Property sales and misleading information: Be aware, be very aware

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By Alex Johnson
Property
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When something goes wrong in buying or selling property it can be extremely costly, *writes Paul Greatholder, partner in the contentious property department of Russell-Cooke LLP.*

People expect to get what they have paid for, but sometimes it is not obvious exactly what that is until it is too late. The law is changing on what a buyer is entitled to know, and what a seller (or its agents) are obliged to tell them.

In 1991 the Conservative Government introduced the Property Misdescriptions Act. This made it a criminal offence for an estate agent to misdescribe a property it was marketing. There was a perception that at the time (around the end of the 1980s property boom) that estate agents were not simply being creative in their descriptions of properties, but were at best exaggerating, and at worst being positively misleading, about things such as the proximity of local services, room sizes and views.

There have been a number of prosecutions under the PMA, sometimes for serious mistakes, and sometimes in cases where the estate agent has in fact been guilty of nothing more than not updating its advertising information. Overall it was seen as a useful tool in the regulation of an otherwise largely unregulated marketplace for property sales. There were occasional complaints that disgruntled parties were using very small errors to 'blackmail' estate agents into waiving their fees, but the position in relation to marketing property has undoubtedly been improved as a result of the Act.

The Department for Business Innovation and Skills on 13 September 2012 announced its intention to propose to Parliament the abolition of the PMA, as part of its programme of cutting the red tape which it considers is hindering business. The BIS suggests that the PMA has been largely superceded by the later regulations. It points specifically to the Consumer Protection from Unfair Trading Regulations, a set of regulations introduced in 2008 with the much wider aim of legislating for improved consumer protection across a large range of products and services. It seeks to enforce a general duty not to trade unfairly across a number of business sectors including the sale of residential property. Breach of the 2008 regulations is (as with the PMA) in certain circumstances a criminal offence, although there are defences available of due diligence and innocent publication.

The temptation for Governments to intervene in the property market is understandable when that market is as volatile as the British property market has been over the last 25 years. Gazumping and gazundering have entered the lexicon as the property market has moved from boom to bust and back again. The criticisms which gave rise to the PMA was directed largely at that those acting on a sale, the estate agents. However, in practice, if someone feels misled about the information they have been given in the process of a purchase it will be of little comfort to know that the estate agent has been given a fine of a few hundred pounds, and so they will want to know what are their rights against the seller: can they force the seller to buy back the property?

Much information about the property that someone is about to buy is obvious, such as the

number of rooms or the location. However, some things might not be immediately apparent, such as permissions or rights which others have over the property, complaints or issues which relate to the property, or information about the condition of the property which is not superficially apparent. The problem is that most people only see a property a very few times before signing the contract to buy it.

Many people are familiar with the concept of caveat emptor – buyer beware – which suggests that the risk in relation to buying a property lies with the buyer, not the seller. That is still the underlying principle in property transactions, but it has become so overlaid with procedures, protocols, standard conditions and contractual provisions that it is virtually unrecognisable. Therefore, whether a purchaser can expect information about a particular aspect of a property, and whether they can rely upon that information, to a very large extent depends upon the detailed drafting of very complicated documentation which (if they were honest) even experienced conveyancing solicitors might admit that they did not fully understand.

Nevertheless, there are a few general rules which will help those involved:

1 – if the buyer is particularly concerned about a problem – for example aircraft noise from a nearby airport – they should ensure that a specific question is asked of the seller, and that they get a clear and satisfactory answer (and if they do not, they should press the point).

2 –a seller should be extremely careful about saying 'Not as far as the seller is aware, but the buyer should make their own enquiries' when trying to avoid answering a question about which they would rather not give the true answer. Such an answer is rarely effective if the seller was, in fact aware.

3 – when a seller says something which is not correct in the process of selling a house, he or she runs the risk of committing the legal wrong of misrepresentation. Whilst this is not a crime, it does give rise to the possibility of a claim in damages or, worst of all, that the sale will be 'undone', and the seller will have to buy back the property. Mispresentation comes in several flavours, from 'innocent', to 'negligent' (where the seller did not take enough care over the answers), to 'fraudulent' (where the seller knew he was saying something incorrect, or did not care whether it was correct or not). The primary legal remedy where there has been fraudulent misrepresentation is to undo the contract (called rescission).

4 – the responsibility for completing one of the most important conveyancing forms which is relied upon in almost all residential sales – the sellers property information form (SPIF) – lies with the seller, not their solicitor or estate agent.

5 – In the case of McMeekin v Long (a conveyancing misrepresentation case) the judge described SPIFs as "…not a lawyer's form, but one that is designed for everyone to be able to understand". The answers are important, but all too often the answers are given more with a view to keeping a sale of course, rather than full and frank disclosure. If an answer is later shown to be misleading a Court will not have much time for lawyers' arguments about the exact meaning of the words used.

6 – The SPIF (a document prepared by the Law Society) asks, amongst many other things, whether the sellers are aware of notices which have been served relating to the property, whether there are disputes with neighbours or complaints have been made or received, whether there are formal or informal arrangements with anyone else in relation to the property, and much more. There is little guidance as to how far back a seller should go in answering these questions. Should a seller disclose an argument over parking on a shared drive which took place a number of years ago and now appears to be water under the bridge? Or a dispute with neighbours caused by one side objecting to an application for planning permission for an extension put forward by the other? This is very much a judgement call for the seller, and although the SPIF makes clear that sellers should ask their solicitor if they have any doubts, a cautious solicitor might do no more than suggest that anything about which they are concerned should be disclosed. One (non-legal) test would be that if a seller needs to ask for someone else's view on whether a concern should be disclosed, it probably should.

7 – the buyer must read and understand the paperwork, including the results of the planning searches, their building survey, and the answers to their (or their solicitors') enquiries. Even if bad news was otherwise hidden in the small print, a buyer will be 'on notice' of the problem and might have lost their right to bring a claim at a later date.

8 – if there is a discussion between the buyer and seller about something important to do with the property, which often happens during the period when the buyer is still deciding whether to buy, the buyer should ensure that anything important which has been said by the seller is confirmed in writing by the sellers' solicitors. A dispute revolving around who said what, to whom, several months or years after the event will be almost impossible to pursue.

This is a guest post by Paul Greatholder, a partner in the contentious property department of Russell-Cooke LLP

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