LAWSURE INSURANCE

NEWSLETTER

March conveyancing round-up

1. Introduction

One big change that the writer has seen in the too-many-to-recall years since he became involved with conveyancing is an increase in risk awareness. Conveyancing is a high risk area and conveyancers have now realised this and have become much more consciously risk averse. This has been seen, for example, in an increase in the number of title insurance policies that are taken out, thus passing the risk of the particular defect from the conveyancer to the title insurer. If there is any doubt about a title issue, then insure against it – why should the conveyancer take the risk?

And another advantage of title insurance – which is not always emphasised to clients – is that many policies will also provide a form of legal expenses insurance to enable the client (via the insurers) to contest any claim brought against them in respect of the risk covered by the policy. Particularly significant when you consider the high cost of bringing or defending litigation these days and the enormous reduction in the availability of legal aid.

2. Restrictive Covenants

> *"Many thousands of words of restrictive covenants clutter the titles of house property and bedevil modern conveyancing. In many cases these covenants are difficult to construe and there is doubt as to whether they are enforceable or whether anyone has power to release them."*

(The Royal Commission on Legal Services 1979)

I am sure that most conveyancers would agree that this statement is still true today, 35 years later! And many title insurance policies are taken out to cover possible breaches of covenants affecting a property. Such policies are widely and comparatively cheaply available. But mistakes are still made, as a recent case shows. We must not ignore covenants on the title and we fail to advise clients and/or take out a policy at our peril.

Darby & Darby v Joyce [2014] EWCA Civ 677

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Facts

In March 2007, Helen Joyce instructed Darby & Darby solicitors to advise her on a purchase of a property in Torquay. She bought the property for £460,000, but the solicitors failed to advise her of restrictive covenants that prevented her from changing the use of the property or making any external alterations.

Ms Joyce planned to make major alterations to the property and to let it out, both of which, unknown to her, required permission from her neighbours, Mr and Mrs Hoyle. Ms Joyce commenced works in September 2007 and received a letter from her neighbours in October asking her to cease immediately until she had obtained permission.

Rather confused, Ms Joyce contacted Darby & Darby again, who agreed to look into the matter and to assist in obtaining the necessary consent from Mr and Mrs Hoyle. However, no advice was given to explain the need to suspend building works until consent was in place. It was not until late December that Ms Joyce was advised that consent was needed and the consequences of not obtaining it. Even then she was not advised to stop the work. Only in January, after a further meeting with her solicitor, was she advised to stop and she signed an undertaking to do so. For some reason, however, Ms Joyce nonetheless continued with the works and was served with an injunction by Mr and Mrs Hoyle. Following this the work was left unfinished and the house was eventually sold as a distressed sale.

In this case, the solicitor was at fault for a number of reasons. The appeal judges branded his work "a professional disgrace" for:

1. Failing to advise Ms Joyce of the existence of the covenants. If she had known about them she may have negotiated a reduced price, invested in a different property or obtained permission from Mr and Mrs Hoyle prior to beginning the works.
2. Continuing to represent her when she asked about the covenant in late 2007. This was a clear conflict of interest and the solicitor's negligent advice had led to the current situation.
3. Failing to advise Ms Joyce at an early stage that it was important to cease works until consent was obtained and of the impact failure to obtain consent would have on her plans. His failure led to Ms Joyce believing that she was entitled to continue works and inhibited her ability to reach an agreement with Mr and Mrs Hoyle.

The reason the case went to the Court of Appeal was with regard to the measure of damages – remember that even when told to stop the construction works, and she had signed an undertaking to do so, Ms Joyce still continued with them. Yet, when advised of the consequences of the covenants in December 2010 Ms Joyce continued to work on the property. Effectively she ignored the (late) advice and it was therefore difficult to be sure that the third failing above caused loss. It could easily be said that, even if she had been advised clearly and promptly to stop the works, she would have ignored it. The appeal court decided that the solicitor ought not to be responsible for her £23,000 in costs for defending the injunction that followed. They decided she had brought those losses on herself – although Longmore LJ dissented on this point.

They also reconsidered other losses and awarded damages for the first two failings set out above. These damages were to compensate the costs of the initial works as Ms Joyce would not have incurred these costs if she had been properly advised of the existence of the restrictive covenants. She also obtained damages for the difference between the price of the property when she bought it and the true market value (with the burden of the covenants).

