, but I am a glass half full person! If I was a glass half empty person, I might depress myself with the Land Registry figures which, certainly for West Sussex, show a fall.

The predictions again for 2012 are not enthusiastically positive but as this year has shown there can be instances where trends are bucked and certain areas of the market may show more positive activity. I think it is fair to say that we should all strap ourselves in for another rollercoaster year.

On a personal level, it has been a busy and interesting first year in Petworth swapping the bright lights of London for the more genteel lights of Petworth! I have enjoyed building relationships with local professionals who know their stuff and are actually proactive in easing the conveyancing process rather than totally driven by sales targets.

Our seminars have been a useful tool in meeting agents and hopefully achieving the aim of sharing knowledge and experience to help further smooth the buying and selling process, whether it is houses or land.

There have been staff changes in the Petworth office and the property team now consists of me and Sarah Harris assisted by Tracy Nicholls and I have included profiles of the team.

I hope you find the information in the brochure useful and, as always, if there are areas you would like to discuss please do not hesitate to contact me. I look forward to strengthening our relationship in the New Year. Details of the 2012 seminar topics and programme will follow in January.

A handwritten signature in black ink, appearing to be 'E.A.', with a long, sweeping horizontal line extending to the right.

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Profiles

Holly Armstrong

I trained at Winckworth Sherwood in London and qualified into the social housing department in 2004. In 2007 I left Winckworth Sherwood to spend some time with my young son but in 2008 started working for Barnes Morley in London as a consultant joining the firm more permanently some time after that. I left Barnes Morley (subsequently merged with Winckworth Sherwood) and joined AL&H in November 2010. I moved to West Sussex in 2008.

As well as dealing with residential and commercial sales and purchases, I worked on development site acquisitions and disposals for social housing providers and commercial housebuilders, regeneration projects, the purchase of occupied property portfolios, dealing with the property acquisition element as well as advising on the status of occupants and formulating strategies for obtaining vacant possession. I produced site scheme set ups for new build sales and acted on new build sales and purchases.

I also dealt with housing management issues including drafting management agreements and leases, service level agreements, advising on service charge issues, advising on unfair contract terms, drafting tenancy agreements and producing policy documentation in light of new legislative requirements, such as disability policies, data protection policies and so on.

I also have experience of governance matters, acting on mergers of housing organisations, board member disputes and the setting up of charitable organisations.

Sarah Harris

Sarah trained and worked for Ensor Byfield, subsequently Clarke Willmott both in Southampton, specialising in acquisitions of development sites and plot sales, joining the firm in 1996. In 2003 she joined AL&H as the head of conveyancing in the Billingshurst office and moved to the Petworth office in October 2011 following maternity leave. Sarah has lived in West Sussex since 2003.

Sarah is experienced in all sales and purchases of both freehold and leasehold properties. She also carries out remortgage work and transfers of equity. Sarah has acted on numerous local developments including Penfold Grange, Newbridge Gardens, Alicks Hill and Bakers Meadow.

Sarah has worked on development site acquisitions and dealt with the acquisition of land as well as the subsequent plot sales.

Tracy Nicholls

Tracy has lived and worked in the local area for most of her life. In 2007 she joined Macdonald Oates in Midhurst working for a partner in the property department. Tracy subsequently moved to the Petersfield branch of the firm supporting a team of fee earners in the property department and joined AL&H three months ago.

Conveyancing update

One of the big changes for solicitors last year was the introduction of the Fifth edition sale conditions in residential contracts and the introduction of a new conveyancing protocol.

As a firm holding the Conveyancing Quality Scheme, we have to comply strictly with the new protocol. There is a practical impact for estate agents in the new protocol regarding enquiries before contract.

Enquiries before contract are always raised during any property transaction purchase. Some solicitors issued standard lists of enquiries which had no relevance to the particular transaction and it was high time for this stage of the process to receive a trim. Is your decision to buy a house really influenced by who has responsibility for the ducks in Wisborough Green? I did go to town in my reply!

What the protocol now requires is that only additional enquiries that are necessary to clarify issues arising out of documents submitted as part of the contract, particularly the legal title to the property, are raised or those which are relevant to the particular nature or location of a property (the duck question might be asked again!). Additionally, solicitors can raise those enquiries which the buyer has expressly requested are raised.

This new approach will require significant tailoring of enquiries before contract and may mean that agents are asked to deal with some enquiries which do not necessarily fall within the various categories or to deal with some enquiries where solicitors acting for sellers do not answer these. So whilst this element of the protocol may make a solicitor's life easier it may not make an agent's easier!

It has been another difficult year for solicitors acting for lenders. Lenders are still trying to reduce the number of solicitors' firms on their lending panels by either making their requirements more stringent and, in some cases, charging firms an "administration fee" for remaining on the panel.

At the Petworth office we remain on all the major lenders' panels and with the award of the Conveyancing Quality Scheme our standing on panels is more secure.

