

Commercial Property

Asbestos: issues to consider when purchasing commercial property



Management of asbestos is a highly regulated area and this note summarises points for consideration by a buyer in advance of exchange of contracts regarding the potential presence of asbestos in a commercial property that was constructed or re-furnished before 2000; after which the use of all types of asbestos in construction, was banned.

The current principal piece of legislation is the Control of Asbestos Regulations 2012 (CAR 2012) which is reinforced through a number of Approved Codes of Practice and other guidance, in particular HSG-264 Asbestos: The Survey Guide which focuses on minimising risks associated with asbestos surveying work. This guidance, published by the Health and Safety Executive is aimed at both surveyors and those who commission surveys.



Source: Fotolia

Pre-contract enquiries

Although there is no common law obligation to reply to pre-contract enquiries (buyer beware) it is common practice for a seller's solicitor to respond to them so that a sale transaction can proceed. The maxim of buyer beware is, however, modified by the legal principle that a seller must disclose 'latent defects' in title; whether or not raised in enquiries. These latent defects include: easements over the property benefitting neighbouring land and which are not obvious on inspection; and the

fact that the physical boundaries do not correspond with the title boundaries. The disclosure obligation does not apply where the buyer is aware of the latent defect. The presence of asbestos is not a latent defect in title and so raising pre-contract enquiries and procuring surveys are key actions for a buyer.

For commercial property transactions, the 'industry standard' is the British Property Federation's suite of Commercial Property Standard Enquiries known as CPSEs. In the context of the potential presence of asbestos, the enquiries from CPSE 1 are as follows:

1. "Has asbestos been used in the present structures forming part of the Property or of any premises of which the Property forms part, including Conduits, fixtures, plant and equipment?"
2. "Please supply a copy of the most recent survey or assessment carried out in relation to the Property (whether by the Seller or by any other person) for the purposes of complying with regulation 4 of the Control of Asbestos Regulations 2012 (or any previous Control of Asbestos Regulations), or advise us when and where it can be inspected."
3. "Please supply a copy of the written plan and any other records prepared for managing asbestos in the Property or in any premises of which the Property forms part, or advise us when and where they can be inspected."
4. "Has any substance (other than asbestos) known or suspected to be unsuitable for its purpose, unstable or hazardous, been used in the present structures forming part of the Property, including Conduits, fixtures, plant and equipment?"
5. "Has any asbestos, or any other substance known or suspected to be unsuitable for its purpose, unstable or hazardous, been removed from the Property in the past?"

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Depending upon the replies given, a buyer's solicitor may consider it appropriate to raise further enquiries before finalising its report on title. In cases where the seller has made an inaccurate statement of fact that is relied on by the buyer when deciding to enter into the contract and the buyer subsequently suffers a loss; then the buyer may be able to bring a claim for misrepresentation. However, replies to enquiries may be heavily qualified (such as that no warranty is given as to the condition of the property and that the purchaser must rely upon its own searches and enquiries) and the contract contains provisions that no representations are given as to the condition of the property and that the buyer has been given a sufficient opportunity to inspect the property.

Does the seller have a "duty to manage" asbestos?

There is no express statutory obligation on a seller to remove all asbestos from a property prior to a sale. However, where asbestos is present, the seller, or where applicable, a tenant, will be under a duty to manage asbestos (and so be classified as a 'duty-holder'); the identity of the duty-holder should be established at pre-contract enquiry stage. Where the sale is with vacant possession and there are no subsisting leases, then (unless there is evidence to the contrary) the seller will have sole responsibility for the property and be the duty-holder.

What are the obligations of a duty-holder under CAR 2012?

1. To take reasonable steps to find out whether there are materials containing asbestos in the property, and if so, the amount, where it is and what condition it is in. This could take the form of a desk-top risk assessment study with a follow up survey.
2. It must presume that materials contain asbestos unless there is strong evidence that they do not.
3. To 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.
4. Assess the risk of anyone being exposed to fibres that are released from the materials identified.
5. Prepare a written asbestos management plan that sets out in detail how the risks from these materials will be managed.
6. To take the necessary steps to put that plan into action and this might include safe removal of asbestos.

7. Periodically review and monitor that plan and the arrangements to act on it so that the plan remains relevant and up-to-date.
8. Provide information on the location and condition of the materials to anyone who is liable to work on or disturb them; such information should also be made available to the emergency services.
9. Ensure that those liable to work on or disturb asbestos-containing materials have had sufficient training to enable them to identify and manage the risk of any asbestos encountered, even if its presence is unanticipated.



Source: Fotolia

What should a buyer do where a seller has not carried out or will not carry out an asbestos survey prior to exchange of contract?

In these circumstances, a buyer may wish to include a pre-condition into the sale contract providing that completion is conditional upon the carrying out of such a survey by a surveyor that it has engaged. This may be more practical where the sale is with vacant possession, given that tenants may also be duty-holders (or have a duty to co-operate with a landlord duty-holder) and lease obligations would need to be carefully checked. A seller is understandably likely to impose restrictions upon site access and may prefer a jointly commissioned survey with the provision of warranties to both parties. A buyer may wish to go further and provide that there can be a price reduction depending upon the result of the survey. Alternatively, the buyer may decide to carry out the survey post-completion but deduct the cost from the purchase price. These will be matters for negotiation.

Contracting out of the duty to manage asbestos?

1. The importance of having an asbestos survey is highlighted by the obligation under CAR 2012 on employers to protect their

employees from exposure to asbestos where demolition, maintenance or other works are being undertaken at a property. The definition of an "employee" extends to third party contractors, tenants or visitors who may be affected by the work activity carried out by the employer. CAR 2012 prevents an employer undertaking any work that might expose employees to asbestos, without carrying out a suitable risk assessment as to the presence and condition of asbestos at the property.

2. As outlined at (3) above, the duty-holder has a number of specific responsibilities to manage the risks posed by asbestos, and where a buyer appoints agents to carry out its property maintenance function, it is usually on the assumption that it can delegate its asbestos management duties. However, any transfer of responsibility must be clearly specified with the delegation only to those who are considered suitably competent following sufficient investigation into their qualifications and relevant experience. Regular monitoring and review of agents must be undertaken. Furthermore, the Management of Health & Safety at Work Regulations 1999 specifically state that appointing a competent person to advise on health and safety does not entirely remove the accountability of the company, or its directors and senior managers for the health and safety of its employees and others. The courts have consistently found that an employer's undertaking should be defined very widely so as to cover all activities necessary for carrying on the employer's business, whether carried out by its own employees or independent contractors. As a result, it is almost impossible to contract out of health and safety responsibilities, even by engaging highly specialist consultants or contractors.

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