

DOUG STEVENS SEMINAR

MONDAY 20th May 2019

08.00HRS TO 09.00HRS

VENUE : **CBRE**

`C-BAR`

Henrietta House

Henrietta Place

W1G 0NB

SUBJECT

Selling & Valuing Property in Disrepair or With Other Defects **50 Mins**

Open Question Time **10 Mins**

NEXT SEMINAR 17th June 2019

SEMINAR BY DOUG STEVENS TO 1st & 2nd YEAR GRADUATES

DELIVERED AS A POWERPOINT PRESENTATION

SCENARIO - YOU ARE A SURVEYOR INSPECTING A COMMERCIAL PROPERTY WHICH YOU WILL BE LETTING / SELLING

Q. WHAT FEATURES PHYSICAL & ENVIRONMENTAL DO YOU NEED TO RECORD?

▶ A. ANYTHING WHICH MIGHT MATERIALLY AFFECT VALUE (rental or capital value)

▶ PHYSICAL CONDITION (ie, DILAPIDATED / in disrepair)

▶ SUSPECTED ASBESTOS (or other deleterious materials)

▶ ADJACENT WATER SOURCE (river, etc)

▶ OVERHEAD POWER CABLES - UNDERGROUND GAS PIPES

▶ Q. WHY DOES YOUR INSPECTION NEED TO RECORD THESE MATTERS?

▶ A. BECAUSE ANY PHYSICAL DEFECT (ie, DISREPAIR or presence of DELETERIOUS MATERIALS

▶ such as ASBESTOS) WILL IMPACT ON THE LETTABILITY (if vacant) OR THE SALEABILITY OF THE PROPERTY and the RENTAL VALUE & CAPITAL VALUE

▶ RICS PROVIDE A PROPERTY OBSERVATION CHECKLIST

RICS INSPECTION CHECK LIST (CONTAMINATION & ENVIRONMENTAL) COMMERCIAL

rics contamination-environment-sustainability-3rd-edition-rics.pdf - Adobe Acrobat Reader DC

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66 Contamination, the environment and sustainability

Property Observation Checklist for Identifying Apparent Potential for Contamination and Environmental Issues (Commercial and Industrial)

Site/Property: _____ Date of Inspection: _____ By: _____

Tick the appropriate boxes to record presence and inspection of the various parts of the subject property and features observed in the course of the ordinary inspection of the property and surrounding area.

PART OF PROPERTY	Present		Inspected		Suspected asbestos - containing material In situ? Discarded? An immediate and significant risk to health?	Waste/ fly tipping	Petroleum or fuel tanks	Other tanks or containers	Discoloured or smelly water/liquids	Invasive species e.g. giant hogweed and Japanese knotweed	Oil staining	Irregular topography	Vegetation dieback	High voltage overhead tension lines / electrical sub-station/ Telecom masts
	Y	N	Y	N										
Buildings:														
occupied?														
vacant?														
dilapidated?														
Basement and subterranean features (e.g. air raid shelters)														
Outbuilding, including garages and stores														
Hardstanding														
Agricultural land														
Derelict or rough ground														
Landscaping and/or natural woodland														
Water Course or adjacent thereto														
Surrounding area														
Extent of inspection of immediate vicinity														

Appendix A

11.69 x 8.27 in

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AS A VALUER OR LETTING OR INVESTMENT SALE AGENT YOU ARE NOT EXPECTED TO FULLY UNDERSTAND OR REPORT ON THESE MATTERS - BUT - YOU ARE REQUIRED TO RECORD THEM

▶ Q. WHAT IS 'CAVEAT EMPTOR'?

▶ A. a latin expression for 'BUYER BEWARE' - ie, IT IS FOR THE BUYER TO IDENTIFY ANY PROBLEMS WITH A PROPERTY

▶ Q. IS THIS NOW THE WHOLE STORY - or - DOES A VENDOR NOW BEAR SOME RESPONSIBILITY TO DISCLOSE ANY DEFECTS IN A PROPERTY

▶ A. YES - 'CAVEAT VENDITOR' NOW APPLIES - " Let the SELLER BEWARE"

▶ PRE-CONTRACT ENQUIRIES - RISK OF LIABILITY FOR MISREPRESENTATION. IF PROVEN BUYER COULD CANCEL THE CONTRACT AND/OR CLAIM DAMAGES

▶ THE MAJORITY OF THE REPLIES TO PRE-CONTRACT ENQUIRIES WILL BE A REPRESENTATION. VENDOR REPRESENTS THE FACTS TO THE BUYER.

SOME ENQUIRIES ONLY ASK FOR OPINION. IF AN OPINION PROVES TO BE INCORRECT THERE IS NO CLAIM FOR MISREPRESENTATION. THIS IS BECAUSE A REPRESENTATION IS A STATEMENT OF FACT OR LAW BUT NOT OPINION. HOWEVER, BE CAREFUL, SOMETIMES A REPLY MAY BE FRAMED AS AN OPINION BUT ACTUALLY WILL BE CONSTRUED AS A STATEMENT OF FACT.

