

Home truths for property buyers and sellers

This article explores Misrepresentation. Buyers and sellers must be aware of the implications of false information, especially in a downturn. It first featured in the Estates Gazette (9th May 2011, edition) and was written by Paul Greatholder and Ed Cracknell.

A number of recent reported cases have looked at the extent to which a seller of property should have disclosed information concerning a property about which the purchaser is subsequently unhappy. In a tight property market, this has important implications for sellers and their advisers.

Buyers generally view a property only a few times, relying on others for essential information. Their solicitor will supply information on the legal rights that accompany or burden the property. The surveyor will provide a survey detailing its physical condition and, perhaps, whether it is worth the purchase price. The seller will have information on some of the practical issues relating to the property about which the buyer would not otherwise be aware.

However, sellers, buyers and their advisers have a limited amount of time in which to explore all the uncertainties. The issue then becomes who is to bear the risk of undisclosed or incorrect information?

Caveat emptor gives an oversimplified view of the conveyancing process, which is that the burden of risk regarding the transaction lies with the buyer, not the seller. In a modern consumer society, such a sweeping presumption is not helpful to the operation of the property market. A detailed arrangement of checks and balances of the legal risk has therefore been developed. The developments can be divided into the law, the contract, and the information forms.

Legal and contractual perspectives

The law relating to conveyancing disputes is complex. Much of the relevant information in a conveyance is exchanged before the parties enter into binding legal contracts. Bringing a legal claim because of something said, or not said, precontract is to rely on the law of misrepresentation. Misrepresentations can be: (i) innocent, whereby the maker of the statement did not know, and perhaps could not have known, the nature of the erroneous statement; (ii) negligent, where the maker (if acting reasonably carefully) should have known the nature of the error; and (iii) fraudulent, where the maker knew the representation to be false or was reckless as to whether it was false. Depending on the circumstances, both common law and statutory remedies (the Misrepresentation Act 1967) may be available. In each of the above cases, not only must there be a misrepresentation, but the buyer must rely on it in order to establish a legal claim.

In general, the more serious the misrepresentation, the wider are a buyer's potential remedies. In cases of fraud, the defence of *caveat emptor* does not apply. The presumed remedy is to rescind the contract. The buyer does not have to show financial loss to succeed, but if he can he will be entitled to claim all his losses, even those caused by an intervening factor such as a fall in the housing market.

In less serious cases, the buyer's remedy might be limited to a claim in damages, for which he would need to show a loss, which would have to be "reasonably foreseeable".

Most sales involve a standard and detailed set of contractual provisions. Many of these deal with risk management; for instance, what happens if one party cannot complete the transaction?

Standard conditions limit a buyer's legal remedies. His right to ask for a return of his money is limited to situations where what he has bought differs substantially from what he thought he was buying. Different contractual provisions apply to residential and commercial property.

Information forms: SPIFs or CPSEs

A usual term of a property contract is that the buyer is not entitled to rely on any statements concerning the property unless they are made by the seller's solicitor in writing or by the sellers when completing an agreed form.

In residential conveyancing, that form is usually the sellers' property information form (SPIF); in commercial transactions, it is the commercial property standard enquiries (CPSE). Additional enquiries may be raised in respect of leasehold property. These restrictions are designed to limit the amount of information a buyer is entitled to rely on when buying a property, but problems still arise.

Both SPIF and CPSE questions address practical matters such as responsibility for boundaries and the existence of guarantees. CPSE questions also cover a range of tax and more technical enquiries. All questions can have legal consequences.

Questions on both forms can give rise to uncertainty at a later date. Primary among these are those that ask whether: (i) notices have been served at the property; or (ii) there are or have been any disputes or complaints regarding the property or any circumstances that might lead to a dispute concerning it or a neighbouring property. There is no express limit on how far back the seller must go when disclosing the existence of a dispute, how close a nearby property might be or what amounts to a dispute or complaint.

It was assumed for some time that sellers could answer difficult questions by using phrases such as "not as far as the seller is aware, but the buyer must make their own enquiries". This was thought to put the burden of risk onto the buyer. *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 held that such words implied that the seller had made reasonable enquiries and that such phrases must be used with care. In *Morgan v Pooley* [2010] EWHC 2447 (QB), *Sindall* was expressly modified, successfully for the seller, by a special contractual condition.

The courts have generally taken a robust view of the seller's obligations in completing an SPIF. In *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 a "running sore" 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".

In *Doe v Skegg* [2006] EWHC 3746 (Ch); [2006] PLSCS 213, an elderly man who claimed that he was not in dispute with neighbours when he had in fact made recent complaints was found liable for fraudulent misrepresentation. The judge held that the SPIF covered a range of different disputes.

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 was found liable for the non-disclosure in precontractual enquiries of dry rot in premises, despite the fact that the buyer had obtained a report into the problem.

Lessons for sellers and buyers

Sellers should answer questions with care. *Morgan* shows that a seller's obligation to give information can be managed, but in that case specific contractual terms were prepared. Any uncertainty about the meaning of an SPIF question should be referred to the seller's solicitor. If in doubt, it will generally be better to disclose more rather than less information.

A buyer should make specific enquiries of issues of particular concern. He should scrutinise the contract to ensure that his rights are not limited in unintended ways. If a problem emerges after purchase, he should take advice promptly to avoid any risk of waiving a legal claim.

Why this matters

- It is rare for parties to have full information on a property they are buying or selling. Material information may not always be disclosed during the conveyancing process. Given the often substantial sums involved, buyers are often motivated to bring a legal claim; this possibility is increased where the non-disclosed problem is one that regularly affects the buyer's enjoyment of the property - noise, nuisance, and neighbour problems, for instance.
- In a falling or static property market, the problems associated with the disclosure of information are more apparent. Sellers become more desperate to sell their properties and may take greater risks with (or pay less attention to) the information that could adversely affect the value of the property. Buyers might be concerned that, having contracted to buy a property for a particular figure, that property might subsequently not be worth the purchase price. They might look for other reasons, perhaps genuine reasons, to rescind the purchase.
- A falling market has profound implications for the amount of loss claimed by a buyer. If fraudulent misrepresentation is alleged, all the loss suffered by the buyer will be claimed, including losses arising from a fall in the general property market. In such cases, the valuation evidence provided at the time of the purchase, and the assumptions on which that valuation was made, will be subject to detailed consideration.
- A buyer may also be "on notice" of a problem if his agent - a solicitor or surveyor - was informed about it. A seller seeking to defend an alleged misrepresentation may maintain that the buyer did not rely on a particular (incorrect) statement because

the true situation was made clear during, for example, an inspection. In all cases of alleged misrepresentation, what was said to or by a valuer at the time of an inspection can become the subject of future detailed scrutiny in a way that was not anticipated at the time. Any information relating to a valuation, even if not referred to in a valuation report, should be scrupulously preserved.

Further reading

Chitty on Contract

Beale Hugh, Professor, (30th ed) Sweet & Maxwell

Treitel: The Law of Contract

Peel E, (12th ed) Sweet & Maxwell

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