and every part of the premises (s 3(1)(a)) and passes those covenants on assignment of the whole or any part (s 3(1)(b)). Moreover, on assignment of part, s 5(3) releases the tenant from covenants only to the extent that they fall to be complied with in relation to that part; s 9 and s 10 deal with apportionment of rent and covenants. Thus, unsurprisingly, LT(C)A 1995 appears entirely consistent with LJ Lewinson's analysis that on assignment of part of the property, the landlord and tenant relationship between landlord and assignee is in relation to that part only. LJ Lewinson's conclusion in *Smith v Jafton* would surely have applied just as well if the original lease had been granted considerably more recently that 1926.

Unusual facts make interesting law

This unusual set of facts has resulted in an interesting case and a survey of some of the fundamental principles of landlord and tenant law. Both LJ Lewinson and LJ Aikens, echoing counsel, doubted that the parliamentary draftsman could have had such facts in mind in drafting LRHUD 1993. However, as they observed, much law is made from factual scenarios which few would predict, especially when it comes to statutory interpretation. It could also be said that such a lack of predictability is the basis of the common law when a decision which sets out a principle is revisited in the light of an unusual set of facts. Unusual facts can also be the source of statute law itself. As LJ Lewinson noted at para 17 of *Smith v Jafton*, the original source of the right of the assignee of a reversion to sue a tenant, now to be found in the Law of Property Act 1925, s 140 and in LT(C)A 1995, s 3 and s 4, was the Grantees of Reversions Act 1540, which was a result of Henry VIII's dissolution of the monasteries.

Cecily Crampin
Barrister, Tanfield Chambers

Lies, damned lies and selling property

Replies to enquiries are a familiar part of the conveyancing process for both residential and commercial property sales. Answering the questions accurately is important and especially so in what is a difficult property market. Imprecise answers can have severe consequences for sellers. ***Ed Cracknell*** *looks at the law of misrepresentation.*

The problem

The basic principle that underpins the sale of real property is *caveat emptor*, or "buyer beware". That is, the buyer takes the property as he finds it and the seller is under no duty to disclose defects. A well-advised buyer will therefore want to find out as much as possible about the property to ensure he is getting what he is paying for.

A lot of the facts that the buyer will want to know are researchable. Physical inspections, structural surveys and enquiries of the local authority will reveal a great deal about the property. However, there are usually a number of important matters that are only known by the seller, such as whether notices have been served in relation to the property or whether disputes with neighbours have arisen.

CPSEs and SPIFs

The property industry sought to better manage the exchange of pre-contractual information by standardising the conveyancing process. In relation to commercial property, the standard commercial property conditions (SCPCs) are widely used, although often subject to modification. These are based upon the standard terms for residential property known as the standard conditions of sale (SCS).

It is also common practice for the buyer to ask the seller a standard series of questions such as the commercial property standard enquiries (CPSEs), for commercial property, and the seller's property information form (SPIF) and seller's leasehold information form (SLIF) for residential property.

The seller is under no obligation to answer the enquiries, but if he does not, that will no doubt raise suspicions in the buyer's mind and he may choose not to proceed with the transaction or to negotiate a better price.

If the seller does provide answers to the enquiries, it is possible that the buyer will rely upon them in entering into the contract. This is where the law of misrepresentation becomes an issue, and the reason why sellers must take great care in making representations about the property during pre-contractual discussions.

Misrepresentation

If the seller makes a false statement of fact relating to the property and that statement is relied upon by the buyer, and causes him loss, the seller can be said to have made a misrepresentation.

A misrepresentation can be fraudulent (where it is made knowingly, or without belief in its truth, or recklessly as to its truth – see per Lord Herschell in *Derry v Peek* [1889] 14 App Cas 337, at 374); negligent (where a statement is made carelessly or without reasonable grounds for believing its truth); or innocent (where the seller had reasonable grounds for believing his statement was true).

Where fraud or negligence is proved, the buyer may seek rescission (treat the contract as not existing) or damages, or both. The measure of damages is that which will put the buyer into the position he was in before the misrepresentation took place. Unlike most damages claims, the recoverable losses are not restricted to those that are reasonably foreseeable. In this way, losses caused by a general fall in the market are recoverable. If the buyer can prove negligence, but not fraud, the court has a discretion to award damages in lieu of rescission (Misrepresentation Act 1967, s 2(2)).

In the case of an innocent misrepresentation, the buyer may only seek rescission although the court can award damages in lieu of rescission – ie, the buyer cannot be awarded both rescission and damages.

There are not many reported cases on property-based misrepresentation but a notable case is that of *McMeekin v Long* [2003] 29 EG 120. The seller had stated that he was no longer in dispute with a neighbour, alleging that relations were friendly. The judge held that, in reality, the dispute was continuing and

the seller was found liable for fraudulent misrepresentation. The judge commented that the SPIF "is not a lawyer's form, but one that is designed for everyone to be able to understand". It is reported that damages and costs of £67,500 were awarded to the buyer.