▶ IN ORDER FOR A BUYER TO MAKE A CLAIM FOR MISREPRESENTATION THE FOLLOWING FACTORS MUST ALL BE PRESENT:

- ▶ * THE SELLER MUST HAVE MADE A REPRESENTATION (OF FACT, OR LAW NOT OPINION)
- ▶ * THE BUYER MUST HAVE RELIED UPON THAT REPRESENTATION WHEN DECIDING TO ENTER INTO THE CONTRACT
- ▶ * THE REPRESENTATION WAS FALSE AT THE TIME OF THE CONTRACT
- ▶ * THE BUYER SUFFERED LOSS AS A RESULT OF ENTERING INTO THE CONTRACT.

▶ WHERE A CLAIM FOR MISREPRESENTATION CAN BE BROUGHT BY THE BUYER IT IS FOR THE SELLER TO PROVE THAT THE BUYER DID NOT RELY ON THE MISREPRESENTATION OR THAT IT'S RELIANCE WAS NOT REASONABLE.

▶ IN *FRANCIS V KNAPPER* THE SELLER OF A HOLIDAY PARK MADE REPRESENTATIONS AS TO THE PHYSICAL CONDITION OF THE PARK IN REPLIES TO PRE-CONTRACT ENQUIRIES. IT WAS PROVED THAT THE SELLER HAD MADE MISREPRESENTATIONS BUT THE SELLER WAS ABLE TO SHOW THAT THE BUYER HAD NOT RELIED ON (OR INDEED READ!) THE REPLIES TO ENQUIRIES AND THEREFORE THE SELLER WAS NOT LIABLE. IF, HOWEVER, THE BUYER HAD RELIED ON THE REPLIES TO ENQUIRIES (AND SUFFERED LOSS) THE SELLER WOULD HAVE BEEN LIABLE.

▶ STATING NOT TO OUR KNOWLEDGE MAY BE TAKEN AS A REPRESENTATION THAT YOU HAVE TAKEN REASONABLE STEPS TO DISCOVER THE CORRECT ANSWER. THIS COULD PUT YOU AT RISK OF A MISREPRESENTATION CLAIM IF IN FACT YOU HAD NOT TAKEN SUCH STEPS.

Q. WHAT ARE YOUR RESPONSIBILITIES AS A VENDOR?

- ▶ A. Firstly you must comply with the RICS Rules of Conduct for Firms, Rules of Conduct for Members - (UK Commercial Real Estate Agency 1st edition, October 2016)
- ▶ 5 RICS ethical principles. You must:
 - ▶ • Act with integrity
 - ▶ • Always provide a high standard of service
 - ▶ • Act in a way that promotes trust in the profession
 - ▶ • Treat others with respect
 - ▶ • Take responsibility.
- ▶ A. Secondly your actions will be covered by CONSUMER PROTECTION regulations
- ▶ Consumer Protection from Unfair Trading Regulations 2008
- ▶ Consumer Protection (Amendment) Regulations 2014 (CPRs), have been in force since October 2014.

SCENARIO

YOU ARE THE OWNER (or adviser to an owner) OF A PROPERTY WITH DEFECTS -
say ASBESTOS -or - IN VERY POOR REPAIR

- ▶ Q. DO YOU MARKET IT (to let or for sale) IN ITS EXISTING CONDITION ?
- ▶ OR DO YOU PUT IT IN GOOD ORDER FIRST?
- ▶ A. IT IS A MATTER OF CHOICE
- ▶ - ARE YOU HAPPY TO LET/SELL 'AS IS'
- ▶ or - PERHAPS YOU DON`T HAVE THE MONEY TO REMEDY THE DEFECT
- ▶ Q. WHAT ARE THE VALUATION IMPLICATIONS OF LETTING/SELLING 'AS IS'
- ▶ A. YOU WILL NOT ACHIEVE FULL MARKET VALUE
- ▶ YOU MAY NOT ACHIEVE A LETTING OR SALE IF THE TENANT/PURCHASER IS UNWILLING
- ▶ TO TAKE ON THE LIABILITY - EVEN AT A REDUCED RENT/PRICE

- ▶ LET`S LOOK AT WHAT IS INVOLVED IN TERMS OF DEFECTS & DELETERIOUS MATERIALS -
- ▶ AND HOW LEASES ARE DRAFTED TO DEAL WITH REPAIRS

