

IT'S THE LAW:

The What, When & Why of Property Transactions

What's it all about?

In this edition of IT'S THE LAW, we review some of the fundamental issues that crop up on property transactions where land is being acquired for development. We hope to explain what, and why, we solicitors do what we do and what it is we need from you, the client, in order to make the transaction run smoothly.

The basic steps of almost all transactions are:

The deal: You do a 'deal'. You agree what land you're going to buy and how much you're going to pay for it. Clearly there are often other terms and conditions - some of which you will agree at the outset and some of which we bash out with the lawyers acting for the Seller in the course of finalising the contract.

Due diligence: Once you've agreed the basic terms, there are various checks we need to do to make sure that the Seller does own what they say they do and to make sure that you can deliver your development. At this stage there are also checks, for the same reason, that you and your technical/construction team will need to undertake.

The contract: Shaking hands on a property deal doesn't make it binding. We agree a contract with the Seller's solicitor and it is not until that is signed and dated that the 'deal' is binding.

Completion: Usually there is a gap between exchange of contracts and actually completing the purchase (which is when the Seller executes the transfer and you pay the money).

Off with their heads

There's no magic (and very little law) to Heads of Terms. It's just a list of the main points of principle of the 'deal'.

They usually have no legal force whatsoever - but they are useful because they concentrate minds and avoid misunderstandings as to what was actually agreed.

We'd suggest that, as a minimum, you cover the following:

- **Name of Seller** (and contact details);
- **Name of Buyer** (and contact details);
- **Name of solicitors** (and contact details) - for both Buyer and Seller;
- **Address/details of Property;** if it's not obvious from the address, attach a plan clearly showing the extent of the Property;
- **Price;** will VAT be payable on top of price? It is always sensible to ask at the outset whether the Seller has already "opted to tax" (or intends to). If they do, VAT may be payable. If it transpires that this is an issue you may want to speak to us at this stage - to agree what should be done about that;
- **Deposit;** On exchange of contracts you would usually expect to pay a deposit. Historically this has been set at 10% of the purchase price. But there is no legal requirement for it to be set at that level. 5% is common these days. It's not unheard of to have nil deposit.
- **Conditions;** You may want to exchange contracts as soon as possible to secure the Property - but still have issues after that to resolve before you want to commit fully to the transaction. We do that by making the contract conditional on those issues being satisfactorily resolved;
 - This is different from saying that the 'deal' is conditional on these issues and that you won't exchange contracts until they are dealt with.
 - Both types of conditions can (and should) be listed in the Heads of Terms - but it is important to distinguish between the two.



Neil Toner
Partner, Head of Real Estate
020 7065 1823
neil.toner@devonshires.co.uk



Charlotte Sawyer
Solicitor, Real Estate & Projects
020 7880 4377
charlotte.sawyer@devonshires.co.uk



Tommy Evans
Paralegal, Real Estate & Projects
020 7880 4397
tommy.evans@devonshires.co.uk

- The most common are the grant of satisfactory planning or the conclusion of a satisfactory soil survey. These conditions actually get listed in the contract;
- **Timing:** It is helpful to give an indication of what timing people are working towards. It is usually best to agree:
 - How quickly will the Seller get their solicitor to send us a full package of papers;
 - How quickly after we receive papers will exchange take place; and
 - How quickly after that will we complete.
- If you just agree that exchange will take place six weeks after the Heads of Terms are agreed, then there is little incentive for the Seller to get the paperwork across to us and we need that in order to start the due diligence process.
- **Anything else?** If there is anything unusual then add this in too.

Once you've agreed the Heads of Terms with the Seller, get both parties to sign and let us have a copy. If you want any help in preparing heads or if you just want to chat through what you plan to include, get in touch with us. The earlier the better.

I love it when a plan comes together

In order to get our searches underway we'll need a plan from you that identifies the boundaries of the Property you think you are acquiring. We need this right at the start. If the plan is incorrect or not clear then we may end up searching the wrong Property. All going well, that will be spotted before exchange - but it may lead to delay and expense whilst we carry out new searches.