3. CML Lenders' Handbook

One particular high risk area is acting for lenders. The major lenders came up with the Lenders' Handbook partly in recognition of this. It has been with us for about 15 years now. All Conveyancers have thus had plenty of time to ensure that they have systems in place requiring all fee earners to consider the Handbook in every transaction and also further systems to monitor fee earners compliance with the Handbook's requirements. But Lenders tell us that non-compliance is still all too frequent and professional indemnity insurers tell us that a large percentage of claims against conveyancers are brought by lenders.

Acting for lenders is thus a high risk area that we perhaps don't always appreciate – remember, be risk averse. What is more, if we don't keep the lenders happy, we might be removed from their panels and without panel membership, survival will be even more difficult, than it is already.

The Lenders' Handbook is quite simply the instructions we receive from our most important clients – the lenders who fund most purchases. As the CML website states:

> *The CML Lenders' Handbook provides comprehensive instructions for conveyancers acting on behalf of lenders in residential conveyancing transactions. It is divided into two or three parts, depending on the jurisdiction. Part 1 sets out the main instructions. Part 2 details each lender's specific requirements. There is a Lenders' Handbook part 1 and part 2 for each legal jurisdiction in the UK. On 2nd July 2012 we published Part 3 of the Lenders' Handbook for England & Wales. Part 3 sets out the standard instructions in the event that a conveyancer is representing the lender separately from the borrower in a residential conveyancing transaction in England and Wales only.*

As well as the CML Handbook, we also have to consider those lenders – many of them mutual – who use the Building Societies Association handbook instead of the CML. As the BSA website explains:

> *The BSA introduced mortgage instructions (occasionally referred to as the BSA Handbook) for its members on 1st January 2010, ensuring that all its members have access to a full set of standard instructions.*
>
> *The BSA Mortgage Instructions are currently being used by 29 lenders.*
>
> *The BSA Mortgage Instructions comprise of two sections: a core set of mortgage instructions; and specific requirements setting out individual lenders' policies.*

Both CML and BSA instructions are available online. Indeed, printed versions should NOT be relied on; Lenders' instructions – and Part 2 of the CML and the Specific Requirements of individual BSA members can and do change regularly. Always check online should be part of your system.

Obviously, carrying out our clients' instructions is a fundamental obligation placed on conveyancers and failure to do so can result not only in claims against us by the lender if loss is suffered but, as a recent case shows, in other more surprising circumstances as well.

E.Surv Ltd v Goldsmith Williams Solicitors [2014] EWHC 1104 (His Honour Judge Stephen Davies sitting as a judge of the High Court)

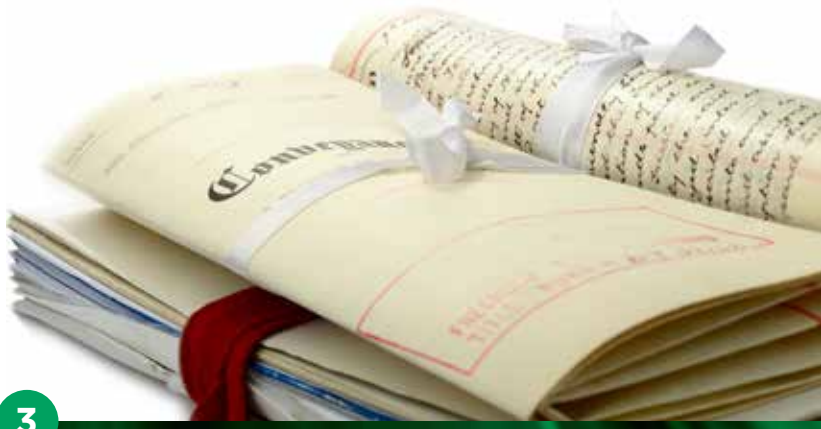
In this case, the particular CML requirement was:

> **5.1 Length of Ownership**
>
> **5.1.1** Please report to us immediately if the owner or registered proprietor has been registered for less than six months.

(The BSA Instructions have an identical requirement at D.17.)

Apparently, this requirement is frequently not complied with but is something that lenders will look at closely in deciding whether or not to lend. Selling a property or mortgaging a property after such a short period of ownership does not fit in with the normal pattern of residential home ownership; people do not usually buy a house and then sell it so quickly. So why is this sale taking place so quickly? It could also be an indication of fraud or money laundering.

