

SEMINAR

MONDAY 11th APRIL 2016

VENUE : **CBRE**

Q & A's

1. *CAVEAT EMPTOR - DOUBLE-DIPPING - IPMS (Offices) - PURPLE BOOK - S.106 & CIL -*

2. *OPEN QUESTIONS*

3. *NEXT SEMINARS 16TH MAY 20TH JUNE*

CAVEAT EMPTOR

- ▶ Latin : ‘let the buyer beware’.
- ▶ The principle that the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made.
- ▶ Under the principle of Caveat Emptor, the buyer of a property cannot recover damages from the seller simply because the seller fails to disclose defects to the buyer.
- ▶ There is a small exception for concealing hidden (or latent) defects, but otherwise the seller is generally not liable for keeping silent on matters which the buyer can otherwise find out about.
- ▶ Therefore, a buyer of a property should ask prudent questions of the seller.
- ▶ What are enquiries before contract ?
- ▶ They are questions which a purchasers solicitors will ask of a vendors solicitors
- ▶ To stop the evasion of answering questions there are now standard forms of enquiries before contract which now provide for more disclosure as there are set questions to be answered by the vendors

CONSUMER PROTECTION

- ▶ Over the years a series of acts introduced to protect consumers
- ▶ UNFAIR CONTRACT TERMS ACT 1977
- ▶ CONSUMER PROTECTION ACT 1987
- ▶ CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008
Consumer Protection Rights (CPRs) are applicable to all parts of the property sector.
- ▶ Since the repeal of the Property Misdescriptions Act 1991 (PMA 1991) in 2013, they are also one of the primary controls on misleading advertising in the property sector.
- ▶ CPRs' prohibition on misleading omissions places an additional duty on property sales businesses: to provide the 'material information' that the average consumer needs, according to the context, to make an informed transactional decision.
- ▶ THE BUSINESS PROTECTION FROM MISLEADING MARKETING REGULATIONS 2008 (BPRs)
- ▶ Care in gathering & presenting information used to advertise and market property.
- ▶ Systems & safeguards to ensure marketing information is accurate, balanced and does not leave out material facts.
- ▶ Take reasonable steps to establish the facts for themselves.
- ▶ Act promptly to correct or update the marketing material and to pass on information whenever new information becomes available.

CONSUMER PROTECTION Cont`d

- ▶ CONSUMER RIGHTS ACT 2015
- ▶ Aimed to replace by consolidation all other Acts & Regulations. BUT overlaps them.
- ▶ The CPRs prohibit property businesses from engaging in unfair commercial practices in their dealings with consumers, which includes-;
- ▶ giving false or misleading information (including information which is given verbally, in writing or visually)
- ▶ failing to give material information, ie, non-disclosure / omissions
- ▶ Crucially, in the context of this legislation, consumers are not only those people who actually buy from or pay a property business - they also include anyone who is a prospective customer.
- ▶ Fines can be imposed.
- ▶ We have now moved from CAVEAT EMPTOR to CAVEAT VENDITOR
- ▶ Many of the provisions in the CPRs and BPRs relate to letting of residential property BUT RICS has its own Guidelines to govern commercial property and industry bodies have established protocols and guidelines.

DOUBLE-DIPPING & DUAL AGENCY

- ▶ DOUBLE DIPPING - when an agent acts for multiple prospective purchasers
- ▶ DUAL AGENCY - when an agent acts on both sides of a deal - Vendor & Purchaser
- ▶ These practices mainly relate to sales/purchases - but they can occur on valuations, reviews, etc.
- ▶ Issue which RICS are looking in to as self-regulation seems to have failed
- ▶ The INVESTMENT PROPERTY FORUM (a body of agents and landlords) recognised the problem and decided to act
- ▶ IPF PROTOCOL - OPEN MARKET INVESTMENT AGENCY 26 November 2014
- ▶ The aim of this UK 'Protocol' is to establish clear guidance around good practice relating to open market property investment sales and acquisitions, in order to address potential conflicts of interest.
- ▶ It stopped short of an agreement to ban these practises - but sought a strict protocol
- ▶ DOUBLE-DIPPING (multiple introductions) a firm acting for several different parties each trying to buy the same asset - providing advice for the purchaser which might lead to submitting more than one offer for it from the same firm of agents
- ▶ Does this result in a CONFLICT OF INTEREST ?