It is also helpful for us to have a plan showing what your finished development will look like.

How does the Queen get involved?

Most land you are likely to be involved with will be registered at Her Majesty's Land Registry. This means we can look at the Registered Title which will show us:

- Who owns the land.
- Whether their title is "Absolute". If it is, the Land Registry is guaranteeing who owns it. There are lesser grades of title such as 'possessory' which carry with them more risk.
- Whether the title is freehold or leasehold.
- What the boundaries of the title are. We will check this against the plan you send us at the outset - but you will also need to check it to ensure there is enough land to deliver your proposed development.

In addition, the Registered Title includes the Charges Register. This sets out all registered adverse interests. There may be other, unregistered, adverse matters (see below) - but the Charges Register often reveals a number of the most important ones.

For example:

Restrictive Covenants: Restrictive covenants are obligations not to use the Property in certain ways. They bind the land, whoever owns it, and so will bind a new owner. A common example is "not to use the property other than as a single private dwelling house". There are various arguments as to whether an RP home amounts to a private dwelling house. In any event, however, your schemes would usually not be for a single unit - and, therefore, there will be a clear breach.

There is a common misapprehension that if a covenant is old (e.g. more than a 100 years old) then it will not be enforceable. That is not correct. Whilst it is true to say that if a breach has existed for a long time enforcement is less likely, a fresh breach of an old restrictive covenant is still fully enforceable.

Easements: The most common form of an easement is a right of way. Rights to use service media crossing the property can also be easements. The route of easements can only be altered with the consent of those with their benefit. Clearly, it's important to ascertain whether there are any easements which will interfere with your proposed development - for example a right of way crossing a part of the Property on which you want to build.

Look before you leap

There are a number of reasons why it is imperative that you and/or your Employer's Agent inspect the site at an early stage:

Adverse matters: Whilst helpful, HM Land Registry doesn't keep a comprehensive list of all adverse matters. Here are two examples of things that don't show up at HM Land Registry:

- Leases of 7 years or less: these will bind any buyer of the freehold even if they did not know about them. The new owner will 'slot in' as the landlord. You need to look round the site and if there is anybody there (other than the Seller) - you need to tell us.
- Rights of Way acquired by prescription: if someone has been walking over the Property to get to their back garden for 20 years - it is likely that they will have acquired the right to do so. That right will bind the new owner of the Property. You need to look to see whether there are any signs of this.

Boundaries: We will send you a copy of the Land Registry plan. You need to check whether 'on the ground' the boundaries shown on the plan accurately reflect what is shown by red edging on the Land Registry plan. If there are any discrepancies (either too much land or too little) you need to let us know.

Surveys & other due diligence

It would be very rare for a contract to include any warranty (or promise) from the Seller that the land and buildings are free from contamination, in good repair and suitable for your development.

You need to satisfy yourself on these points and, unless the contract is conditional on these issues being resolved to your satisfaction, you need to satisfy yourself on these points before we exchange contracts.

The environmental condition of any Property being acquired is important. Acquiring a site with an environmental issue can:-

- Make the new owner liable to adjoining owners if contamination migrates off the site;
- Result in the local authority (or Environment Agency) forcing the new owner to carry out clean-up work;
- Increase development costs (since the planners may require clean up works as part of any development).

As a matter of course we would usually commission a desk top environmental report - but these are of limited benefit, since they don't involve anyone actually inspecting the site. In normal circumstances we would therefore expect you to undertake a soil survey.

Rights to light may be an issue. Regardless of what the Land Registry title says, it may be that buildings on adjoining property have acquired rights to light - i.e. a right not to have the amount of light passing to their windows reduced below a certain amount. These rights usually arise simply by a window being in existence for more than 20 years (there are technical arguments as to precisely how long this period is - so, if this is an issue, you should always check with us). It is important that you look to see whether this might be an issue and, if necessary, obtain a Rights to Light survey.





