

ARE VENDORS AND THEIR AGENTS STILL PROTECTED BY THE PRINCIPLE OF CAVEAT EMPTOR?

Could legislative changes help prevent gazumping?

An exclusive **Property Valuer interview** with **Imelda Reynolds**, IAVI Law Agent and Managing Partner of Beauchamps Solicitors.

Property Valuer:

Has either the legislative or judicial approach in either Ireland or the UK (specifically England and Wales) shifted in relation to caveat emptor in the last decade and, if so, how?

Imelda Reynolds:

There is no legislative basis for caveat emptor ("let the buyer beware") in either the UK (England and Wales) or Ireland. It is a common law principle in conveyancing that means that the seller of property is not obliged to disclose anything about that property to the buyer, even if asked to do so. This means that the onus is on the buyer to find out everything it wants or needs to know about the property before buying it or becoming committed to buy it, for example, by inspecting the property and so on.

Ireland

There have been no recent Irish cases on this principle. The central issue of the principle relates to the extent to which a buyer ought to make preliminary enquiries before signing a contract. In recent times more interests and charges affecting land are not easily discoverable by an inspection or survey of land and this has led to the increase in the number of requisitions or queries on title being asked.

The general rule of caveat emptor may be

modified in cases of fraud, as a fraudulent misrepresentation of fact made by or on behalf of a seller to induce a buyer to purchase entitles the purchaser to rescind the contract (*Carbin v Sommerville [1933] IR 276*) or even where a seller volunteers inaccurate information without realising it is inaccurate.

New buildings

The application of caveat emptor to property where the building has not yet been erected has been the subject of much debate in the courts in Ireland and the UK as the building will normally not be completed before the contract to buy is signed and therefore it is not possible to inspect and survey the completed work until after the contract has been signed.

It seems at common law that a contract builder (one who builds the property under an agreement with the buyer) is subject to an implied warranty as to the condition of the property being built (for example, fit for human habitation; work done in a workmanlike manner; and good quality materials used) at common law and this has been reinforced by the courts. Any implied warranty can be displaced by an express provision in a building contract.

Therefore, a buyer could not rely on a common law implied warranty if the builder complies with the agreement but a defect arises. This does not mean that a builder can insert an unfair or

unreasonable term in a building agreement as in 2001 the Irish High Court prohibited the use of 15 sample unfair terms limiting a builder's liability for defects (*In the matter of an application pursuant to Regulation 8(1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, 20 December 2001, Kearns J.*)

A speculative builder (that is, one who builds a property on his land and then sells it) as well as a contract builder may also be liable in negligence for defects in a property (*Ward v McMaster 1985 IR 29; 1988 IR 337*) although there is some debate over the scope of that liability. In Ireland the position of a buyer of defective premises is stronger, but the Irish courts have yet to consider the retrenchment by the English courts in recent years.

In light of the above therefore there is some uncertainty in Ireland of the rules governing liability for defects in new buildings.

UK position

In the UK (England and Wales) the principle of caveat emptor is subject to a number of exceptions:

- The seller's duty to disclose latent defects in title (this is implied by law). This only requires the seller to disclose matters about which the seller knows, or about which the seller has the

means to know, if acting reasonably and diligently. A latent defect is one which the buyer could not have discovered by any reasonable inspection of the property, such as a right of way which would not be apparent from an inspection of the property. The seller is under no duty to disclose latent defects other than in title. A latent defect in the construction or design of a property would not, therefore, need to be disclosed for the purposes of the implied term that the seller has good title. The Court of Appeal has held that there had been no breach of the implied duty to disclose latent defects in title in *Sykes v Taylor-Rose* ([2004] EWCA Civ 299) where the seller failed to disclose that a murder had taken place in the property prior to the seller's ownership.

- Any contractual obligations on the seller to disclose information about the property. For example, the seller may make a misrepresentation in the contract about the property to be sold, entitling the buyer to remedies in tort and/or in contract (*Gordon v Selico Co Ltd* [1986] EGLR 71).

Similar to the Irish position caveat emptor has no application where the buyer has been induced to enter the contract by fraud. The English Fraud Act 2006 introduces a new general criminal offence of fraud that can be committed in three different ways:

- Fraud by false representation.
- Fraud by failing to disclose information.
- Fraud by abuse of position.

Therefore sellers and agents in this jurisdiction need to be aware that a false representation or a failure to disclose information may amount to fraud.

HIPs

It is important to note one recent development in the UK. A home information pack (HIP) is now required whenever a residential property (with some exceptions) is put on the market. They are not required for commercial properties. A HIP as "a collection of documents relating to the property or the terms on which it is or may become available for sale" (section 148(2), *Housing Act 2004*).