Double -Dipping (Cont`d) - IPF PROTOCOL

- ▶ Agent may elect to make multiple introductions of an investment - should know Principals prospective purchasers - Funds Prop Co`s, ect) introductory system and adopt it
- ▶ Introductions Policy, the Agent should agree at the outset the basis of engagement with the Principal in writing
- ▶ Each firm of agents should have a ‘Barrier Policy’ in place to deal with potential conflicts of interest that is proactively managed and reviewed on a regular basis, with compliance enforced across its entire organisation. Available to Principals on request.
- ▶ If Principal accepts the position it should be confirmed in writing or by email ASAP
- ▶ Agent is appointed on a non-exclusive basis and it is accepted by the Principal that the Agent may act for more than one Principal but confidentiality will be maintained at all times by activating the Agent’s Barrier Policy.
- ▶ Agent must clearly identify and record internally, all individuals (across all services lines) nominated to represent each Principal in connection with formulating their respective offer (the Deal Teams), in accordance with the Agent’s Barrier Policy.
- ▶ Where the Vendor is unrepresented, then the Vendor should be advised directly.
- ▶ Agent's Barrier Policy to ensure clear segregation of the individuals providing advice
- ▶ Ie, Separate advisers adopting CHINESE WALL

EXAMPLE OF BARRIER POLICY

- ▶ BARRIER POLICY (EACH COMPANY WILL ESTABLISH THEIR OWN BARRIER POLICY)
- ▶ INFORMATION BARRIER - ARRANGEMENTS TO MANAGE POTENTIAL CONFLICTS OF INTEREST
- ▶ 1. BACKGROUND TO INTRODUCTION
- ▶ INTRODUCTION BASIS TAILORED TO EACH CLIENT
- ▶ THE COMPANY IS IN DISCUSSIONS WITH (CLIENT) WHICH MAY LEAD TO AN INSTRUCTION TO (BUY/SELL/ADVISE...) (CLIENT NAME). POTENTIAL CONFLICTS OF INTEREST SITUATIONS MAY ARISE TO THE EXTENT THAT:
 - ▶ □ THE COMPANY ALSO REPRESENTS/MAY REPRESENT (...ANOTHER CLIENT/SAME PROPERTY)
 - ▶ □ THE COMPANY IS ALREADY REPRESENTING THIS CLIENT (BUYING/SELLING) AND IS NOW UNDERTAKING FURTHER SERVICES (PLANNING, VALUATION ...)
- ▶ (SPELL OUT THE CONFLICT)
- ▶ THE COMPANY'S CODE OF BUSINESS ETHICS, THE RICS CODE OF CONDUCT AND THE IPF PROTOCOL FOR MANAGING CONFLICTS OF INTEREST ALL INCLUDE REQUIREMENTS REGARDING CONFLICTS OF INTEREST AND CLIENT CONFIDENTIALITY.
- ▶ THE ARRANGEMENTS SET OUT BELOW COMPLY WITH THESE REQUIREMENTS AND ARE DESIGNED TO ENSURE THAT ...(CLIENT NAME) 'S..... INTERESTS ARE SUITABLY PROTECTED THROUGH THE PROPER CONTROL OF CONFIDENTIAL INFORMATION AND APPROPRIATE SEGREGATION OF DUTIES.
- ▶ 2. CLIENT CONFIDENTIALITY
- ▶ 2.1. PERSONNEL A, B AND C (NAMES OF TEAM MEMBERS) WILL MAKE UP THE (TEAM). THESE PEOPLE, AND NO OTHER COMPANY STAFF, WILL HAVE ACCESS TO CONFIDENTIAL INFORMATION AND THE INFORMATION WILL BE CONTROLLED AND PROTECTED AS DETAILED
- ▶ EACH MEMBER OF THE TEAM WILL RECEIVE A COPY OF THIS INFORMATION BARRIER AND WILL BE REQUIRED TO CONFIRM, IN WRITING, THEY HAVE READ, UNDERSTOOD AND WILL COMPLY WITH ITS REQUIREMENTS.
- ▶ A RECORD OF THE TEAM MEMBERS AND THEIR CONFIRMATIONS IN RESPECT OF THIS INFORMATION BARRIER IS ATTACHED.