GLOSSARY OF TERMS

- ▶ FREEHOLDER / LANDLORD (L/L) IDEALLY REQUIRES TENANT (T) TO BE RESPONSIBLE FOR ALL REPAIRS TO THE PROPERTY - SO THAT IT IS A **FULL REPAIRING (AND INSURING) LEASE - FRI**
- ▶ **FRI** - T` RESPONSIBLE FOR ALL REPAIRS TO THE BUILDING.
- ▶ `L/L` RESPONSIBLE FOR INSURING THE BUILDING
- ▶ BUT `T` PAYS THE INSURANCE PREMIUM
- ▶ THE WORDING WILL BE ALONG THESE LINES -;
- ▶ `T` “ **SHALL KEEP THE DEMISED PREMISES IN GOOD AND SUBSTANTIAL REPAIR AND CONDITION**”
- ▶ - BUT IT MAY SAY ” **PUT & KEEP**” IN GOOD AND SUBSTANTIAL REPAIR AND CONDITION
- ▶ THIS IS EFFECTIVELY AN OBLIGATION TO GIVE THE `L/L` BACK A PROPERTY IN BETTER CONDITION THAN WHEN THE LEASE WAS TAKEN.
- ▶ THAT IS MORE ONEROUS FOR A `T` (and so `T` may seek a discount at rent review)
- ▶ - IT MAY SAY **RENEW & REPLACE** ALL FIXTURES & FITTINGS - IT MAY SAY REPAIR AND “**REBUILD**”
- ▶ BOTH OF THESE ARE ONEROUS
- ▶ `T` GENERALLY IS HAPPY TO REPAIR THE BUILDING DURING HIS OCCUPATION BUT NOT TO PUT INTO REPAIR (IF IN POOR REPAIR) OR TO ACCEPT ANY DEFECTS IN THE PROPERTY

Q. WHAT IS AN EFFECTIVE FRI LEASE ?

- ▶ A. WHERE THE BUILDING IS MULTI-LET `T` MAY BE DIRECTLY RESPONSIBLE FOR INTERNAL REPAIRS BUT `L/L` RESPONSIBLE FOR EXTERNAL / STRUCTURAL REPAIRS
- ▶ `L/L` RECOVERS HIS COSTS VIA A SERVICE CHARGE -(so it is effectively FRI)
- ▶ IN SOME LEASES `T` IS RESPONSIBLE FOR INTERNAL REPAIRS ONLY
- ▶ **IRT (INTERNAL REPAIRING TERMS)** - IN THIS FORM OF LEASE `T` IS RESPONSIBLE FOR INTERNAL REPAIRS ONLY
- ▶ L/L RESPONSIBLE FOR EXTERNAL AND STRUCTURAL REPAIRS AND CANNOT RECOVER THOSE COSTS FROM THE TENANT
- ▶ TO REFLECT SAVING TO `T` OF AN **IRT LEASE** (A 10% ADDITION TO RENT MAY BE MADE IF IT IS BEING COMPARED TO A FRI LEASE) - BUT NO ADJUSTMENT IF IT IS COMPARED TO ANOTHER IRT LEASE
- ▶ THERE IS NO STANDARD FORM OF REPAIRING CLAUSE - SO NOTE CAREFULLY WHAT THE LEASE SAYS - AND WHAT IT DOESN'T SAY

GLOSSARY OF TERMS CONT'D

▶ YIELDING UP

▶ "AT THE END OR SOONER DETERMINATION OF THE TERM HEREBY GRANTED TO YIELD UP THE DEMISED PREMISES (IE, GIVE VACANT POSSESSION) AND ALL FIXTURES THEREIN (EXCEPT TENANTS OR TRADE FIXTURES) IN GOOD AND SUBSTANTIAL REPAIR AND CONDITION AS SHALL BE IN ACCORDANCE WITH THE TENANT'S COVENANTS HEREINBEFORE CONTAINED..."

▶ RE-INSTATEMENT

▶ Q. IF `T` HAS CARRIED OUT IMPROVEMENTS / ALTERATIONS (UNDER LICENCE) - DOES THE LEASE REQUIRE RE-INSTATEMENT OF THOSE ITEMS, IE, UNDOING THE WORKS ?

▶ A. ONLY IF THE LEASE (OR LICENCE) SPECIFIES THAT RE-INSTATEMENT IS REQUIRED (OR REASONABLY REQUIRED) BY `L/L`

▶ IN THIS CASE `L/L` MAKES A DECISION - DOES HE WANT THE PROPERTY BACK WITH THE BENEFIT OF THE IMPROVEMENT ? - or - IS IT BETTER FOR THE IMPROVEMENT TO BE REMOVED ?

▶ IMPROVEMENT / ALTERATION

▶ **NB** THE CONCEPT OF IMPROVEMENT IS FROM THE `T`'S PERSPECTIVE (NOT `L/L`'S)

▶ AN IMPROVEMENT IS AN ALTERATION (IF PERMITTED) AND A LICENCE FOR ALTERATION MAY BE REQUIRED

▶ NB BEWARE OF SCENARIO WHERE `T` HAS CARRIED OUT AN IMPROVEMENT - THE VALUE (effect on rent) OF WHICH IS TO BE DISREGARDED AT RENT REVIEW (or lease expiry - 21 YEARS) & SO THE VALUE OF THE IMPROVEMENT SHOULD NOT BE REFLECTED IN THE CAPITAL VALUE

SCENARIO - `L/L` DOES NOT WANT TO - or - CAN`T AFFORD TO PUT PROPERTY IN FULL REPAIR BEFORE LETTING - SO LETS IT IN DISREPAIR

