A case of “Seller Beware”

SPS Groundworks and Building Ltd v Mahil [2022] EWHC 371 (QB) *(23 February 2022)*

Background

Buyers will no doubt be aware of the legal principle of “caveat emptor” which translates as *‘let the buyer beware’*. This means that in law there is a basic premise that the onus falls upon the buyer to investigate the property and find out everything it wants or needs to know before completing a purchase.

A seller’s equitable duty to disclose defects in title and encumbrances of which it is aware is perhaps a less well known but extremely important element of the conveyancing process. A contract condition cannot make good a failure to disclose and enable a defaulting seller to circumvent liability and therefore if a material defect is not disclosed, the purchaser may rescind the contract.

The interesting question however and one which has been addressed in the recent case of *SPS Groundworks and Building Ltd v Mahil*, an appeal from a county court judgement to the High Court, is what exactly is required of the seller to comply with this disclosure duty.

Case

The case involved a plot of land sold at auction which was subject to overage. The overage liability was set at 50% of any uplift in value attributable to future planning permission and this liability was secured by a restriction on the register of title, which prevented the registration of any disposition unless the terms of the overage deed were complied with.

The land was described in the auction catalogue as having *"excellent scope for development, subject to any required planning permission, making a superb investment opportunity"*. There was no reference to the overage covenant in the catalogue and no oral reference was made to it by the auctioneer who conducted the auction.

That said, there was no intention by the seller to bury the defect and no dispute as to the overage liability constituting a defect in title. The legal pack prepared for the auction sale included not only an official copy of the register of title and a copy of the overage instrument itself but also a transfer form, which included a reference to the relevant provision and a requirement for the purchaser to enter into a covenant to be bound by the overage. It is also worth noting that before bidding commenced the auctioneer told those assembled that it was their responsibility to have read the legal pack. Had anyone done so, they would plainly have been alerted to the overage position.

The question was whether, by including the deed in the legal pack but omitting reference to the existence of the overage in the auction process itself, the seller had taken sufficient steps to disclose the existence of the overage in the circumstances and complied with its disclosure duty.

The trial judge took the view that the principle of buyer beware held firm. The purchaser should have studied the legal pack containing the overage provision and had they done so they would have purchased the property in full knowledge of the defect.

However, at appeal in the High Court, the judge held that:

- a seller's duty means that the purchaser must be given full, frank and fair information, or a fair and proper opportunity to gain such information, about any defect; and
- in the absence of specific reference to a defect, a purchaser may assume that entries on a register of title or elsewhere would be *"the usual sort of entries which would not significantly affect the value of the property."*

The judge concluded that the seller had failed to comply with its duty. It was held that references in the brochure, and by the auctioneer, to the need to read the legal pack were not enough to comply with the disclosure duty and that the overage clause should have been specifically brought to the bidder's attention by description in the sales particulars, an addendum notice, or by a specific reference made by the auctioneer.

Commentary

Whilst the property industry's reaction to this decision has ranged from surprise to alarm, the bottom line is that there is nothing groundbreaking in this case, to the extent that, the caveat emptor rule does not apply to defects in title; the seller's disclosure duty prevails and clever drafting cannot circumvent the disclosure duty.

Whilst we wait to see if this decision will be appealed, the case does however raise important questions as to how far sellers must go to disclose defects on title. It seems that it is not enough for a seller to present a purchaser with a well-signposted means of ascertaining the full picture regarding the title and that simply giving the purchaser the opportunity to see to what the property is subject falls short of what is required. Anything short of an express, specific reference to the defect in title will likely not suffice.

The practical implications of this case are not limited to auction sales and since very few titles are absolutely clean, sellers and their legal advisers are going to need to think very carefully going forward about what actually constitutes a defect in title and what steps need to be taken to fulfil the seller's duty of disclosure.

Setting aside the potential that this case has for making the initial stage of the conveyancing process cumbersome and costly the case also raises the more esoteric point as to the rationale for how disclosing every

potentially adverse problem in a catalogue or in auction particulars that the bidder may never have read or understood can be considered good disclosure, when disclosing it in answers to requisitions or a legal pack is not.

Christobel Smales

Professional Support Lawyer (Legal Director)