

Introduction

During virtually all RP transactions information about the property being sold will be supplied by the seller. Nowadays this is usually in the form of the Law Society’s Property Information Form and Leasehold Information Form. However, it also includes replies to either standard form enquiries or specific enquiries raised on behalf of the buyer.

These Q & A’s aim to provide information about how to approach providing such information and what happens if the information turns out to be wrong.

What are representations and misrepresentations?

The term “representation” has a number of different meanings in a legal context but, for this purpose, it is any statement of fact made about a RP. A “misrepresentation” is a statement which is inaccurate or incomplete.

Are sellers liable for misrepresentations?

As a general rule sellers are liable if they make misrepresentations. Under the Standard Conditions of Sale which apply to RP transactions (“Standard Conditions”) it is a contract term that any statements made about the RP are accurate. If not, the seller can be liable.

What about the principle of “buyer beware”?

This principle is enshrined in Standard Conditions 3.2.1 which provides that:

“the buyer accepts the property in the physical state it is in at the date of the contract”

This means statements about the physical state of the property are treated differently, since they do not form part of the contract and should not therefore give rise to liability for the seller.

Can a seller therefore say what they like about the physical state of the property?

Because questions about the physical state of the property are not the subject of the sale contract, they should not be raised by the buyers’ lawyers. Indeed, the Law Society’s Protocol for RP transactions says that, if they are, the seller need not answer them.

However, if a seller does make representations about the physical state of the property, it is important to remember the following two principles:-

- the seller can be liable if the statement is fraudulently misleading or the seller is reckless as to whether it is true or not.
- any response should clearly state that the buyer should nevertheless rely on their physical inspection or survey.



Can liability for misrepresentations be excluded?

Assuming the parties to the transaction are “consumers”, any attempted exclusion of liability is caught by section 11 of the Unfair Contract Terms Act 1977. In order to be enforceable it must therefore be “reasonable” in all the circumstances. In practice, the courts generally resist such attempts to exclude liability.

The “sold as seen” provision in Standard Condition 3.2.1 is, effectively, an exclusion of liability for misrepresentations about the physical state of the property. However, having been well established as the standard practice for RP transactions over many years (and enshrined in the Law Society’s own Standard Conditions), it satisfies the requirement to be “reasonable”.

What remedies does a buyer have if the seller makes a misrepresentation?

In the vast majority of cases a claim is made to cover reasonable loss suffered by the buyer. The usual principles for pursuing a claim for damage or loss would apply i.e. that reliance on the misrepresentation was the cause of the loss and any losses incurred were mitigated.

In an extreme case it may be possible to actually rescind the contract on the basis of a misrepresentation, but such instances are rare.

What if the seller did not know the statement made was inaccurate?

Under section 2 of the Misrepresentation Act 1967 it is a defence to a claim for misrepresentation if the allegedly misrepresenting party:

“had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true”.

Do representations have to be made in writing?

The Law Society’s standard contract for RP sales states that neither party can rely on a representation by the other unless it is in writing.

However, this does not apply if the representation is fraudulent or the person making it is reckless as to its truth. In these circumstances, the seller can be liable even if the statement is made orally or relates to the physical state of the property.

How can Hewitsons help me when providing information about my RP?

We already give general guidance about the approach to be taken when making representations about your RP e.g. if you don’t know the answer to a question it is better to say so than to make a statement which might later be shown to be incorrect or incomplete.

However, there are two particular areas where we aim to assist as follows:-

1. whilst the Property Information Form and Leasehold Information Form are designed so that sellers can complete them without assistance from their lawyers, we are always happy to assist if you are not sure about how to answer any particular questions. It is usually possible to present facts in a way which gives a positive impression without misrepresenting the position in any way. Often we can help with this.
2. when we receive specific enquiries from buyers’ lawyers, we generally try to draft suitable responses to the enquiries for you to consider and approve e.g. if there are enquiries about the physical state of the property, we would either suggest you refuse to answer them or ensure that the draft response makes clear the buyer must rely on their survey rather than your statement.

How can Hewitsons help when considering representations on behalf of buyers?

If any statements made by sellers regarding an RP appear incomplete or inaccurate we will raise this.

Furthermore, where a buyer wishes to rely on a representation about the physical state of the property, we would overcome the general “sold as seen” principle by making it a specific term of the contract that the seller’s statement can be relied on. An example of this would be where the buyer’s survey has identified a defect which the seller then states has been rectified.

Clare Martin



Partner
Cambridge
01223 447412
claremartin@hewitsons.com



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