Where a buyer is financing a property purchase with a mortgage the solicitor acts for both the buyer and the lender. In discharging their duty to the lender solicitors will need to comply with the Council of Mortgage Lenders Handbook ("the CML Handbook"). The CML Handbook is split into two parts – the first part contains requirements which are common to all lenders and the second part contains lender specific requirements.

One of the things that may lead to delays in the conveyancing process is the need for solicitors to disclose matters to lenders. There is one requirement in the CML Handbook which looks fairly innocuous but which can lead to a delay in the conveyancing process. The CML Handbook states that in submitting its certificate of title to the lender requesting completion funds, a solicitor is confirming that all the assumptions in a buyer's valuation are correct. Any discrepancy between the valuation and the actual property details should be disclosed to the lender.

Discrepancies in valuations, for example, can be down to a surveyor not doing their homework properly or, more likely to the seller providing misleading information at the time of a valuation and it is vitally important that sellers are reminded, in light of this, of the need to give accurate information to a valuer.

A further difficulty which can arise with lenders is where a leasehold property is being sold and the lease term is too short. Each lender tends to have its own rules about what length of lease it is willing to lend on and Part II of the CML Handbook will provide these details. Lease extensions solve the short lease problem. Lease extensions can either be dealt with by following the statutory route or by agreeing lease extension terms with a landlord outside the provisions of the legislation, which is often the quickest and simplest solution. This can cause problems for sellers if they do not have the funds to pay any premium the landlord is charging for the extension. Adopting an up front approach with the landlord may enable you to agree that the premium is paid out of sale proceeds and again maintaining dialogue with a landlord or their solicitor in such circumstances does reap benefits. Of course, if you use the legislative process the benefit of an agreed statutory lease extension is automatically assigned to a buyer so there is less of an issue about funding the lease extension as it can be completed by the buyer (but paid for by the seller) following sale of the property.

Who would have thought there would have been so much activity in the world of drains, sewers and septic tanks – how exciting can the conveyancing world get?! New registration requirements for septic tanks were introduced and promptly suspended and new legislation was introduced regarding private drains.

By way of a summary:

- The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 (“the Regulations”) came into force on 1 July 2011. The Regulations mean that sewers serving two or more properties and lateral drains which fall outside the boundary of a property will be transferred to the local sewage undertaker.
- Sewers which carry only surface water and which do not discharge into public sewers are excluded as are systems which serve a single centrally-managed site as well as systems which drain to private treatment facilities or to septic tanks. Sewers under railway land or Crown land are also excluded from the Regulations.

For property owners the reality is that the Regulations will undoubtedly lead to higher bills but should alleviate some of the problems where private sewers are not adequately maintained.

The Environmental Permitting Regulations 2010 were introduced which obliged homeowners with septic tanks or small sewage treatment plants to register their systems with the Environment Agency. Where there was already an existing Environment Agency permission to discharge then there was no obligation to register. Similarly, cesspools and cesspits were not caught by the new legislation.

In August this year, however, the new Regulations were suspended pending a joint review with the Government. Homeowners can still register during this review period but there is no obligation to do so. The regulatory position should be reviewed by 2012.

Development update

The 95% government backed mortgage proposal has found its first taker.

Linden Homes has announced it is launching a 95% mortgage for individuals buying its new homes at a fixed interest rate of 4.99% until 2015. Linden is offering more favourable fixed rates to buyers with higher deposits. Linden is also launching a further mortgage product, which allows buyers to take out an unsecured loan amounting to 15% of the purchase price to enable buyers to build on a lower deposit. Whether this kickstarts the new build property market remains to be seen.

The Community Infrastructure Levy came into force in April 2010 and amendments to the original provisions were made last year to allow local authorities more control over the operation process. The levy is intended to provide an alternative to the section 106 contributions developers are used to negotiating by providing a tariff-based scheme. One point to note is that the obligation to pay the levy falls on the landowner so, depending on the nature of the transaction, it is vital that it is agreed between contracting parties that the developer pays the levy and a contractual provision to this effect will need to be drafted into contract documentation.

With the construction of McCarthy & Stone homes in Petworth and plans, incidentally also to build in Storrington, I thought it would be a good time to track the Office of Fair Trading's investigation of the exit fees which many retirement housing developers charge their leaseholders on the sale of the property. The OFT investigation began in 2009 and whilst McCarthy & Stone has voluntarily agreed to remove the exit fee provisions from their leases, the OFT is still to make a decision as to whether such provisions breach the Unfair Contract Terms Regulations.

One point which arose in the recent development seminar held at Anderson Longmore & Higham was the Stamp Duty Land Tax ("SDLT") treatment of overage. Overage provisions are becoming more common place in property transactions, not only where development land is being sold, but also in residential property transactions where infilling may be an option.