- ▶ This is intended to be a full disclosure - so everyone is supposed to know everything - Caveat Emptor ??

EXAMPLE OF CONFLICT OF INTEREST LETTER

- ▶ Dear X
- ▶ I refer to <our telephone conversation/meeting> <last week> when I advised you that <describe conflict>.
- ▶ The purpose of this letter is to confirm the potential conflict of interest and seek your written confirmation that you are happy for us to proceed on the basis described above.
- ▶ A similar letter will be sent to <the other client> advising them of the above facts and seeking their agreement to act on the basis stated.
- ▶ As discussed/agreed, we propose to manage this conflict of interest by establishing an information barrier.
- ▶ The information barrier will protect your interests by ensuring that your instruction is handled in a strictly confidential manner.
- ▶ All the information relating to your instruction will remain confidential to the instruction team and will not be made available to, or be accessible by, other people within the firm.]
- ▶ Please will you confirm your agreement by signing and returning the attached copy of this letter.
- ▶ I look forward to hearing from you.
- ▶ Yours sincerely

DUAL AGENCY - IPF PROTOCOL

- ▶ DUAL AGENCY arises where an Agent, acting on behalf of the Vendor in the sale of an investment property then acts for another Principal to act on its behalf, in respect of the proposed acquisition of the same property.
- ▶ The default position is that an Agent retained to sell a property should avoid acting for another Principal on the buy-side.
- ▶ Before taking the sales instruction the Vendor Agent should declare any pre-existing, sole buying mandates that the Agent has that are likely to result in a Prospective Purchaser for the property. Ie that agent has a contractual 'retainer' to buy for a Principal
- ▶ Where the Agent is instructed to sell, it should only approach Prospective Purchasers in its capacity as retained selling Agent. Under no circumstances should it also seek to introduce the transaction in order to create a buy-side position. (BUT SEE ABOVE & BELOW)
- ▶ On receiving instructions from the Vendor, the Agent must clearly identify and record internally individuals across all service lines nominated to represent the Vendor on the sale (the Deal Team), in accordance with the Agent's Barrier Policy.
- ▶ BUT where there is a mandate the same firm can act for a purchaser but with a different team
- ▶ For transparency to the wider market where the retained selling Agent also has a retained buy-side instruction then the Vendor's Deal Team should ensure all other Prospective Purchasers and their Agents are made aware of this (and the terms of the Agent's Barrier Policy).
- ▶ Where an Agent is acting in this dual agency capacity, all bids should go directly to a Third Party, such as the Vendor, Vendor's Solicitors or a joint selling agent.

SHOULD THE IPF SELF-REGULATION PROTOCOL WORK ?

- ▶ NICK LESLAU (Prestbury Group) said
- ▶ “ A sell side agency also acting on the buy side may well produce a better result for a seller and so the introduction of a protocol identifying how this will work is an absolute requirement.
- ▶ I do think the idea that a selling agent may not use its position to procure a buyer for which it is going to act, even subject to a barrier agreement, is a little naïve.
- ▶ Agents are forever leaking forthcoming deals to one another and there is nothing wrong with that. That they are not going to leak it to their ‘own’ is unrealistic.
- ▶ This is a situation where self-regulation is absolutely appropriate because ultimately this area of possible conflict is entirely in the hands of the vendor.
- ▶ If we are selling a property and we don’t want the selected agent to act on the buy side for fear of conflict challenges then that’s how it will be. If the agent doesn’t like it then they are not going to get the instruction.
- ▶ If we believe an agent can achieve a better price for us by acting on both sides then, subject to comprehensive disclosure and strictly enforced process management protocols, I don’t have a problem with it.
- ▶ I believe if the selling arrangement is properly set up, enforced and monitored by vendors then there is no reason why these proposals won’t work.
- ▶ The vendor can always say ‘no’ and if these proposals are not strictly followed then vendors surely will.”

