

Misled by wrongs, baffled by rights

What redress is available to a misled property buyer? **Anthony Judge** investigates

Recently there has been much interest in the regulation of estate agents. In February the Office of Fair Trading (OFT) issued proceedings against Foxtons under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) in connection with the contracts they issue to their landlord clients. There has been a flurry of prosecutions against agencies for "flyboarding"—agencies erecting "sold" or "to let" signs without instructions to do so. There was also a warning in January from the Law Society that solicitors were losing work because some estate agents insist that clients use their own Home Information Pack (HIP) provider. A recent case has heightened interest in this sector.

THE BUCHANAN CASE

In *Lancashire County Council v Buchanan* [2004] EWHC 3194 (Admin), an estate agent was cleared of offences under the Property Misdescriptions Act 1991 (PMA 1991). Under s 1, it is an offence to make a false or misleading statement about a prescribed matter in the course of an estate agency business. The test of a misleading statement is whether what a reasonable person might infer from the statement (or from any omission from it) is false.

Buchanan had marketed a property as having a garden which was "excellent, good sized and well-fenced, incorporating a lawn and other features". The local trading standards office received two complaints from prospective buyers that the seller was not the garden's registered owner. This was true, although the seller was likely to be able to establish possessory title as the land had been fenced in and used as the house's garden for over 30 years. The court confirmed that in principle it would be possible for an estate agent's particulars to be so false or misleading as to constitute an offence under PMA 1991. However, for a case to succeed the inaccurate statement would

have to constitute a representation, not mere sales puff, and the court decided the particulars in this case could not be deemed to be a representation as to title because (i) they were marked "subject to contract" and (ii) a reasonable person would expect title matters to be investigated during the conveyancing process. As Buchanan had gathered evidence from various sources regarding the duration of the adverse possession of the garden, he could also have relied on PMA 1991, s 2(1) by which it is a defence to show that he "took all reasonable steps and exercised all due diligence to avoid committing the offence".

The claim for misdescription failed, which was unsurprising in this situation where the agent had done his homework, but if we imagine a hypothetical situation where there were perhaps only five years of undocumented adverse possession, how else could a buyer achieve redress when an estate agent had proved less than rigorous in his description of a property?

COURT ACTION

Against the agent

If a buyer enters into the sale contract relying on the misleading particulars and thereby suffers loss, two tortious claims could assist: negligent misstatement and fraudulent misrepresentation.

Negligent misstatement is committed when someone makes a careless statement where he has a duty of care to the other party. The buyer would have to establish that Buchanan owed him a duty of care and that he had breached this duty, but it is likely that the "subject to contract" disclaimer would defeat this

IN BRIEF

- For a case to succeed under the Property Misdescriptions Act 1991, an inaccurate statement would have to constitute a representation and not mere sales puff.
- The Ombudsman for Estate Agents (OEA) supervises an independent code of practice and is the only approved redress scheme for HIP-related complaints.
- The Consumers, Estate Agents and Redress Act 2007 increases the Office of Fair Trading's powers against agents and requires all estate agents to belong to an approved redress scheme.

argument. In *Collins v Howell-Jones* [1981] 2 EGLR 108, the sales particulars were found to be a misrepresentation but the disclaimer that neither the seller nor the agent gave a representation or warranty about the property meant that neither party was liable for the misrepresentation.

To establish fraudulent misrepresentation the buyer would have to prove that Buchanan did not honestly believe his statement was true, so it would be a defence for Buchanan to show he was satisfied that there was not likely to be a problem with title.

Against the seller

The second approach would be to proceed against the seller himself, because there is



a *prima facie* assumption that the seller is liable for his agent's statements even where he has not authorised them, such as where sale particulars are used in draft form.

"A buyer bought a house on the understanding that it had off-street parking, only to find that there were no such rights"

The buyer could claim misrepresentation under common law and statute, requiring the seller to establish his belief in the contested statement, and (particularly if the statement is sufficiently important to constitute a term) could also claim breach of contract. However, it is likely the disclaimer will again exonerate the seller. The sale and purchase contract will also contain terms limiting the seller's liability. Condition 3.1.2 of the Standard Commercial Property Conditions (second edition) for commercial properties and condition 3.1.2 of the Standard Conditions of Sale (fourth edition) for residential properties specify the matters to which the sale is subject including those (i) discoverable on inspection and (ii) which would be revealed by the searches a prudent buyer would carry out. A well-drafted contract will also contain an "entire agreement" provision and an acknowledgment that the buyer has not entered into the contract in reliance on any representation by the seller or its agent.