- ▶ Q. THE `T` IS PREPARED TO ACCEPT A LEASE ON THE PROPERTY IN DISREPAIR - BUT HOW WOULD THAT DISREPAIR BE RECORDED IN THE LEASE - SO THAT `T` WASN`T SUBSEQUENTLY LIABLE TO PUT THE PROPERTY IN TO FULL REPAIR?
- ▶ A. A SCHEDULE OF CONDITION WOULD BE ATTACHED TO THE LEASE
- ▶ SCHEDULE OF CONDITION - IN MANY CASES `L/L` WILL NOT WANT TO PUT A PROPERTY INTO FULL REPAIR OR `T` WILL NOT AGREE TO DO SO. THE SOLUTION IS TO LET THE PROPERTY IN A STATE OF DISREPAIR - RECORDING THAT DISREPAIR IN A SCHEDULE OF CONDITION.
- ▶ THE SCHEDULE WILL DESCRIBE THE DEFECTS AND MAY PROVIDE PHOTOGRAPHS AS EVIDENCE
- ▶ `T` WILL BE REQUIRED TO HAND BACK THE PROPERTY AT THE END OF THE LEASE IN NO WORSE CONDITION THAN AS EVIDENCED BY THE SCHEDULE OF CONDITION
- ▶ **FAIR WEAR & TEAR EXCEPTION** - WHERE A PROPERTY IS TO BE LET ON A SHORT LEASE IT MAY NOT BE APPROPRIATE FOR `T` TO HAVE ANY SIGNIFICANT REPAIRING OBLIGATIONS. FAIR WEAR & TEAR EXCEPTION MAY APPLY.
- ▶ FAIR WEAR & TEAR IS THE *TYPE OF DISREPAIR WHICH THE TENANT WOULD HAVE OTHERWISE HAD TO MAKE GOOD HAD THE EXCEPTION NOT APPLIED*, ie
 - ▶ CHANGES WHICH HAPPEN DURING THE NORMAL USE OF THE PREMISES OR THEIR FIXTURES AND FITTINGS
 - ▶ CHANGES WHICH HAPPEN DUE TO THE NATURAL AGING OF PREMISES OR THEIR FIXTURES AND FITTINGS

SCENARIO - `T` HAS AN FRI LEASE - BUT HAS NOT KEPT PROPERTY IN GOOD REPAIR
`L/L` WANTS TO SELL THE F/H INVESTMENT AND MAY NOT GET FULL
MARKET VALUE DUE TO THE DISREPAIR

Q. WHAT CAN THE `L/L` DO?

- ▶ A. THE LEASE WILL NORMALLY PROVIDE FOR THE `L/L` TO ENSURE THAT ANY DISREPAIR IS REMEDIED BY THE `T`
- ▶ FRI LEASE IS WORDED SUCH THAT `L/L` HAS RIGHTS TO INSPECT THE PROPERTY TO ASSESS ANY DISREPAIR (BREACH OF REPAIRING CLAUSES)
- ▶ FRI LEASE WILL RESERVE RIGHTS FOR `L/L` TO REQUIRE `T` TO CARRY OUT ANY WANTS OF REPAIR (DISREPAIRS) & MAY RESERVE RIGHTS FOR `L/L` TO ENTER TO CARRY OUT THE WORKS
- ▶ A. `L/L` CAN SERVE A SCHEDULE OF DILAPIDATIONS ON `T`
- ▶ **DILAPIDATIONS** - this is the general term used for wants of repair or decoration. Schedules used to notify tenants of the works of repair and decoration which the landlord wishes to be carried out under the terms of the lease are referred to as A SCHEDULE OF DILAPIDATIONS.
- ▶ **INTERIM OR TERMINAL SCHEDULE OF DILAPIDATIONS** Lease will normally permit L/L to serve a schedule during the term (INTERIM SCHEDULE) or at the end of the lease (TERMINAL SCHEDULE)

Q. IF THE REPAIRING BREACH IS SERIOUS AND `T` WILL NOT REMEDY IT CAN THE L/L OBTAIN VACANT POSSESSION FOR THE BREACH OF REPAIRING COVENANT?

- ▶ A. YES (subject to the wording of the repairing provisions in the lease)
- ▶ FORFEITURE - IF THE DISREPAIR IS SIGNIFICANT AND `L/L` SEEKS POSSESSION FROM THE `T` FOR BREACH OF REPAIRING COVENANT `L/L` CAN TAKE ACTION TO FORFEIT THE LEASE (ie. GET VACANT POSSESSION)
- ▶ FORFEITURE BY `L/L` FOR BREACH OF REPAIR AND RELIEF THEREFROM FOR `T` ARE GOVERNED BY STATUTE (this over-rides what is stated in the lease)
- ▶ LAW OF PROPERTY ACT 1925 `L/L` SEEKING FORFEITURE FOR BREACH OF REPAIR SERVES A
- ▶ S.146 NOTICE
- ▶ THE NOTICE STIPULATES THE 'WANTS OF REPAIR' AND GIVES A REASONABLE TIME PERIOD FOR WORKS OF REPAIR TO BE CARRIED OUT
- ▶ LEASEHOLD PROPERTY (REPAIRS) ACT 1938 TO PROTECT `T`'s FROM OVERZEALOUS `L/L`'s
`T` HAS PROTECTION FROM FORFEITURE BY VIRTUE OF THIS ACT
- ▶ `L/L` IN SERVING S.146 MUST NOTIFY `T` OF RIGHTS UNDER LP (R) A 1938 - THIS APPLIES TO LEASES GRANTED FOR A TERM OF 7 YEARS OR MORE OF WHICH AT LEAST 3 YEARS ARE UNEXPIRED
- ▶ WHERE `L/L` SERVES A S.146 `T` HAS 28 DAYS TO CLAIM THE BENEFIT OF THE 1938 ACT BY A COUNTER NOTICE
- ▶ THE EFFECT OF THE COUNTER NOTICE IS THAT NO PROCEEDINGS BY ACTION OR OTHERWISE MAY BE TAKEN BY THE `L/L` FOR FORFEITURE OR FOR DAMAGES WITHOUT THE LEAVE OF THE COURT