Of course it could all be quite innocent; the sale is needed because of a sudden change of job, for example. But an explanation should be sought from the seller – and it MUST be notified – and 'immediately'.



The case itself was a rather unusual situation where a lender suffered a loss on repossession and sale, in turn suing the valuer for damages for a negligent valuation. The valuer then claimed a contribution to the loss from the solicitors for failure to comply with the CML obligations. As the judge said:

1. *In this case the claimant surveyors E.Surv Limited ("the surveyors"), seek contribution under the Civil Liability (Contribution) Act 1978 from the defendant solicitors Goldsmith Williams ("the solicitors"), in respect of monies paid to a mortgage lending company, The Mortgage Business ("the lender"), in settlement of its claim for damages for negligent over-valuation of a property known as Quarnford Lodge, near Buxton ("the property").*

2. *The surveyors' case is that the solicitors failed, in breach of the express and implied terms of its contract with the lender, to advise the lender that the would-be borrower, a Mr David Gayler ("the borrower"), had been registered as proprietor of the property for less than 6 months and that the price he had paid for it as disclosed on the office copy entries, £390,000, was significantly less than the surveyors' valuation as stated in the mortgage offer, £725,000. The surveyors' case is that had the solicitors done so then the lender would have requested the surveyors to reconsider their valuation in the light of that information, that at that point the surveyors would have realised that the borrower had misinformed them about the purchase price, and would have: (a) produced a significantly reduced valuation; and/or (b) informed the lenders about this misinformation, with the result in either case being that the lender would have declined to lend to the borrower and, thus, avoided the loss which it in fact incurred.*

3. *Whilst the surveyors accept that they cannot recover all of their loss from the solicitors, they do claim that they are entitled to a substantial contribution from them against the total amount paid in settlement, which was £200,000.*

4. *The solicitors defend the claim on the following basis:*

    (1) Although they admit breach of an express obligation to inform the lender that the borrower had been the registered proprietor for less than 6 months, they deny that they were obliged to inform the lender as to the purchase price paid. This raises the question as to whether or not what is known as the "Bowerman" duty (the duty on a solicitor to report to his lender client matters relevant to the valuation of the property offered as security for a loan) is ousted by the terms of the Lenders Handbook issued by the Council of Mortgage Lenders.

    (2) They deny that the lender would have acted differently had this information been provided because the borrower had, in his application form, already informed the lender that he had purchased the property for £450,000 in October 2005, that information provoking no apparent concern with the lender. Whilst they accept that the true position was that he had purchased the property for £390,000 in September 2005, they say that in the context of an application made in late December 2005 for a loan of £580,000 based on a valuation of £725,000 there is no basis for concluding that the lender would have regarded the differences as material.

    (3) They deny that, even had the lender asked the surveyors whether this information affected their valuation, the surveyors would have revised their valuation downwards, either at all or to any significant extent, and they also deny that the surveyors would have had cause to report to the lender that the information provided by the borrower to them as to the purchase price was materially different to the true position.

    (4) In short, they deny any causative effect as between any breach on their part and the lender's decision to lend. A major plank of their case in this regard is what they contend is the surveyors' failure to adduce any relevant or admissible evidence from the lender's underwriting team as to the impact that this information would or might have had on the lending decision.

    (5) Finally, and alternatively, they contend that so far as any apportionment is concerned their share should be modest.

My conclusions

65. It follows, in my judgment, that it is not possible for the solicitors to say that the terms of the Lenders Handbook, read with the Practice Rules and the certificate of title, exclude, on their true construction, the Bowerman duty.

66. On the wider point, in my judgment what the Lenders Handbook, read with the Practice Rules and the certificate of title, is intended to do is to identify and to delimit the precise scope of the specific activities which the solicitor is being retained to do, in circumstances where the solicitor is faced with the difficult position of acting for two parties with potentially conflicting interests. It is not intended to exclude the general obligation to exercise reasonable care and skill in the performance of such activities or, as part of such general obligation, the obligation to report to the lender as one of the clients where, through the performance of such obligations, the solicitor comes into possession of information which has a material bearing on the valuation of the lender's security or some other ingredient of the lending decision.