CURRENT POSITION ON DOUBLE-DIPPING & DUAL AGENCY

- ▶ 3 X ARTICLES IN LAST 6 MONTHS IN PROPERTY WEEK SUGGEST IT IS A `LIVE` ISSUE
- ▶ Triggered by UNIVERSITY OF LEEDS REPORT - AGENT ACTION - RICS INVESTIGATION
- ▶ UNIVERSITY OF LEEDS 160-page study - comprehensive examination of conflicts of interest in property raised serious doubts over the industry's ability to effectively self-regulate dual agency. "Clear risks" in reliance on "ad hoc" Chinese walls. Walls were "prone to being breached".
- ▶ "Very difficult" for clients to spot a "suboptimal" deal. "There's a difference between a skewed deal, which could be readily spotted, and a deal that's been subtly distorted," he said. "It's more about slightly altering the deal and we just don't believe that kind of subtle wrongdoing will be picked up
- ▶ The report said current RICS guidance was "inadequate" and contained "numerous flaws".
- ▶ AGENT ACTION - JLL, CBRE, Savills, Cushman & Wakefield and Knight Frank are developing an online course / training programme to combat the practice of 'double dipping,' including a test for investment agents which will outline best practice when working on investment deals.
- ▶ RICS also launched a wider consultation on conflicts of interest in autumn 2015 - DUE TO REPORT IN 2017 .
- ▶ RICS want higher standards. Smaller firms believe the practice `carves them out` of transactions. Non-qualified brokers have no need to follow IPF Protocol or RICS Guidelines

IPMS (offices) INTERNATIONAL PROPERTY MEASURING STANDARDS

- ▶ SECTOR BY SECTOR RICS ARE STARTING TO ADOPT INTERNATIONAL MEASURING STANDARDS
- ▶ TO BE USED ALONGSIDE EXISTING RICS Code Of Measuring Practice (COMP) 6TH EDITION
- ▶ IN THE UK WE ADOPT DIFFERENT BASES OF MEASUREMENT TO EUROPE & GLOBALLY.
- ▶ THE FLOOR AREAS USED IN SALES/LETTING DOCS AND VALUATIONS CAN VARY SUBSTANTIALLY COUNTRY BY COUNTRY (dependent on what areas are included or excluded).
- ▶ THERE IS JOINT CONSULTATION (RICS and other bodies) on a SECTOR BY SECTOR basis
- ▶ SINCE MAY 2015 THE 1ST ONE (OFFICES) IS NOW IN PLACE. OTHER SECTORS WILL FOLLOW
- ▶ RICS Property Measurement 1st Edition published 18 May 2015 updates RICS COMP 6th edition and incorporates International Property Measurement Standards (IPMS).
- ▶ FROM 1ST JANUARY 2016 all RICS professionals undertaking and commissioning property measurements will be required to follow the RICS Property Measurement Professional Statement.” It will enhance transparency and consistency in the way office property is measured throughout the world”
- ▶ 3 STANDARDS IPMS 1, 2 & 3.

IPMS (offices) 1, 2 & 3

- ▶ Previous RICS COMP used GIA & NIA for offices (GEA for planning & development)
- ▶ IPMS 1 compares closely to gross external area ("GEA") with some differences (balconies and accessible rooftop terraces are included in IPMS 1 but excluded for GEA). IPMS 1 is particularly used in a planning context.
- ▶ IPMS 2 compares closely but not exactly to gross internal area ("GIA"). In addition to the differences mentioned between IPMS 1 and GEA, areas occupied by the reveals of windows when measured and assessed as the internal dominant face are included in IPMS 2 but excluded for GIA. IPMS 2 is particularly used in a costings context.
- ▶ IPMS 3-Office compares to net internal area ("NIA"), but has the largest number of differences between the old and new measure. IPMS 3 is particularly used in the context of agency and valuation; taxation; and property and facilities management.
- ▶ IPMS 3 is used for measuring the internal area of a building in exclusive occupation, including internal walls and columns (previously excluded from net internal area) It also includes some measurements that must be stated separately (balconies, covered galleries, rooftop terraces).
- ▶ **All internal walls and columns within an occupant's exclusive area are included within IPMS 3 - Office. The floor area is taken to the internal dominant face and, where there is a common wall with an adjacent tenant, to the centre-line of the common wall.** NB The dominant face may be to a window, ie, measuring over a window ledge