Q. IS THERE A LIMIT TO THE VALUE OF WORKS TO BE CARRIED OUT IN A TERMINAL SCHEDULE OF DILAPIDATION ?

- ▶ A. YES
- ▶ LANDLORD & TENANT ACT 1927 SECTION 18
- ▶ WHEN `L/L` SEEKS DAMAGES FOR BREACH OF COVENANT TO PUT, KEEP OR LEAVE IN REPAIR
- ▶ THE SUM OF DAMAGES MUST IN NO CASE EXCEED THE AMOUNT (IF ANY) BY WHICH THE VALUE OF THE REVERSION IN THE PREMISES IS DIMINISHED AS A CONSEQUENCE OF THE BREACH OF COVENANT
- ▶ ie, `L/L` CANNOT OBTAIN A HIGHER SUM OF DAMAGES THAN THE LOSS HE WOULD SUFFER FROM A PREMISES BEING IN DISREPAIR
- ▶ It is known as S.18 DIMINUTION IN VALUE
- ▶ Q. DOES THE LEASE ALLOW L/L FULL ACCESS TO ASSESS DILAPIDATIONS AND CARRY OUT THE REPAIRS HIMSELF AND RECOVER COSTS FROM `T`?
- ▶ A. YES - GENERALLY - BUT ONLY IF LEASE PERMITS THIS - BUT SEE CASE LAW BELOW

JERVIS V HARRIS - Court of Appeal 14 NOV 1995

- ▶ A provision in the lease obliged a tenant to carry out repairs and provided that if he did not do so, the landlord might enter the premises do the repairs himself and recover from the tenant the costs and expenses of doing so.
- ▶ The potential conflict is **L/L's right to inspect** - prepare schedule - serve notice - then do works - **versus** - **T's right to quiet enjoyment**
- ▶ **Held:** The provision was not a penalty. The money was payable not upon the breach but because the L/L decided to do repairs himself and claimed the costs thereof as a debt.
- ▶ L/L's claim for rent is regarded as a claim in debt. Rule requiring an injured party to mitigate his losses does not apply to a claim in debt.
- ▶ **Advantages to the `L/L`** of having and implementing a Jervis V Harris type remedy for a `T`s breach of repairing covenant are that -;
- ▶ It avoids need to forfeit - so no need for a S146 Notice - so the Leasehold Property (Repairs) Act 1938 does not apply;
- ▶ L/L controls the work the work which can be done without having to wait to the end of the term.
- ▶ **Disadvantages are** -;
- ▶ The risk of a claim for trespass if the conditions of entry have not been complied with
- ▶ L/L has to spend the money first,
- ▶ L/L risks dispute about the costs and extent of the work.
- ▶ There may be litigation over enforcement of the right of access

Q. ARE THERE RICS GUIDELINES AS TO THE APPROPRIATE DISCOUNT TO MAKE FROM AN OPEN MARKET VALUATION FOR DISREPAIR OR DELETERIOUS MATERIALS?

▶ A. NO

▶ THERE IS NO UNIVERSAL FORMULA OR GENERALLY ACCEPTED DISCOUNT TO APPLY

▶ Q. HOW WOULD YOU MAKE AN ADJUSTMENT TO SALE PRICE / VALUATION TO REFLECT THIS?

▶ A. OBTAIN AN ESTIMATE OF THE COST OF REMEDIAL WORKS AND THE TIME IT WOULD TAKE TO CARRY OUT THOSE WORKS

▶ THEN DEDUCT THAT COST AND THE LOSS OF RENT (for the period it takes for the remedial works to be done) FROM THE SALE PRICE / VALUATION.

▶ A PRACTICAL PROBLEM IS THAT A PURCHASER MIGHT NOT WANT THE LIABILITY / TROUBLE OF CARRYING OUT THE WORKS EVEN FOR A PRICE DEDUCTION - OR MAY NOT ACCEPT THAT THE DEDUCTION MADE IS LARGE ENOUGH

▶ RECENT EXAMPLES - BHS DISPOSALS

▶ MANY OF THE BUILDINGS HAD ASBESTOS (a deleterious material),

▶ FOR A 60,000 SQ FT STORE THE COST OF REMOVING ASBESTOS MAY BE UP TO £2M AND THE TIME SCALE UP TO A YEAR

DELETERIOUS MATERIALS



▶ **Q. WHAT ARE DELETERIOUS MATERIALS?**

▶ **A. Materials or building techniques which are dangerous to health, or which are environmentally unfriendly, or which tend to fail in practice.**

▶ **Q. NAME SOME DELETERIOUS MATERIALS**

▶ High Alumina Cement (HAC)

▶ Wood wool slabs in permanent formwork to concrete.