67. It follows in my judgment that a solicitor must perform his express obligations under the Lenders Handbook by undertaking a Land Registry search and by reading the office copies so obtained as well as by reading a copy of the valuation report provided to him. If in the process of so doing he discovers information from the office copies about the recent purchase price which has a material bearing on the valuation of the property, then he is under an obligation to the lender to disclose it. That is an obligation which does not extend beyond the limitations of the Lenders Handbook, is expressly preserved by clause 1.3 of the Lenders Handbook, and must be performed unless to do so would involve a conflict of interest, in which case the solicitor must act in accordance with clause 5.1.2 of the Lenders Handbook.

69. It has not been suggested by Mr Mitchell, rightly in my judgment, that having regard to the actual purchase details and the valuation the discrepancy between the purchase price in September 2005 and the valuation in December 2005 was not such that the solicitors were not required to disclose it to the lender. Even making allowance for what appears to have been a buoyant property market at the time, it is clear in my judgment that the disparity was so significant that it ought to have been disclosed to the lender. Since the solicitors were not provided with a copy of the mortgage application form they would not have known that the borrower had in fact disclosed details of the purchase date and purchase price on the form, but even if they had they would have observed that there was a discrepancy of some significance between the purchase price as declared by him and the actual purchase price, and would have known therefore that they should ensure that the lender was made aware of the actual purchase price. As Mr Patel submitted, if the solicitors had wanted to challenge these points it would have been expected either that they would call the conveyancer involved at the time or at least explain why she was not being, or could not be, called to give evidence to address these points.

70. It follows in my judgment that breach in failing to notify the lender of the actual purchase price as well as the purchase date has been made out.

E- Surv had been ordered to pay £200,000 to Santander; Goldsmith Williams were ordered to pay a 50% contribution i.e. £100,000.

Comment

Note that the decision involves TWO obligations: to notify the lender of the short period of ownership AND also to notify of the disparity between the price paid and the actual purchase price. However, these are hardly onerous – and may well be something that the buyer in a conveyancing transaction might also be interested in!

It is understood that Goldsmith Williams are appealing this decision and obviously the circumstances of the claim – i.e. as one for a contribution in respect of the valuer's liability will be relevant. But the Lenders' instructions are clear. You MUST notify the lender under the 'six month' rule of that fact and unless and until that aspect of the case is overturned, also of any significant disparities in the price.

The case also stands as a reminder to all of us to ensure that we have systems in place to ensure that our fee earners are clear about the requirements of the Lenders' Handbook and do indeed comply with them.

4. Architect's Certificates

Our final topic this month just shows how wrong we can be with regard to procedures we have followed for years.

Every conveyancer knows that when buying a new build property – or indeed, to quote the CML handbook (6.7.1) if the property has been built or converted within the past ten years, or is to be occupied for the first time' some form of new home warranty must be in place. CML require this to be in place 'on or before legal completion'. The reasons for this, of course, are that although the builder will be responsible to the buyer under the terms of the contract if structural defects appear in the property, such a claim against the builder will not be possible if the builder is insolvent or, if an individual, has just disappeared. A warranty from a third party is thus required and is essential for CML purposes.

Various schemes are in existence, the oldest one being that under the auspices of the National House Building Council or NHBC which provides an insurance backed warranty against various stated defects arising within 10 years of the issue of the certificate. There are several other similar schemes in existence e.g. Premier Guarantee and LABC (both underwritten by AM Trust Europe Ltd).

But some smaller builders, in particular, are unable or unwilling to comply with the conditions required to belong to such schemes. In such cases proof that the house has been completed under the supervision of an architect (or similar professional referred to as a 'professional consultant') will usually be acceptable to lenders and buyers.

CML Handbook requires conveyancers to look at a particular lender's Part 2 to see which of the following consultants (if any) are acceptable:

- fellow or member of the Royal Institution of Chartered Surveyors (FRICS or MRICS); or
- fellow or member of the Institution of Structural Engineers (F.I.Struct.E or M.I.Struct.E); or
- fellow or member of the Chartered Institute of Building (FCIOB or MCIOB); or
- fellow or member of the Architecture and Surveying Institute (FASI or MASI); or
- fellow or member of the Association of Building Engineers (FB.Eng or MB.Eng); or
- member of the Chartered Institute of Architectural Technologists (formally British Institute of Architectural Technologists) (MCIAT); or
- architect registered with the Architects Registration Board (ARB). An architect must be registered with the Architects Registration Board, even if also a member of another institution, for example the Royal Institute of British Architects (RIBA); or
- fellow or member of the Institution of Civil Engineers (FICE or MICE).