If a seller instructs an estate agent, the duty to prepare a HIP will generally rest with the estate agent. Failure to comply with the duties may lead to a penalty charge notice being issued by an enforcement officer from the trading standards authority. The intention is that HIPs give potential buyers relevant information that may affect their decision to proceed and ultimately should speed up the conveyancing process and help prevent gazumping.

Although HIPs alter certain procedural aspects relating to conveyancing, the principle of caveat emptor remains applicable. This means that it is the buyer's responsibility to investigate the property that it proposes to buy. A HIP need only contain the documents and information specified in the HIPs No 2 Regulations 2007. This will not necessarily comprise all the relevant information that the buyer will need to complete a full investigation of the property.

Property Valuer:

How should estate agents approach the voluntary disclosure of faults or defects in real property entrusted to them to sell or let in light of the current position and how can estate agents protect themselves from an action by client sellers or lessors if it is felt that greater disclosure than at present is needed?

Imelda Reynolds:

Obviously a different approach must be taken depending on whether the property is situated in Ireland or the UK in light of the answer to question 1 above. Also an estate agent should always act on his client's instructions, which should preferably be confirmed in writing. If there is a query about faults or defects from a prospective buyer, the agent should ideally seek a written response from the client on what he intends to disclose and the agent should advise the client to seek legal advice on the issue also. I think estate agents' terms and conditions should be regularly reviewed by their solicitors to ensure that they are fully compliant in as far as possible and up to date in all areas of relevant law.

Property Valuer:

If greater disclosure is not needed at this time, but agents wish to bring about regime change that would benefit the buyers and tenants of properties more, what legislative changes could be sought to give effect to this intent?

Imelda Reynolds:

Legislation dealing with the issues that arise in relation to new buildings as outlined above, in order to define the exact scope of liability, would benefit buyers as their rights and duties could be explained to them more clearly in advance of purchase. In conjunction with the HomeBond and similar schemes, this would give greater protection to buyers.

Property Valuer:

If moves were made to curtail gazumping that would create a short term option for a buyer to proceed on the (reasonable) terms set out in a draft private treaty contract, could legislation be drafted that would prevent abuse by either principal or their agents?

Imelda Reynolds:

In August 1999 the Irish Law Reform Commission (Commission) published a report on gazumping but no consultation paper/draft legislation ensued - see www.lawreform.ie/publications/data/lrc105/lrc_105.pdf It recognised that a desirable reform of the law would be to simplify conveyancing procedure, so that the time period between an informal agreement to buy and the making of a binding contract would be reduced in length, so reducing the opportunity for gazumping.

Interestingly the Commission did not recommend legislation which would deem the payment of a booking deposit as creating either a binding contract for sale or an option to buy for the purchaser for the following reasons:

1. An option to purchase is a contract whereby the prospective purchaser obtains the right to acquire property (or to choose not to do so) for some specified period. It constitutes an irrevocable offer by the seller to sell to the purchaser within a specified time. As this is a separate contract, it must be supported by consideration. While the law is satisfied by nominal consideration, the amount is a matter for negotiation. In a rising market, where gazumping may occur, the consideration sought for an option will be more than nominal. In fact, it could be so substantial that the cost would defeat the purpose of acquiring the option in the first place, that is, to protect the purchaser from an increase in house prices. Therefore, any legislation deeming the payment of a booking deposit to be an option to purchase the property would also have to fix the consideration at an artificially low level if it was to protect purchasers. This amount would not then be refundable if the purchaser failed to exercise the option. This would be a departure from current practice, where the deposit is refundable.
2. Constitutional difficulties. These are twofold. All of the constitutional objections to the enforcement of "subject to contract" agreements apply, since the creation of a statutory option would vest in a depositor the right to acquire the owner's property at some time in the future despite the absence of any concluded agreement for sale. Further, as it would be necessary to fix the consideration for the option, the legislation might be open to constitutional challenge on the grounds of price-fixing.
3. When an option is granted in relation to land, the terms of any future contract for sale are naturally also fixed at that time. However this would not be the case in the artificial situation we are discussing. How, therefore, would the terms of the contract be settled?
4. Legislation which equated the payment of

a booking deposit with an option to purchase the property could easily be circumvented by a seller. The legislation would result in no deposits being taken, and such a proposal would therefore actually harm the interests of buyers.

5. Any proposal creating an option exercisable by the purchaser could be open to abuse if market conditions changed so that the purchaser was in a stronger bargaining position.

In light of the above it is unlikely that the government would implement such legislation. This conclusion is supported by the English Law Commission which declined to recommend the use of options in sales of dwelling houses by private treaty for similar reasons.