▶ Calcium Chloride or Sodium Chloride in concrete.

▶ Asbestos Products.

▶ Marine or sea dredged aggregates.

▶ Lead, or materials containing lead, which may be ingested or absorbed.

▶ Calcium silicate bricks or tiles.

▶ Materials composed of mineral fibres with diameter of < 3 microns or less or length of < 200 microns

▶ Decorative finishes containing lead or asbestos.

▶ Paints and wood preservatives containing Pentachlorophenol.

DELETERIOUS MATERIALS Cont`d

CONCRETE CANCER is caused when the steel reinforcing within a concrete slab begins to rust. As steel rusts it expands up to 7 times its original size causing the surrounding concrete to be displaced and become flakey. As the steel pushes the concrete away, more water gets to the steel accelerating the process. The process is often referred to as concrete spalling.

HIGH ALUMINA CEMENT HAC popular from 1950's to 1970. It used calcium aluminates rather than calcium silicates. Sometimes caused reductions in concrete strength and increased vulnerability to chemical attack. HAC is also known as Calcium Aluminate Cement (CAC). HAC concrete was effectively banned for use in new structural concrete in the UK following a few well publicised collapses in the 1970s. Most HAC concrete in the UK went into precast beams. Up to 50,000 buildings with similar beams continue to remain successfully in service today in the UK.

ASBESTOS REMOVAL



CONCRETE CANCER - Calcium Chloride



- ▶ Q. WHY IS IMPORTANT TO IDENTIFY PRESENCE OF DELETERIOUS MATERIALS?
- ▶ A. IT WILL IMPACT ON VALUE
 - directly if the rental or capital value is adjusted
 - indirectly if repair - removal works are required as direct cost or via service charge
- ▶ **ASBESTOS** USE WAS BANNED IN 1999 BUT PAST EXPOSURE STILL KILLS 4,500 ANNUALLY IN UK.
- ▶ PRESENT IN AIR & WATER BUT IN NON-HARMFUL QUANTITIES AND 2/3RDS OF ALL ROCKS.
- ▶ **3 TYPES OF ASBESTOS - WHITE (MOST COMMON) BROWN BLUE**
- ▶ WAS PRODUCT OF CHOICE 1950'S - 1980'S FOR INSULATION, CEILING TILES, ROOF TILES, ETC
- ▶ RIFE IN WOOLWORTHS & BHS BUT ALSO IN SOME M & S, PRIMARK STORES, ETC.
- ▶ **NB BUILDINGS WITH ASBESTOS IN MUST MAINTAIN A REGISTER WITH LOCATIONS MARKED ON.**
- ▶ CONTROL OF ASBESTOS REGULATIONS 2006 GOVERNS LANDLORDS DUTIES TO TENANTS,
- ▶ IF IT'S IN GOOD CONDITION AND NOT DAMAGED OR DISTURBED THEN IT SHOULDN'T PRESENT A RISK.
- ▶ BUT IT IS DANGEROUS IF DISTURBED - SO SHOP / STORE CANNOT BE RE-FITTED WITHOUT REMOVAL WHICH WOULD REQUIRE VACANT POSSESSION

Q. CAN YOU SELL A BUILDING WITH AN INHERENT DEFECT ie, FAULTY CLADDING (GRENFELL TOWER type)?

- ▶ **A. YES - BUT - IT IS MORE ADVISABLE FOR THE OWNER / VENDOR TO REMEDY THE PROBLEM FIRST AND THEN SELL**
- ▶ **3 EXAMPLES - 1. A HOTEL FORMING PART OF A SHOPPING CENTRE HAS GRENFELL TOWER TYPE EXTERNAL CLADDING. OWNER /VENDOR IS REMEDYING THIS BEFORE SALE**
 - ▶ (even if the works would have been covered under an insurance policy a purchaser would still want to see the works completed first - before committing to a purchase)
- ▶ **2. A DEPARTMENT STORE BUILDING HAD POORLY DESIGNED EXTERNAL PANELS - (POTENTIALLY LIABLE TO FAIL AND FALL). THIS WAS A NOT A MATERIALS FAULT - BUT A DESIGN FAULT. PROSPECTIVE PURCHASER WITHDREW FROM PURCHASE BECAUSE OF THE INHERENT DEFECT (in the design of the external cladding).**
- ▶ **3. A SHOPPING CENTRE WITH A MULTI-STOREY CAR PARK WITH CONCRETE CANCER. SURVEY REPORT CONFIRMS THAT DEMOLITION AND RECONSTRUCTION WILL BE REQUIRED IN THE NEAR FUTURE . FOOD STORE ANCHOR FACES RENT REVIEW AND ARGUES THAT CAR PARKING IS FUNDAMENTAL TO THE EFFECTIVE OPERATION OF THE FOOD STORE AND RAISES 2 ISSUES - 1. CUSTOM WILL BE LOST (possibly permanently) WHILE CAR PARK IS DEMOLISHED AND REBUILT 2. IN THE INTERIM THE SERVICE CHARGE WILL RISE DUE TO ONGOING RUNNING REPAIRS TO THE CAR PARK**
- ▶ **Q. SHOULD THE FOOD STORE `T` GET A DISCOUNT FROM A FULL OPEN MARKET RENT?**
- ▶ **A. YES - SO THIS DISREPAIR DOES IMPACT ON `L/L`'s VALUATION**

LATENT / INHERENT DEFECTS

▶ Q. WHAT IS AN “INHERENT OR LATENT DEFECT”?