Such consultants must provide 'the lender's Professional Consultant's Certificate which forms an appendix to this Handbook or such other form as we may provide. The professional consultant should also confirm to you that he has appropriate experience in the design or monitoring of the construction or conversion of residential buildings' and must have 'professional indemnity insurance in force for each claim for the greater of either:

- the value of the property once completed; or
- £250,000 if employed directly by the borrower or, in any other case, £500,000. If we require a collateral warranty from any professional adviser, this will be stated specifically in the mortgage instructions.'

The Certificate is as follows:

APPENDIX 1 - PROFESSIONAL CONSULTANT'S CERTIFICATE

Return to: _____

Name of Applicant(s) _____

_____

Full address of property _____

_____

_____

_____

I certify that:

1. I have visited the site at appropriate periods from the commencement of construction to the current stage to check generally:

   (a) progress, and

   (b) conformity with drawings, approved under the building regulations, and

   (c) conformity with drawings/instructions properly issued under the building contract.

2. At the stage of my last inspection on

_____ ,

the property had reached the stage of

_____

_____

_____

3. So far as could be determined by each periodic visual inspection, the property has been generally constructed:

(a) to a satisfactory standard, and

(b) in general compliance with the drawings approved under the building regulations.

4. I was originally retained by _____

_____

_____

who is the applicant/builder/developer in this case (delete as appropriate).

5. I am aware this certificate is being relied upon by the first purchaser

_____

_____ of the property and also by

_____

(name of lender) when making a mortgage advance to that purchaser secured on this property.

6. I confirm that I will remain liable for a period of 6 years from the date of this certificate. Such liability shall be to the first purchasers and their lenders and upon each sale of the property the remaining period shall be transferred to the subsequent purchasers and their lenders.

7. I confirm that I have appropriate experience in the design and/or monitoring of the construction or conversion of residential buildings.

_____

Name of Professional Consultant

_____

Qualifications _____

Address _____

_____

_____

Telephone No. _____

Fax No. _____

Professional Indemnity Insurer _____

_____

8. The box below shows the minimum amount of professional indemnity insurance the consultant will keep in force to cover his liabilities under this certificate for any one claim or series of claims arising out of one event.

Signature _____

Date _____

The emphasis on professional indemnity insurance is, of course, due to the fact that it is the existence of such insurance that makes the giving of the certificate acceptable. A certification by a man or woman 'of straw' is worthless; it is the insurers who will end up paying for any claim. But will they?

It has long been realised that such a certificate is very much second best to the NHBC and similar schemes noted above. For a start it only gives protection for six years. Further, there is no dispute resolution system in place or guarantee that faults will be corrected if there is a problem with the property. There is just a right to sue the consultant for damages if he/she has conducted the inspections referred to negligently. So there could well be structural problems without it following that there has been negligence by the consultant.

However a recent case shows that in many cases such certificates may not be worth the paper they are written on even if there has been negligence....

HUNT and others v OPTIMA (CAMBRIDGE) LTD and others[2014] EWCA (Civ) 714

The facts of the case can be set out quite simply. Optima built a block of 26 flats in Cambridge. Strutt & Parker issued professional consultant's certificates to the various buyers in the CML prescribed form. Over the years a number of 'serious defects' arose with the block. There were problems (inter alia) with the roof, the floors and the drains. In the case of one flat buyer 'on 14 January 2005 his kitchen ceiling collapsed due to the weight of water leaking; four days later his bedroom and bathroom ceiling caved in on him while he was sleeping. In all his ceilings have suffered leaks on at least 14 occasions'.

Eventually court proceedings were commenced against Optima and Strutt & Parker. On 29th April 2013, Akenhead J, gave judgement in favour of 7 of the flat owners against Optima and Strutt & Parker. Subsequently, Optima went into administration and Strutt & Parker appealed the judgement against them. On 31st July 2014, the Court of Appeal unanimously allowed the appeal. Strutt & Parker were not liable on the certificates to the buyers.

