# It remains a question of buyer beware

**Pre-contract enquiries** have become almost meaningless as responses from sellers and their solicitors are ever more cautious. Joanna Sykes advises how buyers should respond to this trend

There was a time when replies to pre-contract enquiries revealed useful legal or practical information concerning a property. However, in recent years, sellers and their solicitors have become so cautious about responding to these enquiries that the process rarely yields any information of value. What can the buyer's solicitors do to counter this prevailing trend?

## Buyer beware

The legal principle of *caveat emptor* puts the onus on the buyer to carry out all necessary due diligence before buying a property. In addition to carrying out searches, the prudent buyer should raise enquiries of the seller. Indeed, standard condition 3.12 of the standard commercial property conditions (2nd ed) states that the property is sold subject to all matters that would have been revealed by the enquiries that a prudent buyer should have raised before entering into the contract.

Whether or not the buyer raises enquiries, the major exception to the *caveat emptor* principle is that the seller is under a duty to disclose latent encumbrances and defects in title unless the contract says something to the contrary. This does not extend to the disclosure of physical defects and the seller is not required to disclose anything of which the buyer is already aware, although it is generally unwise for the seller to assume that the buyer has any actual knowledge.

**The buyer will rely on replies to enquiries and they can be sued on in the case of misrepresentation**

**But sellers' solicitors are adding substantial disclaimers to the replies to limit their liability**

To expedite the transaction, the seller and its advisers will generally prepare replies in advance. The commercial property standard enquiries (CPSE) are generally accepted for use in the industry and are comprehensive. Since they are intended to strike a fair balance as between the buyer and the seller, they constitute a reasonable standard set of enquiries to which a seller can volunteer replies.

A question mark hangs over the efficacy of pre-contract enquiries

## How do sellers limit their liability?

### Awareness

In *William Sindall plc* v *Cambridgeshire County Council* [1994] 1 WLR 1016, Hoffmann LJ reiterated that "a statement that a vendor is not aware of a [particular matter] carries with it an implied representation that he has taken reasonable steps to ascertain whether any exists".

It is common for a seller to respond to an enquiry relating to the physical state of the property by stating: "Not to the seller's knowledge but no warranty is given and the buyer must rely on his own inspection and survey." The denial of any warranty and the statement that the buyer should inspect or carry out a survey will not protect the seller if the reply also contains a misrepresentation, namely that the seller is not aware of the particular matter enquired about: see *Morris* v *Jones* [2002] EWCA Civ 1790.

A simple response directing the buyer to inspect or carry out a survey, without any statement as to the seller's knowledge, will not generally cause any liability to be owed by the seller to the buyer even if the former is aware of a particular defect.

In a more recent case, a statement that the landlord was not aware of any flooding but suggesting that the tenant should carry out its own survey carried with it an implied representation that the landlord had made reasonable investigations of the matter to ascertain the position: see *Clinicare Ltd (formerly known as Strasbourgeoise UK Private Health Insurance Services Ltd)* v *Orchard Homes & Developments Ltd* [2004] EWHC 1694 (QB); [2004] PLSCS 176.

**Corporate awareness**

If the seller is a corporate entity and has owned the property for a number of years, records may no longer be available; personnel with expert knowledge of the property may have left the company or confidentiality issues may prevent it from consulting its employees. The seller should advise potential buyers of any deficiencies in its records or where key personnel are not available to supply the information required. There is no implied representation on the part of the seller that proper records have been kept; such a representation was proposed in *William Sindall* but rejected by the Court of Appeal. The court did say, however, that if the deeds of the property had been eaten by mice or destroyed by enemy action, the seller must disclose those facts.

**Claim against a solicitor**

Where an inaccurate reply results from the seller's solicitor's negligence, the solicitor will be liable to its client. However, it owes no duty of care in negligence to the buyer (*Gran Gelato Ltd* v *Richcliff (Group) Ltd* [1992] 1 EGLR 297), and the CPSEs specifically exclude such liability.

**Seller's solicitor's caveats to replies**

The seller's solicitor will invariably include a disclaimer in the replies to enquiries; in addition, further caveats may be generated by the case law (see box).

In *First National Commercial Bank plc* v *Loxleys* [1997] PNLR 211, it was held that the lawyer's disclaimer had to be scrutinised to see if it constituted an unfair term. Whether the solicitor owed a duty of care could not be decided without assessing the validity of the disclaimer with reference to the Unfair Contract Terms Act 1977. The question is not just whether the disclaimer is fair and reasonable, but whether it is fair and reasonable to allow solicitors to rely on it, having regard to all the circumstances.

## DISCLAIMERS AND CAVEATS

Example of disclaimer in replies to enquiries:

These replies, except in the case of any enquiry expressly requiring a reply from the Seller's solicitors, are given on behalf of the proposed Seller and without responsibility on the part of its solicitors, their partners or employees. They are believed to be correct but their accuracy is not guaranteed and they do not obviate the need to make appropriate searches, enquiries and inspections.

Where the Seller confirms that it is not aware of any matter or makes any expression as to its awareness, such statement is made without specific enquiry.

Example of caveats generated by case law:

Unless expressly stated to the contrary, where a phrase such as "so far as the Seller is aware" is used, this is intended to refer only to the actual knowledge of the Seller and nothing in the replies to the enquiries should be taken as representing or implying that any investigations have been undertaken by the Seller in connection with or to ensure the accuracy of such a reply.

The Property is managed by the Seller but has never been occupied by it and accordingly its knowledge of day to day matters is limited. In the light of this, the Buyer should make all appropriate enquiries of its own and satisfy itself by making an inspection of the Property.

Subject to contract, the buyer has no remedy against the seller unless it can show misrepresentation

### Buyer's remedies for incorrect or incomplete replies

Subject to the terms of the contract, the buyer has no remedy against the seller for incorrect or incomplete replies unless it can successfully establish a misrepresentation. This means that an inaccurate but honest reply is unlikely to give rise to liability.

A legal misrepresentation requires:

- an untrue statement of fact by the seller;
- reliance on the statement by the buyer; and
- loss suffered by the buyer as a result of entering into the contract.

Reliance on the misrepresentation is a question of fact. If the buyer had an opportunity to discover the truth, this does not prevent the statement from being a misrepresentation: see *Redgrave* v *Hurd* (1882) LR 20 Ch D 1. It is not necessary to show that the misrepresentation was the only matter that the buyer relied on when entering into the contract; liability may arise even if the misrepresentation forms only part of the information relied on as long as the misrepresentation was material: see *Edgington* v *Fitzmaurice* (1885) LR 29 Ch D 459. "Material" is not necessarily the same as "reasonable" and a buyer may succeed in a claim for misrepresentation even if a reasonable person would not have been influenced by that misrepresentation. A seller is not obliged to answer all or any pre-contract enquiries, and silence does not generally amount to a misrepresentation.

### Alive and kicking

Replies to enquiries will be relied on by the buyer and can be sued on to the extent that there has been misrepresentation and loss.

However, sellers' solicitors are tending to add substantial disclaimers to the replies in order to: (i) avoid claims against it and the seller; (ii) heavily limit the replies by directing the buyer to carry out its own due diligence; and (iii) provide no further information or confirmations.

The buyer's solicitors should respond by: (i) ensuring that such disclaimers do not constitute unfair terms and, if necessary, asking for the replies to be reissued without them; (ii) ensuring that the contract expressly states that the buyer is relying on the replies; and (iii) seeking an express contractual confirmation from the seller that it has disclosed any matters of which it is aware and subject to which the property is sold.

As buyers know all too well, the *caveat emptor* principle is still very much alive and kicking.

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