

The Scottish Law Agents Society



Submissions regarding the house buying and selling process

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The Scottish Law Agents Society was incorporated by Royal Charter in 1884 and is the largest voluntary organisation of solicitors in Scotland representing over 1500 members who have a wealth of experience in the process of buying and selling property in Scotland. We submitted our first response to the work of subgroup B in October 2001. The following further comments are specifically addressed to the discussions which took place at the working group of 9th May 2002.:

- (i) *improving/altering the contents of existing surveys/valuation reports to include e.g. energy efficiency and disability audits.*

It is clear from the DTZ Pieda research that purchasers have difficulty in decoding the language used in surveys. Experienced solicitors have never been asked about running costs or energy efficiency of properties. Prospective purchasers are already overloaded with information at the time of purchase and use the survey to determine what to offer. Experience suggests that they do not focus on affordability at this point. Disability audits are only of interest to purchaser, where they or a member of their household is disabled. If a prospective purchaser has concerns about say a central heating boiler he may instruct a heating engineer to report prior to offering.

Given a lack of demand there should be no move to increase the cost of surveys by including information which does not appear to be required by purchasers. The inclusion along with a survey of a leaflet illustrating and naming parts of a building might help purchasers.

- (ii) *Encouraging home-owners to keep log books of repair work and make these available to prospective purchasers*

The writer is concerned about several issues. If the work is DIY there will be no receipts. There are opportunities to falsify records but the most fundamental is that owners will not maintain records and they ought not to be under any compulsion to do so. Like cars however sellers may achieve higher prices where there is a full service history than where there is none. This market dynamic is preferable.

- (iii) *Encouraging sellers or their agents to provide other standard information to prospective purchaser (possibly including a building standards report and a clear statement of the repair and maintenance obligations as set out in the title deeds)*

Provided there is no compulsion there can be no objection to this. However there is a danger in this approach. Property sold at auction is sold *tantum et tale*. Prospective purchasers therefore require to examine the titles, certificate etc in advance as there are no warranties after the minute of preference and enactment. If such information is

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made available pre-purchaser there is a significant danger that the seller would not accept many conditions currently contained in an offer and *tantum et tale* would apply. This would result in every prospective purchaser's solicitor requiring to examine the titles etc. prior to offering. This would significantly increase the costs of particularly for unsuccessful offerers.

- (iv) *Encouraging local authorities to provide right to buy purchasers with detailed information on the repair and maintenance history of their property and current condition.*

There can be no objection to this. It could usefully be extended to include information about prospective repairs and improvements which the council may have programmed for the future.

- (v) *Consider abolishing or modifying the principle of caveat emptor.*

Transactions are between private sellers and buyers, neither acting in the course of a business. They are not consumer transactions therefore. While attractive to purchasers this is not attractive to sellers. There is no rationale for the seller effectively insuring the buyer against defects. The private sale of a second-hand car carries only a warranty as to title and offers a good analogy.

- (vi) *Production of best practice guidelines for solicitors/estate agents/mortgage advisers to ensure that prospective house buyers and sellers are given good quality information on the repair and maintenance obligations associated with the title deeds.*

Solicitors are already subject to a Code of Practice which requires them to communicate effectively with clients [para 5(e) Code of Conduct Rules] disclose the terms of the titles to clients on a purchase. They ought to be encouraged to supply this in an intelligible way. Mortgage advisers have no role to play. There is no professional body which can produce such guidelines for the whole body of estate agents. The National Association of Estate Agents is a voluntary body. Estate agents are subject to those provisions of the Estate Agents Act 1979 which are in force and subject to barring orders by the Director General of Fair Trading where they have persistently engaged in unfair business practices. Estate agents are not necessarily professionally equipped to provide information about title deeds.

- (vii) *Legislation to require independent seller's surveys (with or without energy efficiency and disability audits and valuation) and associated insurance policies or otherwise to encourage the uptake of independent seller's surveys.*

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The model for legislation can be seen in the Homes Bill. It would increase the cost of selling by at least £300 (more if seller's packs are introduced as well). It criminalises marketing without the survey, may require the introduction of statutory missives, requires the establishment of a statutory regulation system for surveyors. It provides a wholly unnecessary central database of surveys for the Executive to which the public has no access. There is no solution offered to the problem of low value and low demand property. Sellers may have an expectation that this will be funded by the agent. This will place small businesses at a disadvantage as they may not be able to afford this. Exemption schemes will only stigmatise low demand areas exacerbating the problems. Without valuations included in a seller's survey multiple valuations will still occur in high demand areas. There can be objection to seller's surveys as marketing initiative but there is not a sufficient problem to impose such surveys by legislation.

- (viii) *Production of best practice guidelines for solicitors/estate agents/mortgage advisers to ensure that prospective house buyers and sellers are given good quality information on house buying and selling costs, including the treatment of outlays such as registration/recording dues.*

Estate agents are required by law to provide a written quotation for their fees and outlays. Some mortgage advisers may not charge but receive commission from the lender. The law of agency requires disclosure as secret commissions are not. They are obliged as part of the Mortgage Code to provide illustration of mortgage costs. It is no part of the function of mortgage advisers to give information on the purchase costs as opposed to the costs associated with the mortgage. Solicitors will generally provide estimates and best practice guidelines should not be encouraged in this area.