▶ A. A LATENT DEFECT IS A FAULT OR DEFECT CAUSED BY FAILURES IN DESIGN, MATERIALS OR CONSTRUCTION METHOD WHICH MAY NOT BECOME APPARENT OR EASILY DETECTABLE UNTIL YEARS AFTER COMPLETION OF THE CONSTRUCTION PROJECT AND AFTER EXPIRY OF THE DEFECTS LIABILITY PERIOD.

▶ IT MIGHT BE THOUGHT THAT IF A BUILDING WAS DEFECTIVE THAT WAS THE `L/L'S PROBLEM BUT SEE

▶ ***(RAVENSEFT PROPERTIES LTD V DAVSTONE (HOLDINGS) LTD [1979] 1 EGLR 54; (1978) 249 EG 51).***

▶ EXTERNAL STONE CLADDING HAD STARTED TO DETACH FROM A CONCRETE FRAME OF A 16-MAISONETTE BUILDING, RENDERING IT DANGEROUS. PRINCIPAL REASON FOR THE PROBLEM WAS LACK OF EXPANSION JOINTS. IT WAS NOT REALISED THAT EXPANSION JOINTS WOULD BE NECESSARY.

▶ TO DEAL WITH PROBLEM ALL THE STONE CLADDING TAKEN DOWN & REPLACED IT WITH PROPER TIES, INCLUDING EXPANSION JOINTS (THE ABSENCE OF WHICH THE T'S CLAIMED WAS THE INHERENT DEFECT).

▶ `T` ARGUED THAT THIS REPAIR WORK FELL OUTSIDE THE SCOPE OF THEIR REPAIRING COVENANT BECAUSE IT AROSE OUT OF AN INHERENT DEFECT.

▶ THE COURT NOT ONLY REJECTED THE EXISTENCE OF A DOCTRINE OF INHERENT DEFECT BUT ALSO REJECTED THE TENANTS' CONTENTION THAT THEY SHOULD NOT BE LIABLE FOR ANY WORK UNDER THE COVENANT THAT ULTIMATELY NECESSITATES REMEDY OF AN INHERENT DEFECT.

▶ THE COURT ADOPTED A “FACT AND DEGREE” APPROACH, CONCLUDING THAT THE WORK WAS “REPAIR” WITHIN THE MEANING OF THE TENANT'S COVENANT.

▶ **NB RECENT EXAMPLE ON CHEESEGRATER BUILDING. FAULTY BATCH OF BOLTS TO RETAIN CLADDING. NOVEMBER 2014 TWO BOLTS, THE SIZE OF A HUMAN ARM BROKE AND FELL FROM THE 738FT TOWER. CLAIM AGAINST STEEL FABRICATOR - COVERED BY INSURANCE**

LATENT / INHERENT DEFECTS CONT'D

- ▶ FAULTS AND DEFECTS CAUSED BY FAILURES IN DESIGN, WORKMANSHIP OR MATERIALS, MAY NOT BECOME APPARENT OR READILY DETECTABLE (EVEN WITH THE EXERCISE OF REASONABLE CARE) UNTIL MANY YEARS AFTER COMPLETION OF THE PROJECT, LONG AFTER THE END OF THE DEFECTS LIABILITY PERIOD.
- ▶ **EXAMPLES OF LATENT DEFECTS** INCLUDE:
- ▶ **DEFECTIVE BASEMENT TANKING** ALLOWING WATER PENETRATION.
- ▶ **INADEQUATE WALL TIES** ALLOWING MOVEMENT WHICH DAMAGES WALLS.
- ▶ **UNDER-STRENGTH CONCRETE OR MISPLACED REINFORCEMENT** ALLOWING MOVEMENT TO DAMAGE THE STRUCTURE.
- ▶ INADEQUATE FOUNDATIONS CAUSING SUBSIDENCE OF THE BUILDING.
- ▶ COMPLETED BUILDINGS HAVE A LIFE-CYCLE OF MANY YEARS - OFTEN OWNERSHIP CHANGES- CURRENT OWNER MAY HAVE HAD NO INVOLVEMENT IN ORIGINAL CONSTRUCTION, BUT IS NEVERTHELESS NOW LIABLE
- ▶ DEFECTS LIABILITY PERIOD MAY HAVE ENDED. TOO LATE TO INSIST CONTRACTOR RECTIFIES DEFECTS.
- ▶ OWNER MUST THEREFORE SEEK REDRESS IN AN ACTION FOR DAMAGES, FOR BREACH OF CONTRACT, OR FOR NEGLIGENCE. IN THE CASE OF DWELLINGS THERE IS A STATUTORY REMEDY PROVIDED BY THE DEFECTIVE PREMISES ACT 1972. ACTIONS FOR BREACH OF CONTRACT ARE TIME BARRED AFTER 6 YEARS FROM THE DATE OF BREACH
- ▶ BUT IF IT WAS A CONTRACT UNDER SEAL, THE PERIOD IS 12 YEARS. CLEARLY THEREFORE IT IS IMPORTANT TO THE BUILDING OWNER THAT ALL CONTRACTS ARE MADE UNDER SEAL; NOT SO FOR THE CONTRACTOR, THE PROFESSIONAL CONSULTANT OR THEIR INSURERS. WHERE THE CLAIM IS FOR NEGLIGENCE, THE TIME LIMIT IS 6 YEARS FROM THE DATE ON WHICH THE CAUSE OF ACTION ACCRUED, WHICH WILL BE THE DATE WHEN THE DAMAGE OCCURRED.
- ▶ EXAMPLE OF DEFECTIVE CLADDING ON A STORE - RESULTING IN ABANDONMENT OF PURCHASE DUE TO RISK OF INJURY TO PUBLIC.

Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd (2013)

- ▶ 35 YEAR LEASE. PREMISES FITTED OUT WITH STATE-OF-THE-ART FITTINGS IN EARLY 1970S.
- ▶ `T` FAILED TO COMPLY WITH REPAIRING OBLIGATIONS - PREMISES WERE IN A POOR STATE.
- ▶ WHEN LEASE EXPIRED `L/L` CLAIMED £2.172M PLUS INTEREST FOR REMEDIAL WORK HE CARRIED OUT.
- ▶ `T` ARGUED THAT THE COST OF REPAIRS WAS £700,000 - SUBJECT TO S.18 (1) L & T ACT 1927 CAP.
- ▶ **Q. SHOULD `T` HAVE COMPLIED WITH REPAIRING COVENANTS BY RETURNING TO PREMISES WITH 1970`s EQUIPMENT - or - REPLACED THEM WITH MODERN EQUIPMENT.**
- ▶ **A. COURT HELD THAT**
- ▶ **`T` OBLIGED TO RETURN PREMISES IN GOOD AND TENANTABLE CONDITION AND WITH INSTALLATION SYSTEMS IN SATISFACTORY WORKING ORDER. `T` IS NOT REQUIRED TO DELIVER UP THE PREMISES WITH NEW EQUIPMENT.**
- ▶ **STANDARD OF REPAIRS JUDGED BY REFERENCE TO THE CONDITION OF THE EQUIPMENT AT THE START OF THE LEASE, NOT THE CONDITION THAT WOULD BE EXPECTED OF AN EQUIVALENT BUILDING AT THE EXPIRY OF THE LEASE.**
- ▶ **`T` ONLY OBLIGED TO REPLACE BROKEN EQUIPMENT ON A `LIKE-FOR-LIKE` BASIS.**
- ▶ **`T` NOT REQUIRED TO UPGRADE EQUIPMENT IN LINE WITH CURRENT STANDARDS.**
- ▶ **ie, `T` IS ENTITLED TO PERFORM COVENANTS IN THE MANNER LEAST ONEROUS TO THE `T`**
- ▶ **JUDGE CARRIED OUT OWN VALUATION. AWARDED £1,353,254 + INTEREST.**

LOOK AT THE CONDITION OF A PROPERTY BEFORE YOU ATTEMPT TO VALUE IT
ASSESS ANY DEFECTS AND THEIR IMPACT ON VALUE (lettability & saleability)
REFLECT THIS IN THE PRICING

- ▶ Q. MUST YOU ALWAYS ASSUME THAT YOU VALUE THE PROPERTY IN THE CONDITION IN WHICH YOU FIND IT WHEN INSPECTING?
- ▶ A. NO
- ▶ Q. IF A `T` HOLD A LEASE ON FRI TERMS AND THE PROPERTY IS IN DISREPAIR AT A RENT REVIEW DATE - CAN THE `T` ARGUE FOR A LOWER RENT DUE TO THE DISREPAIR?
- ▶ A. NO
- ▶ MOST LEASES WILL CONTAIN A PROVISION IN THE RENT REVIEW CLAUSE WITH A STATED ASSUMPTION TO THE EFFECT THAT -;
- ▶ *“the covenants of the Tenant have been fully observed and performed”*
- ▶ *THIS MEANS THAT THE `T` HAS COMPLIED WITH ANY REPAIRING CLAUSES AND (even if it is not actually the case) THE ASSUMPTION IS THAT THE PREMISES ARE IN A STATE OF FULL REPAIR*
- ▶ *IN EFFECT THIS MEANS THAT THE `T` CANNOT PROFIT FROM IT`S OWN BREACH OF REPAIR*
- ▶ *A FULL MARKET RENT WILL APPLY REGARDLESS OF THE CONDITION OF THE PREMISES*