Keeping it local

Each Local Authority has a statutory duty to keep a register of each property in their area and to log on that register certain details including:

Certain financial charges: Local Authorities have the power to impose certain financial charges on a property (for example, if they have incurred expenditure in making a dangerous structure safe). Those charges attach to the land and therefore a new owner will be liable for them even though they were incurred at a time when they didn't own the property.

Tree Preservation Orders: Trees covered by TPOs are protected and can only be felled or even just pruned with certain Local Authority consents in place. Destroying a tree covered by a TPO is a criminal offence. Magistrates can fine someone up to £20,000. In particularly serious cases the matter can be referred to the Crown Court and there is no limit to the fine that they can impose.

Conservation Area status: No demolition can take place in a conservation area without a specific Local Authority consent.

An official Local Authority search reveals all these details. In addition to results from the statutory registers referred to above, a Local Authority search will reveal other matters of interest including:

- Whether the road is an adopted highway. In practice this is often insufficient. Knowing that Acacia Avenue is an adopted highway does not tell you whether the title you are acquiring at No.2 Acacia Avenue extends to the adopted extent of the road. It is possible for small strips of land to exist between the land being acquired and the adopted extent of the highway. These are often referred to as ransom strips - since, if the person who owns it does not cooperate, they can make the property unusable - and therefore hold it to ransom. We will often, therefore, forward a specific plan identifying the title to the highways department at the Local Authority and ask them to confirm the precise extent of the adopted highway.
- Whether any planning enforcement or stop notices have been served.

- What planning applications have been made, granted and refused. Note that the search does not reveal any planning history for any adjoining or neighbouring properties. There are additional searches we can now do to ascertain that - but we would not do that unless specifically requested.
- Proposed compulsory purchase orders.

When you do a search with a local authority- the information could change the following day. So, for example, a financial charge could be put on the property by the Local Authority and we wouldn't know about it.

As a rule of thumb, people tend to rely on a local search for 3 months and, if the transaction hasn't exchanged by then, get another search done to check that nothing has changed. There is nothing 'magic' about 3 months - it's just a convention that has been adopted down the years.

Secret service

Services running under a site can be troublesome. Not discovering that electricity cables lie under a site until part way through development can be dangerous, cause a delay in the construction programme and result in additional expense (in terms of paying for them to be moved).

The existence of a public sewer under a site can mean that development is not allowed without a "Build Over Agreement" with the relevant sewerage company.

These agreements are usually extremely draconian and often allow the company to demolish any building on the site if required to gain access to the sewer in the future. Not only does the company not have to re-build or compensate the landowner for the demolition, the company is often allowed to charge the landowner the costs of demolition!

We therefore contact the principal utility service providers requesting confirmation of their services. They provide plans showing the route of their services in the area. In practice, whilst we will look at these plans, as they are technical in nature, you would need to rely on your technical consultants (usually your Employer's Agent) for a full opinion.



Who said property lawyers were stuck in the past?

Under medieval cannon law, the rector of a parish church was responsible for the repair of the church chancel (the alter end of the church). That liability attached to the land of the rector - and can bind the current owners of that land. It was not uncommon for rectors to own land throughout the parish - so this liability may well attach to land which is not close to any church.

As from 13 October 2013, chancel repair liability is no longer capable of taking affect as an “overriding interest” so, very broadly, it needs to be registered at the Land Registry to bind once someone has purchased the land for valuable consideration. But this does not mean that the risk of chancel repair liability itself has been extinguished. Purchasers of land, where there hasn't been a previous sale for valuable consideration since 13 October 2013, will be bound by chancel liability if it is registered at the Land Registry before they are registered as owner. Registration of the chancel repair liability could occur after they have exchanged contracts and even in the period between completion of the transaction and registration at the Land Registry.