It also did not recommend legislation to make compensation payable by a gazumping seller to a purchaser, either for the purchaser's out-of-pocket expenses, (not a deterrent if the seller is getting a significantly higher price) or for his loss of expectation (too hard to quantify).

The Report of the Auctioneering/Estate Agency Review Group 2005 concurs with the views of the Commission on gazumping and this has been reported on fully in the Property Valuer previously.

Recommendations

The Commission recommended the following reforms. First, legislation should be enacted requiring that a receipt, in the form prescribed by law, be issued to a purchaser on the payment of a booking deposit. The receipt should include at least the following information:

- a statement that the receipt is one which merely confirms the payment and receipt of a booking deposit and does not of itself create a contract;
- the names of the persons paying and receiving the deposit;
- the amount of the deposit;
- reference to the property concerned;
- a statement that the deposit is refundable in full in the event that the parties do not enter into any contract;
- a statement that the purchaser will not be

entitled to reimbursement of any expenses incurred should the parties fail to proceed to a formal contract;

- such further matters as may be prescribed by law. For example, it might be desirable to require the payee to identify those organisations of which he is a member, e.g. the IHBA.

The obligation to issue a receipt in the required form should be enforced by the criminal sanction deemed appropriate by the Oireachtas. They suggest that this duty should be imposed on the person who actually receives the money, or their employee, and would if enacted therefore apply to estate agents and auctioneers as well as to the builder or other agents for sellers acting in the course of business.

They also recommended that legislation be enacted regulating advertisements for the sale of houses in new housing developments (see next question for more detail).

Finally, they recommended that legislation, again backed by criminal penalties for non-observance, be enacted to prevent the taking of booking deposits of more than 0.5% of the purchase price and that legislation be enacted to provide that the entire amount of the booking deposit, without any deduction, be refunded to the purchaser in any case where the parties do not proceed to a contract.

Editor's Note: *The IAVI at the time of publication of the Law Reform Commission's Report on Gazumping responded by advising the Commission and Government that limiting the initial deposit to 0.5% would result in deposits not being taken, as such a low amount had no relevance to the transaction and failed to demonstrate a serious interest or an ability to perform on the part of the prospective buyer. The IAVI argument was accepted by the Review Group on Auctioneering, which did not follow the Commission's line on this, recognising that the taking of deposits by selling agents assists buyers, sellers and the sale process and should continue.*

Property Valuer:

Could Government force Homebond and other home building guarantee schemes to refuse cover to developments where builders renege on prices agreed in principle without overhauling the entire law of contract?

Imelda Reynolds:

I feel this would be difficult to do without having regard to the law of contract in relation to land transactions, which is very strict in that there must be a written agreement between the parties with consensus on all essential terms before it is enforceable.

The HomeBond agreement is usually executed at

the same time as the contract documentation and the price has to be agreed between the parties at that stage. Further, this would not be the way forward in any event in that home building guarantee schemes are designed to give buyers of new properties certain guarantees against major structural defects and are not designed to cover the issue of property prices.

However, as set out previously the Commission in its report on gazumping recommended that legislation be enacted regulating the advertisement of the sale of houses in new housing developments. Such legislation would, inter alia, provide for the following matters:

- that any advertisement be required to specify the number of houses offered for sale at each price level as well as the period for which these prices are fixed;
- that a criminal penalty be imposed on any

person who fails to provide the required information, or fails to comply with the terms of the advertisement and dishonours the commitment which it implies.

In this way, the Government could penalise builders who renege on prices advertised.

This article is for general information purposes only and does not comprise legal advice on any particular matter. You should not rely on any of the material in this article without seeking appropriate legal or other professional advice. While every care has been taken in preparation of this article, we are not liable for any inaccuracies, errors, omissions or misleading information contained in it.



Stand out from the crowd...

...let Display Specialists Ltd. help with your interior and window display needs. Window displays, if used effectively, can be a major tool in attracting customers and increasing your sales. Your window is an important advertising space and so it's important to make yours stand out from the crowd.

Display Specialists have a wide range of products to get you noticed including lighting, revolving, signage, freestanding and digital displays. We are always happy to advise on what will work best for you. We offer free quotations and a nationwide service. With almost 35 years experience in the pond you can rely on us!

- Cable & Rod Displays
- Retail Lighting
- Retail Displays
- Wall Panels
- Acrylics
- Digital
- Poster Displays
- Revolving Displays
- Counters & Showcases and much more...

T: (01) 4018 106 F: (01) 4018 116
E: info@displayspecialists.ie
W: www.displayspecialists.ie
Unit G5, Greenogue Business Park,
Rathcoole, Co. Dublin



Display Specialists Ltd.