REDRESS SCHEMES

There are various non-contentious routes our buyer could follow:

Ombudsman for Estate Agents and the National Association of Estate Agents

The Ombudsman for Estate Agents (OEA) supervises an independent code of practice. According to its annual report, as at January 2007 about 64% of the 12,000 branch offices in the UK adhered to the scheme. Although it can grant compensation of up to £25,000, in 2006 only five awards were made in excess of £3,000 despite receiving 8472 complaints that year. Some 714 of the complaints related to sales particulars.

It is impossible to track these complaints from the initial query until the outcome of any formal review. However, one of the

report's anonymised cases concerns a buyer who bought a house on a dual carriageway on the understanding that it had off-street parking by the house, only to find when she tried to sell the house a year later that there were no such rights and her house was worth £5,000 less as a result. The OEA decided the agent was only partly to blame, since the surveyor and solicitor should have investigated the issue, and awarded her £1,700.

The National Association of Estate Agents is the main professional body for estate agents in the UK. It operates a code of conduct and can discipline its members, but only about 60% of agents are members. It has, however, recently required its members to sign up for the OEA scheme, probably as a result of (i) the new partnership between the OEA and the National Approved Lettings Scheme, and (ii) the fact that from September 2007 any estate agent in England or Wales who markets for sale a home with three or more bedrooms must belong to an approved redress scheme for HIP-related complaints, and the Ombudsman is the only approved scheme so far.

The OFT

The Estate Agents Act 1979 (EEA 1979) lays down the duties estate agents owe to clients and gives the OFT power to ban a person or company from carrying out estate agency work if they are convicted of specified offences including fraud or other dishonesty, or if they breach any of the regulations in EEA 1979. Those regulations include a duty to:

- declare any personal interest to a buyer or a seller;
- set out his terms and conditions clearly in writing before his client is contractually bound;
- not discriminate against buyers who do not want to buy services such as arranging a mortgage;
- forward all offers promptly and in writing to the seller, unless the seller does not want to receive some kinds of offers;
- provide clients with a list of all services offered to a buyer; and
- not misrepresent to sellers the details/existence of any offer or existence/status of any purchaser.

In its 2004 report into the estate agency market in England and Wales, the OFT concluded it was restricted in taking enforcement action in this sector by limitations

within EAA 1979. It recommended amending the Act to allow more effective and proportionate action to be taken to address breaches of the legislation.

Consumers, Estate Agents and Redress Act 2007—redress scheme

In response to the OFT report, the Consumers, Estate Agents and Redress Act 2007 (CEARA 2007) came into force in October 2007. It contains provisions relating to commercial property agents (such as the duty to keep records for six years) and increases the OFT's powers to investigate, sanction and ban agents. It also requires all estate agents to belong to an approved redress scheme in connection with the sale and purchase of residential property.

The OFT carried out a tendering process in October, for which there were four applicants, but has not yet announced its decision as to which schemes it will implement. There is concern that if there are several schemes available then consumers will be confused and, unless consistency across the schemes is rigorously enforced, agencies will tend to opt for the scheme with the lightest touch.

The new system was expected to be in place by April, but the OFT announced on 3 March that the four applicants have asked it to look at certain issues relating to the operation of the schemes and it intends to give these issues further consideration before providing a detailed response.

CEARA 2007 does not follow up on all the issues raised in the OFT's 2004 report. The government's Business, Enterprise and Regulatory Reform department (BERR) has conducted a three-month consultation into: (i) the ways the powers in CEARA 2007 should be exercised; and (ii) matters such as the level of penalties and the scope of the remit of the redress schemes. Secondary legislation will probably be used to fine-tune the existing structures.

CONCLUSION

Our hypothetical buyer clutching his inaccurate sales particulars seems to have at his disposal a bewildering array of possible means of redress, but none seem straightforward or rewarding. Let's see what the new statutory schemes have to offer.

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