When looked at closely, the Court's reasoning is so obvious, one wonders why we never realised the problem before. To be able to claim on the certificate, the buyers had to make out a claim in either contract or tort. To be able to bring a claim in contract, the certificate would have to amount to a collateral warranty in favour of the buyer (and its lender) i.e. a contractual promise to the buyer and the lender. The Court held that it did not. It was not worded so as to take effect as a warranty. As Christopher Clarke LJ said:

> *I do not, however, regard the Certificate as constituting any form of warranty. The document is one whose terms are the product of negotiation between professionals in the field who should know of the distinction between a warranty and a representation. The Certificate is described as such; not as a promise, warranty or guarantee. It contains no reference to any consideration.... The document certifies that various things have happened and states various conclusions as to the state of completion of the property and the standard of its construction. Clause 5 uses the language ("I am aware that this Certificate is being relied upon...") to be expected of a document which its maker intends to be relied on so as to give rise to a potential liability in negligent misstatement. These words are unnecessary if there is contractual liability anyway. So also is the confirmation in clause 7 that the certifier has appropriate experience. I do not agree with the judge's description of the Certificate as written in a way which was akin to contract or that, as he held, "on its face" it is a warranty.*

So no liability in contract. But what about the liability for a negligent misstatement which would give rise to liability in tort? The Court seemed to agree that Strutt & Parker had been negligent in making at least some of the statements in the certificate. But to be able to sue, the claimants had to be able to show that they had relied on these statements in agreeing to buy the property. This is an essential element of the tort.

The snag was that most of the buyers did not receive the certificates until AFTER they had exchanged contracts to buy the property. They could not claim that the statements on the certificate had influenced their decision to buy when the certificates were not received until after they had committed to buying the flats –indeed the certificates were not received until after completion.

The buyers did try to claim that they had seen a draft of the certificate prior to exchange and agreed to buy in reliance of the fact that they would eventually receive a completed certificate. Certainly, in the real world i.e. as opposed to the Court of Appeal, they certainly would not have bought had they not been promised such a certificate. This might have been a valid argument against the selling developer, but it failed against Strutt & Parker. There was no evidence that Strutt & Parker had accepted liability on such basis. As Tomlinson LJ said:

Naturally I accept that Strutt & Parker owed a contractual duty to carry out the work of inspection competently. I cannot however accept that it is appropriate to regard Strutt & Parker as at that stage assuming a like responsibility to those to whom Certificates might one day be issued. It seems to me that the stage at which Strutt & Parker should be taken as assuming a responsibility to third parties is the stage at which they had to decide whether to issue a Certificate, and if so in what form. After all, it might subsequent to an inspection or the inspections have become apparent to Strutt & Parker that an inspection or the inspections had not been properly conducted, in consequence of which they might, and should, have decided either not to issue a Certificate or to issue a Certificate only in an appropriately qualified form. It would I think be anomalous if notwithstanding that responsible decision Strutt & Parker nonetheless attracted a liability to third parties in respect of the failure properly to conduct the inspections. It would render the issue of the Certificate a superfluous step in the process whereby they attracted liability ....

Practical Points

In the writer's experience it is often the case that the certificate is not available until completion. The decision in this case now renders this procedure negligent. We will have failed to ensure our clients get the benefit of that certification.

How can we ensure then that they do get the protection that the certificate is designed to give – and avoid a potential negligence claim?

Two possibilities spring to mind. Firstly we could insist on actually getting a proper contractual warranty from the consultant – a collateral warranty as it is often called in commercial property developments. The problem then arises as to the form and content of such warranty to ensure that it gives adequate protection. Alternatively, we must refrain from exchanging contracts until the certificate has actually been issued. This is certainly the simplest method and avoids any issues about having to approve the terms of the collateral warranty.

Certainly, in the short term one can imagine builder's conveyancers being unwilling/unable to comply with either of these requirements. At the moment the contract between builder and consultant will have been on the basis that the certificate is issued, not that a separate contractual warranty is required and the consultant may thus be able to resist providing one.

Further, a developer may well be reluctant for financial reasons to complete a property until a buyer has committed to buy and the certificate cannot be issued until the property is complete. However, in the long term builder's conveyancers will need to ensure that they educate their clients about the problems caused by this case. Unless builders change their ways to fit in with a buyer's requests, they will find it difficult to sell any properties.