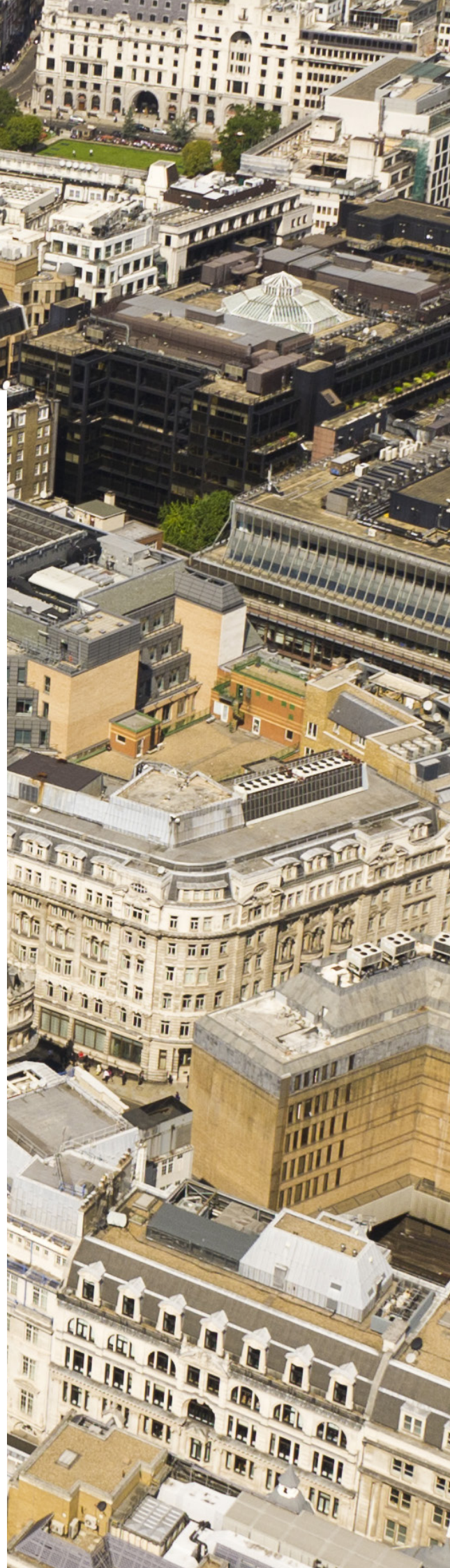
The only way to get a definitive answer as to liability in these circumstances is to carry out a personal search at the National Archives at Kew. In practice, most people do a Chancel Check search (£10-£15). That shows whether the property is within a relevant parish. If it is, insurance against liability can usually be obtained at a cost ranging from £60 - £1,200.

Due to the changes brought in on 13 October 2013, if there has been a transfer for value since this date and that has been registered at the Land Registry (and there are no entries on the Title relating to chancel repair liability), the Property will be free from further risk and so there will be no need to carry out a search.

A little less common

There are a whole range of additional searches that we might do depending on the circumstances. These include:

- Coal mining;
- River/stream/canal bank responsibility;
- Franchises and manors;
- Mining;
- China clay;
- Cheshires brine.



Question time

There are a number of practical issues on which it would be helpful to get information from the Seller. For example:

Disputes: If there is an ongoing dispute with the neighbours about something, you probably want to know about it in advance - rather than being embroiled in it once you have acquired the Property.

Boundaries: Who owns and maintains boundaries is often very much a 'grey area'. Definitive details are rarely revealed from the searches above. It is therefore helpful to know how neighbours have treated their boundaries in the past.

Party Walls: Historic party wall information will often not be revealed by the searches above.

To try and elicit information on these issues, we raise pre-contract enquiries of the Seller. This is simply a series of questions. There is no legal requirement for the Seller to answer these - but, if they do, their answers must be accurate - or you may have an action for misrepresentation.

Historically, each firm (and sometimes each solicitor within a firm) had a different set of standard pre-contract enquires they had cobbled together over time. Increasingly, firms are adopting the "Commercial Property Standard Enquires" supported by the British Property Federation.