IPMS 3 (offices) Cont`d

- ▶ Measurements should now be taken to what is known as the ‘internal dominant face’ (the area within each vertical section [wall] that makes up the perimeter of the building/unit). This can include inside the window recess (to include inside glazing), as long as the glazing is 50% or more of the floor to ceiling height.
- ▶ In a multi-let scenario, the area occupied by the dividing wall between two tenants’ accommodation is included within the floor area and apportioned equally between the two as a limited use area.
- ▶ Will the rentalised area increase with IPMS 3 ?
- ▶ Essentially no, the useable floor area calculations are representative of the former net internal area.
- ▶ From 1st January 2016 it is the IPMS basis of measurement which must be used.
- ▶ We await (with some trepidation) the outcome of ongoing consultations between RICS and other international bodies how the current 6th Edition COMP will be amended to follow international/global practice on retail, residential, etc.

Purple Book - RICS Real Estate Agency and Brokerage Guidance, 2nd edition 2014

- ▶ 12 core principles - **A MICRO DVD (A MM I CCC RO DVD)** acronym
- ▶ **A CT** Act in an honest, fair, transparent and professional manner
- ▶ **M ONEY** Client money separately accounted for and insured
- ▶ **M ARKETING** Marketing and advertising material to be honest and truthful
- ▶ **I NSURANCE** Professional Indemnity Insurance
- ▶ **C ONFLICTS** Avoid conflicts of interest - if you can't then deal with them openly & fairly
- ▶ **C LARITY** Ensure that clients are provided with terms of business/engagement that are fair and clear especially in relation to fees & with details of the firm's Complaints Handling Procedure
- ▶ **C OMMUNICATION** Fair, clear, timely and transparent communications
- ▶ **R EALISM** Give realistic assessments of selling prices / rents based on market evidence and professional judgement
- ▶ **O BLIGATIONS** Identify client and your obligations to them & other parties - money laundering
- ▶ **D ILIGENCE** Carry out work with skill care diligence - ensure all staff employed have the skills to carry out tasks
- ▶ **V IEWINGS** Carry out viewings in accordance with clients wishes
- ▶ **D ISCRIMINATION** Always act in a non-discriminatory manner

Section 106 TOWN & COUNTRY PLANNING ACT 1990

- ▶ **106 Planning obligations.**
- ▶ Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into a “planning obligation”
- ▶ (a) restricting the development or use of the land in any specified way;
- ▶ (b) requiring specified operations or activities to be carried out in, on, under or over the land;
- ▶ (c) requiring the land to be used in any specified way; or
- ▶ (d) requiring a sum or sums to be paid to the authority on a specified date(s).
- ▶ A planning obligation may—
 - ▶ - be unconditional or subject to conditions;
 - ▶ - impose any restriction or requirement either indefinitely or for such period or periods as may be specified; and
 - ▶ - if it requires a sum or sums to be paid, require the payments to be paid on specific dates or for a specified period or indefinitely.
- ▶ A restriction or requirement imposed under a planning obligation is enforceable by injunction. Authority can enter the land and carry out the operations and recover from the person against whom the obligation is enforceable any expenses reasonably incurred by them in doing so.

Section 278 Highways Act 1980

- ▶ an agreement between the Council and developer which describes
- ▶ proposed modifications to the existing highway network to facilitate or service a proposed development
- ▶ • typically the scope of any off site works that are required to mitigate the impact of the development on the existing road network
- ▶ • examples of works covered by this type of agreement could include:

roundabouts, signalised junctions, right turn lanes, safety related works such as - traffic calming, street lighting, improved facilities for pedestrians and cyclists.