SDLT is payable by the buyer on the purchase price of the land and on the estimated enhanced value of the land under the overage provision and the SDLT provisions assume that any future event will occur, such as the grant of planning permission. Interest does not run on the amount estimated on the overage element and to that end, it is sensible to make a larger than anticipated estimate. Once the overage payment is known, further SDLT returns would need to be made at that time and any additional amounts paid or over-payments refunded. One further point to note is that the original buyer under the land contract/transfer remains liable for the SDLT even if he has sold the land on. To avoid this the overage arrangement must be novated or robust contractual provisions inserted in sale documentation to ensure that the original buyer gets all the information he needs from subsequent owners to file the necessary SDLT returns.

Commercial property update

One point landlords should consider when entering into leases of commercial premises is the empty premises relief which for 2011/2012 is £2600.

Thought should be given to:

- who will benefit from the relief should the property become vacant during the lease term – will this be the tenant or the landlord;
- how an overall liability can be limited where landlords own several commercial property portfolios;
- how the relief might be dealt with should a landlord consider forfeiting a lease or accepting a lease surrender;
- how to best ensure that commercial premises remain occupied – this may involve flexible terms with reasonable break options or possibly lower rents. It could also mean taking a more flexible approach to sublettings and assignments.

We are all familiar with the Landlord and Tenant Act 1954 grounds to oppose the grant of a new tenancy where a lease of commercial premises, which has not been contracted out of the 1954 Act provisions, comes to an end. Two common grounds for opposing the grant of a new lease have come under scrutiny in recent case law. When relying on the redevelopment ground, a recent case has highlighted the importance of a landlord showing the necessary intention to redevelop. Having planning permission in place together with funding for redevelopment can assist in factually pointing towards the necessary intention.

Another ground on which landlords commonly rely is where the landlord intends to occupy the premises himself. This ground can only be relied upon where the landlord has acquired the interest in the premises more than 5 years prior to the lease coming to an end. Case law this year re-established the need to show an intention to occupy the premises for a meaningful length of time. In *Patel v Keels* the court felt the necessary intention was not established as the landlord intended to occupy only for 2 years and there was a real danger the premises would subsequently be re-let.

Exercising options to break in commercial leases usually present a mathematical conundrum in ensuring the notice is served at the correct time. However, there are various conditions attached when break clauses are exercised, not least the vacant possession condition. The Court of Appeal held in a 2011 case that the tenant remaining on the premises to deal with dilapidations meant that the break had not been validly exercised as the vacant possession condition was not satisfied. The lease continued, obliging the tenant to pay the rent, rates and other services until the expiry of the lease term. The court held that in order to comply with the vacant possession condition the property must be empty of people and chattels and allow the landlord to enjoy immediate and exclusive possession, control and occupation of the premises.

Landlord and tenant update

There have been two headline court decisions regarding the tenancy deposit scheme which many commentators feel have rendered the scheme toothless.

This could explain why the Localism Act contains provisions to amend the scheme which come into force in April 2012. In the Tinesia case it was held that a landlord can place a deposit into a scheme at any time during the tenancy. This therefore removes the obligation on the landlord to protect the deposit at the start of the tenancy and does place the deposit at risk. This has been exacerbated as a result of the Hashemi case where it was held that the mandatory penalties which can be imposed on a landlord for failing to comply with its legal duties cannot be imposed once a tenancy has come to an end. This leaves practitioners wondering where the obligation actually lies on landlords to protect deposits and it remains to be seen whether the Localism Act will redress the balance.

The Property Ombudsman decided this year that where letting agents carry out income checks they must investigate how any shortfall between income and rent payments is going to be met. The decision related to the housing of a tenant who received housing benefit. The housing benefit the tenant received was insufficient to meet the rent payment and the income check the letting agent carried out was limited to just establishing that the tenant received housing benefit. The Ombudsman felt this was insufficient and lettings agents should carry out full income checks and obtain information as to how any shortfall is to be paid.

Some local authorities across the country have introduced landlord accreditation schemes. The Government confirmed in 2011 that it has no plans to introduce a nationwide scheme. Some local authorities in West Sussex have, however, introduced voluntary schemes. With the demand on rental properties increasing and to ensure that private tenants are adequately protected, our own view is that it is just a matter of time before such schemes do become mandatory.

Things to look out for in 2012

- With the deadline for the registration of chancel repair liability looming in 2013, 2012 may be the year when solicitors start to find registered title chancel repair liabilities potentially leading to an increased insurance premium in this regard
- The removal of the SDLT exemption for first time buyers which will come into effect on 24 March 2012
- The results of the Office of Fair Trading consultation launched in September 2011 on guidance for estate agents and property developers on the sale of property and land. The consultation closed on 9 December 2011
- The dilapidations pre-action protocol comes into force on 1 January 2012 which will regulate the process for such claims
- The impact of the National Planning Policy Framework
- The coming into force of provisions of the Localism Act which received Royal Assent in November 2011
- Changes to the provisions regarding energy performance certificates are expected in April 2012
- Changes in capital allowances and fixtures are expected in April 2012 which will affect commercial property owners
- The introduction of legislation making squatting a criminal offence is expected in 2012



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