The paperwork

At the same time as conducting the various due diligence searches above, we agree the form of contract. This is no more and no less than setting out, in writing, what the 'deal' is - i.e. what you pay, when you pay it and what you get in return.

Generally, at any time before the contract is agreed, signed and dated by both parties - either side can change their mind and walk away or seek to renegotiate any or every part of the 'deal'. Once contracts are exchanged, both parties are legally bound into the 'deal' and the 'deal' is then fixed.

That 'deal' might permit the price to go up or down and might include provisions that say someone can walk away if planning isn't granted - but all of that is determined by what the written contract says - if a term is not in the written contract then it generally doesn't bind anyone.

The transfer is simply the document which transfers title to the property. Until that is executed and dated at completion, the property still belongs to the Seller.

A temporary tax

Stamp Duty was first introduced in 1694 as a temporary measure to help fund a war against France. We're now, mostly, on much better terms with the French. But the tax, in the form of Stamp Duty Land Tax, lives on. So, following completion on a land transaction, SDLT formalities will need to be dealt with.

There will sometimes be no money to pay, because we can successfully claim a relief. We will need to discuss that with you as the transaction progresses.

We will usually have a go at filling in the SDLT form for you but (a) you will need to check it and authorise us to submit it on your behalf and (b) you are responsible for ensuring that it is correct. We do not advise on tax - so you may need to get specialist tax input.

Letting the Queen know

Technically, even after completion, the Buyer doesn't immediately own the land. It is not until the transaction is registered at the HM Land Registry that the Buyer becomes the full legal owner of the Property.

Its good to talk

We hope this edition of 'IT'S THE LAW' has given you a brief overview of the main elements of a property purchase transaction. If you want any more detail or just to chat through a project you are considering, give us a call.

The tiny print

This is one of a series of leaflets published by Devonshires' Real Estate & Projects Department aimed at our developer clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

Find out more

Neil Toner
Partner, Head of Real Estate
020 7065 1823
neil.toner@devonshires.co.uk



Real Estate & Projects Team:

Contact details



Neil Toner, Partner

e: neil.toner@devonshires.co.uk
t: 020 7065 1823



Jonathan Corris, Partner

e: jonathan.corris@devonshires.co.uk
t: 020 7880 4305



Caroline Mostowfi, Partner

e: caroline.mostowfi@devonshires.co.uk
t: 020 7065 1855



Elad Yasdi, Partner

e: elad.yasdi@devonshires.co.uk
t: 020 7880 4314



Kris Kelliher, Partner

e: kris.kelliher@devonshires.co.uk
t: 020 7880 4372



Hannah Langford, Partner

e: hannah.langford@devonshires.co.uk
t: 020 7880 4450



Alasdair Muir, Solicitor

e: alasdair.muir@devonshires.co.uk
t: 020 7880 4439



Charlotte Sawyer, Solicitor

e: charlotte.sawyer@devonshires.co.uk
t: 020 7880 4364



Nat Cartwright, Solicitor

e: nat.cartwright@devonshires.co.uk
t: 020 7880 4429



Paul Buckland, Partner

e: paul.buckland@devonshires.co.uk
t: 020 7880 4346



Triya Maicha, Partner

e: triya.maicha@devonshires.co.uk
t: 020 7065 1805



Dan Moan, Partner

e: dan.moan@devonshires.co.uk
t: 020 7880 4336



Robert Turner, Partner

e: robert.turner@devonshires.co.uk
t: 020 7880 4238



Aruna Sarwar, Partner

e: aruna.sarwar@devonshires.co.uk
t: 020 7065 1846



Carol Chan, Solicitor

e: carol.chan@devonshires.co.uk
t: 020 7880 4393



James Santos-Murphy, Solicitor

e: james.murphy@devonshires.co.uk
t: 020 7880 4276



Dominic Bauers, Solicitor

e: dominic.bauers@devonshires.co.uk
t: 020 7880 4295



Philip Evans, Solicitor

e: philip.evans@devonshires.co.uk
t: 020 7065 1807



Lucy Woollard, Solicitor

e: lucy.woollard@devonshires.co.uk
t: 020 7880 4410



Nick Hemus, Solicitor

e: nick.hemus@devonshires.co.uk
t: 020 7065 1867



Peter Antoni, Solicitor

e: peter.antoni@devonshires.co.uk
t: 020 7880 4416



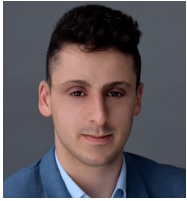
Jamie Leonard, Solicitor

e: jamie.leonard@devonshires.co.uk
t: 020 7880 4246



Elen Storey, Solicitor

e: elen.storey@devonshires.co.uk
t: 020 7880 4389



Harry Petrou, Solicitor

e: harry.petrou@devonshires.co.uk
t: 020 7880 4426



James Gostling, Trainee Legal Executive

e: james.gostling@devonshires.co.uk
t: 020 7880 4441



Abena Ampofo, Paralegal

e: abena.ampofo@devonshires.co.uk
t: 020 7880 4210



Rosemond Sarpong, Paralegal

e: rosemond.sarpong@devonshires.co.uk
t: 020 7880 4330



Nathaniel Bleasdille, Paralegal

e: nathaniel.bleasdille@devonshires.co.uk
t: 020 7880 4419



Alexandra Benion, Solicitor

e: alexandra.benion@devonshires.co.uk
t: 020 7880 4342



Tania Afrin, Solicitor

e: tania.afrin@devonshires.co.uk
t: 020 7880 4266



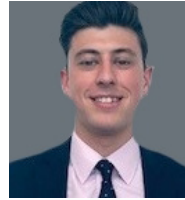
David Bullock, Solicitor

e: david.bullock@devonshires.co.uk
t: 020 7065 1852



Grant Duranti, Solicitor

e: grant.duranti@devonshires.co.uk
t: 020 7880 4355



Oliver Grech, Solicitor

e: oliver.grech@devonshires.co.uk
t: 020 7880 4449



Rachel Keenan, Chartered Legal Executive Lawyer

e: rachel.keenan@devonshires.co.uk
t: 020 7880 4420



Charles Edwards, Paralegal

e: charles.edwards@devonshires.co.uk
t: 020 7880 4425



Jessica Moor, Paralegal

e: jessica.moor@devonshires.co.uk
t: 020 7065 1835



Sundas Malik, Paralegal

e: sundas.malik@devonshires.co.uk
t: 020 7880 4371



Summer Gibb, Paralegal

e: summer.gibb@devonshires.co.uk
t: 020 7880 4347



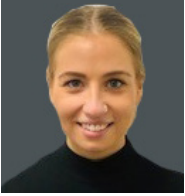
Tommy Evans, Paralegal

e: tommy.evans@devonshires.co.uk
t: 020 7880 4397



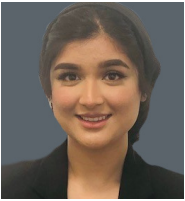
Natalie Anderson, Paralegal

e: natalie.anderson@devonshires.co.uk
t: 020 7880 4312



Elle Wooding, Paralegal

e: elle.wooding@devonshires.co.uk
t: 020 7880 4275



Thohura Kabir, Paralegal

e: thohura.kabir@devonshires.co.uk
t: 020 7065 1816



Rebecca Goodwin, Trainee Solicitor

e: rebecca.goodwin@devonshires.co.uk
t: 020 7880 4405



Bryony Hewer, Trainee Solicitor

e: bryony.hewer@devonshires.co.uk
t: 020 7065 1865



Hannah Keane, Trainee Solicitor

e: hannah.keane@devonshires.co.uk
t: 020 7880 4309



Llewellyn Pekins, Trainee Solicitor

e: llewellyn.perkins@devonshires.co.uk
t: 020 7065 1848