In *Clinicare Ltd (formerly known as Strasbourgeoise UK Private Health Insurance Services Ltd) v Orchard Homes & Developments Ltd* [2004] EWHC 1694 (QB); [2004] PLSCS 176, a case involving a transfer of commercial property, the seller had made a fraudulent misrepresentation in knowingly failing to disclose dry rot in response to a specific enquiry in the CPSEs. In this case, it was not a defence that the buyer had obtained a report into the problem.

Contracting out

It is common practice to limit the seller's liability for misrepresentations in the terms of the contract. Indeed the SCS provide that the buyer may only rescind the contract in the case of a fraudulent or reckless misrepresentation or where the buyer "would be obliged, to his prejudice, to accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect". The SCPCs contain a similar provision.

However, sellers often seek to go further than this, for example by including a non-reliance statement in the contract to the effect that the buyer has not entered into the contract in reliance upon any statement made by the seller. If this term appears in the contract, an estoppel arises and any misrepresentation claim by the buyer is likely to fail. A buyer may sensibly seek to restrict the ambit of the non-reliance statement to representations other than those made in the standard property information forms.

There are often arguments about whether clauses restricting the buyer's remedies are enforceable. They may be subject to challenge, for example, under the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contracts Regulations 1999 and each case will be decided on its own facts. In *Schyde Investments Ltd v Cleaver* [2011] EWCA Civ 929, for example, the standard provision referred to above that restricts rescission to particular circumstances was held to be an unfair term, despite it having been endorsed by the Law Society. The court stressed, however, that the clause would not necessarily be unfair in all cases.

Protective answers

Sellers may be able to limit their liability by answering pre-contract enquiries by using phrases such as "not as far as the seller is aware, but the buyer must make their own enquiries". To ensure that such phrases do not give rise to an implication that the buyer has made reasonable enquiries, the seller should only use this type of response where a provision in the contract recites that no such enquiries have been made (see *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 and *Morgan v Pooley* [2010] EWHC 2447).

Despite the availability of protective contractual provisions, the best way to avoid a claim is to give full, accurate answers to pre-contract enquiries. The property information forms are set out in laymen's terms. Unless specifically stated in the question, there is no limit to the type of matters that may be contemplated by the question. For example, in relation to disputes, potentially any type of disputes or complaints could be caught, no matter when they occurred as long as they relate to the property or a property nearby. If in doubt, more, rather than less, information should be given.

Representations made outside of the conveyancing process may also be relied upon. This includes statements made by the seller and statements made by the seller's agent, whether in estate agents' particulars or otherwise.

Buyers should ensure that they supplement the standard enquiries with specific questions on matters about which they are concerned. If, after completion, they consider they have a claim for misrepresentation they should take legal advice immediately. Their remedies can be lost if they do not act quickly and/or if they inadvertently take steps to affirm the contract.

Ed Cracknell, Solicitor
Contentious property department
Russell-Cooke LLP

Cut-off point

A tenant was liable to pay gas charges as part of its service charge. The liability of the management company to pay arose more than 18 months before the service charge demand was made, but the costs were incurred less than 18 months before

The Landlord and Tenant Act 1985, s 20B(1) provides that tenants under long leases of dwellings are not liable to pay service charges to the extent that the costs were incurred more than 18 months before the demand is made.

In *OM Property Management v Burr* [2012] UKUT 2 (LC), a management company had been paying the wrong gas provider (EDF) from April 2001 until late 2007 (this was eventually reimbursed after a dispute) in respect of gas to heat a swimming pool. EDF had been undercharging and when the correct gas provider submitted an invoice in November 2007 it was for £135,000 (although it agreed to reduce it to £100,000). The management company demanded this amount from the tenants in the service charge accounts for 30 April 2008. Mr Burr's share, as tenant, was £313.90.

The Upper Tribunal (Lands Chamber), allowing an appeal against the decision of the Leasehold Valuation Tribunal (LVT), held that Mr Burr was liable to pay it. The cost of the gas had not been incurred, at least until the bill was presented in November 2007. It was included in the service charge demanded in April 2008 which was well within the 18-month time limit.

The crucial issue was the proper interpretation of the words "costs… incurred" in s 20B(1). The statute confirms that it is "costs" that are incurred. There was no authority to suggest that a cost is incurred when the liability is incurred. A cost and a liability are separate things and Parliament chose to use the word "cost".

Liability to pay may have been incurred when the gas was used, but the costs had not been. Costs are incurred on the presentation of an invoice or on payment. It will depend on the facts of a particular case as to which applies. The LVT was well placed to decide such