- ▶ S.278 Agreement - states the relevant planning permission with a schedule detailing the works to be done and shown on appropriate plans

states the extent of the improvements and any land to be conveyed to the Local Highway Authority -

defines who will design and/or project manage the new works (Local Highway Authority or consultant Highway Engineer on behalf of the developer)

details the full costs of the works to be paid by the developer and also the Local Highway Authority's administrative, legal, design checks and inspection costs

details the commuted sums for the future maintenance of the improvement works

Community Infrastructure Levy (CIL)

The intentions to supercede S.106 Agreements

- ▶ Community Infrastructure Levy introduced in 2008 Planning Act - came into force in April 2010.
- ▶ Allows local authorities in England and Wales to raise funds from developers undertaking new building projects in their area to fund a wide range of infrastructure that is needed as a result of development - includes new or safer road schemes, flood defences, schools, hospitals, social care facilities, park improvements, green spaces and leisure centres. NOT mandatory adoption of CIL
- ▶ The Community Infrastructure Levy charging authorities in England will be district and metropolitan district councils, London borough councils, unitary authorities, national park authorities, The Broads Authority and the Mayor of London. These bodies all prepare development plans for their areas, which are informed by assessments of the infrastructure needs for which the levy may be collected.
- ▶ Government decided that this tariff-based approach provides the best framework to fund new infrastructure to unlock land for growth. The Community Infrastructure Levy is fairer, faster and more certain and transparent than the system of planning obligations which causes delay as a result of lengthy negotiations. Levy rates will be set in consultation with local communities and developers and will provide developers with much more certainty 'up front' about how much money they will be expected to contribute
- ▶ Under the system of planning obligations (S.106) only 6 per cent of all planning permissions brought any contribution to the cost of supporting infrastructure, when even small developments can create a need for new services. The levy creates a fairer system, with all but the smallest building projects making a contribution towards additional infrastructure that is needed as a result of their development.

CIL (Cont`d)

- ▶ Almost all development has some impact on the need for infrastructure, services and amenities - or benefits from it - so it is only fair that such development pays a share of the cost. It is also right that those who benefit financially when planning permission is given should share some of that gain with the community which granted it to help fund the infrastructure that is needed to make development acceptable and sustainable.
- ▶ Infrastructure is defined in The Planning Act 2008 Infrastructure can include transport, flood defences, schools, hospitals, and other health and social care facilities and the levy collected can be used to fund a very broad range of facilities such as play areas, parks and green spaces, cultural and sports facilities, district heating schemes and police stations and other community safety facilities. This gives local communities flexibility to choose what infrastructure they need to deliver their development plan.
- ▶ Charging authorities should assess the infrastructure needs and propose a levy rate which does not put at serious risk the overall development of their area.
- ▶ Intention is that the levy and planning obligations (s.106) do not overlap
- ▶ Where a charging authority sets out that it intends to fund an item of infrastructure via the levy then that authority cannot seek a planning obligation contribution towards the same item of infrastructure

CIL - an example of the setting of the levy

- ▶ Cambridge City's draft CIL announced in 2015 that developers of residential schemes within Cambridge City Council's administrative area will be subject to a community infrastructure levy (CIL) rate of £125 per square metre draft charging schedule (DCS). In addition to the proposed city-wide residential rate, which would also apply to student accommodation uses, the Council has set a draft rate of £75 to apply to retail developments. A nil rate levy would apply to all other types of development if the rates in the DCS are eventually adopted.
- ▶ Won't CIL and S106 overlap?
- ▶ No, the regulations restrict the use of local planning obligations on the adoption of CIL to ensure that individual developments are not charged for the same items twice.
- ▶ Where the authority has indicated that it intends to fund an item of infrastructure through CIL it cannot then also seek money through s106 for the same thing.
- ▶ The Reg 123 list will show the intended infrastructure projects or infrastructure types that the authority will be (or may be) wholly or partially funded through CIL. If this list isn't published, the default is any infrastructure which could be CIL funded so no planning obligations under S106 can then be sought for such infrastructure. The list of infrastructure will be updated and priorities for CIL spend will change over time and the Council just need to update the published list on the website. The process of updating the list is not linked to any review of the Charging Schedule.

CIL & S.106 The real differences

- ▶ The CIL payments of the levy are paid up front
- ▶ The rate of levy is non-negotiable
- ▶ With CIL in place S.106 is still in place subject to maximum of 5 S.106 charges
- ▶ CIL is not discretionary. Once a levy has been set it must be charged
- ▶ CIL is 'broadbrush' - it can even cover contaminated land
- ▶ In addition to development CIL can capture refurbishments and changes of use
- ▶ In London there is a separate, additional levy - The Mayors CIL

- ▶ The real question is whether the introduction of CIL as a legislative change intended to promote development is actually deterring development ?