

CAVEAT EMPTOR

1. General Principle

The general principle of *caveat emptor* (literally “let the buyer beware”) used to apply to all sales whether of goods or heritable property. That course has been changed in so far as ordinary goods are concerned by the Sale of Goods legislation. However it has never been changed in so far as heritable property sales are concerned. Accordingly, the only warranty which a seller gives in the sale of a house is that the seller has a good title to the house which can be passed to the buyer. This guarantee of title is referred to in legal terms as warrandice. It has been decided that warrandice does not cover defects in the property whether evident or latent. (Aberdeen Development Co. v. Mackie, Ramsay & Taylor, 1977 SLT 177 at 181) Some academics have attempted to argue that warrandice should cover basic defects in the property and they derive their authority for this from Roman law (see R. Black 1982 JR 31; D.J. Cusine 1983 JLS 228; J.M. Halliday 1983 J.R.1). It is however quite clear that this view is entirely speculative. The law of *caveat emptor* applies in full force to sales of heritable property. Basically, of course, the policy argument is that it is up to the purchaser to have the property properly surveyed before lodging a formal and binding offer. It should also be emphasised that even if the seller knows of a defect which might be of significance to a purchaser or a purchaser’s lender, the seller has no duty, legal or fiduciary, to disclose such a defect to a purchaser or a purchaser’s surveyor. The only contracts where there are duties of disclosure are the so called contracts of utmost good faith (partnership, insurance etc.). If however a seller chooses to make a statement or a representation concerning the state of repair of his or her property then, in accordance with the general law of contract, the seller may be liable if that statement turns out to be untrue. Most sellers however know that they should say nothing or at the very most indicate that they had the property surveyed when they bought and leave it to the potential purchaser’s surveyor to do a thorough job.

2. Contractual Changes

There is nothing in the law which would prevent a purchaser and a seller from expressly contracting that the property or indeed any part of the property is in a good state of repair. As is well known, modern offers now contain a great many clauses which have absolutely nothing to do with the title to the property. This is the main reason why it now takes so long to conclude missives. I have seen very general clauses in offers to the effect that the seller knows of no defect of any kind in the property so material has to be of significance to a purchaser. Not surprisingly any seller’s solicitor worth his or her salt would delete such a clause in its entirety. There are some specific areas, however, where the purchasers are able to gain some sort of comfort from sellers in relation to what might be regarded as non-title matters.

2.1 Central Heating/Plumbing/Working Items

It is now universal practice for purchasers’ solicitors to insert a clause in an offer to the effect that any central heating system including the boiler, radiators, piping and

other appurtenances will be in good working order as at the date of entry. Sometimes this clause is expanded to include any other moveable items of a working or running nature which are included in the sale. Sellers accept this clause but they normally qualify it in two respects:-

- (a) In the first place there is a provision to the effect that the heating system and other items will be in working order commensurate with their age and original design. This is to avoid a situation where a purchaser calls in a plumber or other contractor and asks for a full report on the central heating system. If the system is 15 years old the report will no doubt disclose that it is wearing out and does not conform to current regulations. No seller undertakes the obligation to upgrade the system.
- (b) In the second place the seller normally provides that unless the purchaser has intimated an alleged defect or lack of repair within a certain time after the date of entry no claim will arise. The period varies but it would normally be fairly short, say seven days.

2.3 White Goods in New Houses

Although the Sale of Goods Act 1979 does not actually apply to the sale of second hand cookers, hobs, fridges, freezers, as part of the sale of a house, it would probably apply to the sale of these white goods with a new house by a developer acting in the course of business (see s.14(2) of the 1979 Act). There might therefore be an implied term in these cases that the goods were of satisfactory quality.

2.4 Woodwork, Dry Rot and Wet Rot

Many houses of an older type have been treated by specialist firms for rot or woodworm or other decay. These firms routinely provide a guarantee for say twenty years or more. It is now common if not universal practice for an offer from a purchaser to contain a clause to the effect that if the house has been treated by a specialist firm for any of these defects then there exists a valid and enforceable guarantee which the seller will hand over along with the original survey report by the specialist firm. Of course the seller does not warrant that this guarantee will be enforceable. There are good and bad specialist firms and a guarantee is only a piece of paper the end of the day. If the specialist firm has gone into liquidation the purchaser will not be able to enforce the guarantee. A clause of this type is not a warranty by the seller that the work has been done properly. Some clauses go further than this and provide that the seller is unaware of any woodworm, dry rot or wet rot or other fungal decay in the property. I am bound to say that it is my practice to delete that part of the clause routinely on the basis that I do not want an argument at a later date that the seller either must have known about some rot under the floor or at least ought to have known if he or she had ever bothered to go into the cellar. Sometimes when I delete this part of the clause a purchaser's solicitor asks why I have done this. Obviously they wish to know whether the deletion is because the seller is in fact aware of some rot or whether I have simply deleted it because I do not like it. Here the selling solicitor must be careful to make no representation on behalf of the seller. My stock response to this is that I routinely delete this part of the clause because I do not

wish to interfere in any way with the *caveat emptor* principle and in any event the purchaser will have had the property surveyed.

2.5 NHBC Guarantees and Architects Certificates

All offers contain a clause which provides that if the property has been erected within the past ten years it is covered by the appropriate National House Builders Council Guarantee. This guarantee of course only applies where a builder is a member of the NHBC. These clauses therefore routinely provide as an alternative that if there is no NHBC guarantee then the property was supervised by a qualified architect or surveyor during construction and the seller will deliver a Certificate of Supervision and Completion by such architect or surveyor. These certificates are normally acceptable to lenders as an alternative to the NHBC guarantee. There are, however, two difficulties with architect certificates as opposed to NHBC guarantees:-

- (a) In the first place while the NHBC guarantee goes with the house no matter who owns it, an architect's certificate would require to be assigned by the seller to the purchaser in the sense of the seller's right to recover damages from the architect if the property has not been properly designed or constructed. Some certificates make it quite clear that they are personal to the original client who instructed the building of the house and the architect's consent to the transfer may be required. Certificates also vary in terminology and accordingly such a certificate would require to be examined by the purchaser's solicitor before the missives are concluded.
- (b) In the second place, there is, as far as I know, no compulsory professional indemnity insurance scheme for architects or surveyors. Accordingly if a house has serious design faults of a type which ought to have been picked up by a supervising architect or surveyor any legal claim to damages against that professional may be frustrated simply because the professional does not have the money to pay up. One of the gripes often put forward by solicitors who are sued along with surveyors is that they are unfairly targeted by claimants simply because they have compulsory insurance.

2.6 Common Repairs

It is almost universal practice to provide in an offer that if the property is a flat in a tenement or block there are no outstanding common repairs and the seller is unaware of any common repairs which have been instructed but which will not have been carried out or paid for prior to the date of entry. This of course is not a warranty of condition by the seller but if a seller accepted such a clause there would be a duty to disclose, for example, that six months previously all the proprietors had agreed that the common roof needed to be renewed at a cost of £25,000.