- (ix) *Encouraging sellers and/or their agents to give prospective buyers a reasonable period to consider whether they wish to offer for a property (e.g. by a minimum notice period between setting of closing dates for offers or by a minimum/fixed period between marketing and acceptance of an offer)*

Agents acting for sellers are under a duty to obtain the best price possible for their clients. In most cases a closing date will be fixed on a date to suit prospective offerers. More offers will maximise the price obtained. Too long a period may lead to parties losing interest. Short closing dates are often a response to pre-emptive offer's being received. This gives other parties an opportunity to offer rather than simply accepting what is presumably an attractive offer. No matter when a closing date is fixed a party who comes late to the process will

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have little time. The seller should be free to adopt whatever tactics including the timing of closing dates as will maximise his price

(x) *Introducing standard missives*

Under the Homes Bill the draft contract would be in a standard form. House buying is a type of transaction that in principle is standard and it ought to be possible to produce a standard offer. This may not lead to a standard contract as the qualifications will be property specific and where the seller is asked for contractual warranties may depend on the seller's attitudes. There are examples of good practice at local levels in relation to the standardisation of missives.

(xi) *Altering the existing blind bidding system to increase certainty for buyers.*

There can be only one successful party. The outcome is equally certain for all parties. Sellers should be free to choose whatever sales method will maximise the price. In some cases the top offer is not accepted where another offer presents a better overall package e.g. on entry date or lack of seller's warranties. There is no evidence of any detriment which would suggest reform is needed. The Law Society has issued best practice guidelines for closing dates which are applicable to both purchaser's and seller's solicitors. These require the solicitor to cease acting where the client seeks to engage in any impropriety. There are no similar generally applicable guidelines for estate agents because there is no overall professional body.

(xii) *Production of best practice guidelines for solicitors/estate agents to ensure that upset prices are set at realistic levels.*

Solicitors and estate agents are under a duty to obtain the best price for their selling clients. The suggestion in the HITF Stage 1 Report para 93 suggests this may encourage parties to incur surveys on properties they cannot afford. A figure of 20% tolerance has been suggested between the asking price and the anticipated selling price. There appears to be a misconception that valuation is a science it is an art. In a recent case, *Harrison v D M Hall* 16th October 2001 (unreported) Scottish Courts website, Lord Macfadyen refused to accept that a valuation would be automatically be negligent if it fell outwith a band +/- 15%. Assume a seller is told by his agent X that his house should be put on the market at £85000 with a view to achieving £100000. Assume the property is actually 'worth' £100000. Surveyor A values it at £85000 (-15%) and surveyor B values it at £115000 (+15%). B's client knows that in the market he has to offer about 10% over and gets the property at £125000. The seller is delighted with X but A's client might make a complaint because X had not priced with 20% of the actual price. This demonstrates that the idea is simply unworkable.

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There is no professional body to which estate agents must belong and who could police such a guideline. The selling market needs to present a level playing field to all sectors. It would be unfair to burden solicitors with a guideline which did not apply to others.

(xiii) *Providing better avenues of redress for consumers who face difficulties due to poor advice and/or service from professionals*

The complaints regime for solicitors is presently subject to review by the Justice 1 Committee of the Scottish Parliament. RICS has its own arbitration scheme and institutional estate agents have a voluntary ombudsman scheme, While the scheme has been extended to admit others than large corporate estate agents many independent estate agencies are not members there is no consumer redress scheme.

Conclusions

The evidence suggests that buyers are already provided with too much information to assimilate at the time of offering for the property. At present transactions proceed on the basis that the titles searches and local authority property inquiry certificates are in order and will be produced in the course of the conveyancing after the offer has been accepted. Information can then be passed to buyers in digestible chunks.

There is no evidence that the lack of such information impedes transactions. Where problems arise this is in general due to the carrying out by the owner or a predecessor in title having carried out unauthorised alterations in the past. This information is often known to the buyer in terms of his survey but this is not brought to the seller's attention soon enough. Where there are delays in concluding bargains this is often as a result of the buyer's delay while funding is arranged or an existing property is sold. The Task Force should concentrate its attention on making information available electronically by web based technology. The ScotLIS project should be supported to provide low cost instant access information which renders seller's packs irrelevant.

The case for compulsory seller's packs is not made out. Seller's packs may be a useful marketing technique for certain properties. The disadvantages of statutory offences, certification of surveyors and the compilation of a central database as well as cost are clear. If seller's packs are such a good thing then no doubt they will be adopted by the market.

The Scottish system works well with costs low by international standards. There is no reason to increase the costs to sellers without proven corresponding benefit.

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Best practice guidelines should apply equally to all professionals engaged in the buying and selling process, with similar sanctions.